

YEARBOOK
OF THE
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LAW COMMISSION
1977

Volume I

*Summary records
of the twenty-ninth session*

9 May-29 July 1977

UNITED NATIONS



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INTRODUCTORY NOTE

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

The symbols appearing in the text, consisting of letters combined with figures serve to identify United Nations documents. References to the *Yearbook of the International Law Commission* are in a shortened form consisting of the word *Yearbook* followed by 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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MEMBERS OF THE COMMISSION

<i>Name</i>	<i>Country of nationality</i>	<i>Name</i>	<i>Country of nationality</i>
Mr. Roberto AGO	Italy	Mr. Milan ŠAHOVIĆ	Yugoslavia
Mr. Mohammed BEDJAOUTI	Algeria	Mr. Stephen M. SCHWEBEL	United States of America
Mr. Juan José CALLE Y CALLE	Peru	Mr. José SETTE CÂMARA	Brazil
Mr. Jorge CASTAÑEDA	Mexico	Mr. Sompong SUCHARITKUL	Thailand
Mr. Emmanuel Kodjoe DADZIE	Ghana	Mr. Abdul Hakim TABIBI	Afghanistan
Mr. Leonardo DÍAZ GONZÁLEZ	Venezuela	Mr. Doudou THIAM	Senegal
Mr. Abdullah EL-ERIAN	Egypt	Mr. Senjin TSURUOKA	Japan
Mr. Laurel B. FRANCIS	Jamaica	Mr. N. A. USHAKOV	Union of Soviet Socialist Republics
Mr. S. P. JAGOTA	India	Sir Francis VALLAT	United Kingdom of Great Britain and Northern Ireland
Mr. Frank X. J. C. NJENGA	Kenya	Mr. Stephan VEROSTA	Austria
Mr. C. W. PINTO	Sri Lanka	Mr. Alexander YANKOV	Bulgaria
Mr. R. Q. QUENTIN-BAXTER	New Zealand		
Mr. Paul REUTER	France		
Mr. Willem RIPHAGEN	Netherlands		

OFFICERS

<i>Chairman:</i>	Sir Francis VALLAT
<i>First Vice-Chairman:</i>	Mr. José SETTE CÂMARA
<i>Second Vice-Chairman:</i>	Mr. Alexander YANKOV
<i>Chairman of the Drafting Committee:</i>	Mr. Senjin TSURUOKA
<i>Rapporteur:</i>	Mr. Mohammed BEDJAOUTI

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 1414th meeting, held on 9 May 1977:

1. Filling of casual vacancies in the Commission (article 11 of the Statute).
2. State responsibility.
3. Succession of States in respect of matters other than treaties.
4. Question of treaties concluded between States and international organizations or between two or more international organizations.
5. Proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (para. 4 of General Assembly resolution 31/76).
6. Most-favoured-nation clause.
7. The law of the non-navigational uses of international watercourses.
8. Long-term programme of work.
9. Organization of future work.
10. Co-operation with other bodies.
11. Date and place of the thirtieth session.
12. Other business.

ABBREVIATIONS

ASEAN	Association of South East Asian Nations
CMEA	Council for Mutual Economic Assistance
ECAFE	Economic Commission for Asia and the Far East
EEC	European Economic Community
ESCAP	Economic and Social Commission for Asia and the Pacific
EURATOM	European Atomic Energy Community
Eurochemic	European Company for the Chemical Processing of Irradiated Fuels
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
I.C.J.	International Court of Justice
<i>I.C.J. Pleadings</i>	<i>I.C.J., Pleadings, Oral Arguments, Documents</i>
<i>I.C.J. Reports</i>	<i>I.C.J., Reports of Judgments, Advisory Opinions and Orders</i>
ILO	International Labour Organisation
ITU	International Telecommunication Union
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
OAU	Organization of African Unity
OPEC	Organization of Petroleum Exporting Countries
<i>P.C.I.J.</i>	Permanent Court of International Justice
<i>P.C.I.J. Series B</i>	<i>P.C.I.J., Judgments, Orders and Advisory Opinions</i>
SEATO	South-East Asia Treaty Organization
SNCF	French National Railways
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations Children's Fund
UPU	Universal Postal Union
WHO	World Health Organization
WMO	World Meteorological Organization

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE TWENTY-NINTH SESSION

Held at Geneva from 9 May to 29 July 1977

1414th MEETING

Monday, 9 May 1977, at 3.15 p.m.

Chairman: Mr. Abdullah EL-ERIAN
later: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Opening of the session

1. The CHAIRMAN declared open the twenty-ninth session of the International Law Commission, and welcomed the new members.

Tribute to the memory of Mr. Edvard Hambro

2. The CHAIRMAN said that, regrettably, the meeting today could not but evoke feelings of sadness in all present at the loss of their esteemed friend and colleague Edvard Hambro, who had been one of the most distinguished members of the Commission. On behalf of the Commission, he had sent a cable to the Minister for Foreign Affairs of Norway expressing the Commission's sense of loss and requesting the Minister to convey its condolences to the Government of Norway and to Mrs. Hambro; he had received a reply expressing the appreciation of the Minister and of Mrs. Hambro for the Commission's message. He took it that, in accordance with practice, the Commission might wish to hold a special meeting to pay tribute to the memory of Edvard Hambro.¹

3. He would now invite the representative of the Secretary-General to say a few words.

4. Mr. SUY (Legal Counsel, representative of the Secretary-General) said he knew from experience that Mr. Hambro, whose merits were so well-known, disliked praise. He would therefore respect what he was sure would have been Mr. Hambro's wish and confine himself to quoting the sublime phrase of St. Augustine: "Death is not to be regarded as a misfortune when a good life has gone before it".

¹ 1419th meeting.

On the proposal of the Chairman, the members of the Commission observed a minute's silence.

5. The CHAIRMAN said that as the Ambassador of Norway was present at the meeting, he would ask him also to convey the condolences of the Commission to the Norwegian Government and to Mrs. Hambro.

6. A message had been received from the President of the Inter-American Juridical Committee stating that the Committee had adopted a resolution expressing its grief at the loss of Mr. Hambro and conveying its sincere condolences to the Commission.

7. The representative of the Secretary-General of the United Nations had made a special request that the name of Mr. Hambro should remain at his place on the members' table until a new member had been elected to fill the vacancy.

Statement by the outgoing Chairman

8. The CHAIRMAN said he would make only a very brief statement, since the report of the Sixth Committee² gave a clear and comprehensive account of its discussion on the report of the International Law Commission on its twenty-eighth session, which he had introduced in the Committee. He was gratified to be able to report that the discussions had been helpful and constructive. There had been general agreement on the high standard of the Commission's work, and appreciation of the scholarly character of its commentaries as well as of its methods of work. But, as was to be expected, there had been some criticism of the length of the commentaries, the size of the report and the delay in issuing it.

9. There had been general approval of the Commission's approach to the three main topics for its twenty-eighth session, namely, the most-favoured-nation clause, State responsibility, and succession of States in matters other than treaties. He would not go into detail, but would content himself with saying that article 19 of the draft articles on State responsibility had given rise to a very lively discussion, and the different schools of thought represented were reflected in the Committee's report.³ The Sixth Committee had also welcomed the progress made with regard to non-navigational uses of international watercourses, and had hoped that States would reply as fully as possible to the Commission's questionnaire.

² *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 16, document A/31/370.

³ *Ibid.*, paras. 124 *et seq.*

10. The draft resolution approved by the Sixth Committee⁴ had endorsed the order of priority fixed by the Commission, but the question of the relationship between the Enlarged Bureau and the Planning Group had resulted in the same division of opinion as in the Commission. However, he had assured the Sixth Committee that the matter would be carefully considered by the Commission.

11. With regard to the Commission's activities of a scholarly nature, such as the Gilberto Amado Memorial Lecture and the International Law Seminar, he had expressed the hope that more Governments would give fellowships for participation in such activities. The present year's session of the International Law Seminar would be known as the Edvard Hambro Seminar.

12. With regard to the length of the commentaries and the size of the report, he had emphasized the usefulness of the commentaries. The fact that they were included in the reports of the Special Rapporteurs did not mean that they should not also be included in the Commission's reports, since the former were given a limited distribution only whereas the latter provided the basis on which Governments determined their positions; it was therefore essential that they should include as much as possible of the source material on which the Commission had based its own conclusions.

13. In response to the criticisms that had been made of unduly lengthy references to General Assembly resolutions, he had pointed out that international law was in a state of flux and that as the Commission wished to indicate the trends by which it was guided in formulating new rules, it was obliged to refer to its sources in order to clarify the development of its thinking. In its work of codification, on the other hand, the practice of States was well-defined, so that constant references to sources were not necessary.

14. Finally, he had received a letter from the Acting Permanent Representative of Indonesia to the United Nations, in his capacity as Chairman of the Asian Group for the month of February 1977, pointing out that the Asian Group at present occupied four out of the five seats allocated to it in the Commission under the gentlemen's agreement,⁵ and requesting the Commission to review the position. He believed that the letter had already been circulated to members of the Commission. He had now received another letter from the Japanese Ambassador in Bern, stating that he had received a cable from the Permanent Representative of Japan to the United Nations, in his capacity as Chairman of the Asian Group for the month of May 1977, reaffirming the position of the Asian Group as already expressed. He would be grateful if the Secretariat would circulate that letter also to members of the Commission.

Election of officers

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

⁴ *Ibid.*, para. 251.

⁵ *Ibid.*, agenda item 23, document A/31/134, para. 4.

16. Mr. AGO said he wished first to congratulate the outgoing Chairman on the efficiency with which he had directed the work of the Commission and the way in which he had defended the interests of the Commission in the General Assembly. The outgoing Chairman was particularly to be commended for the manner in which he had answered those members of the Sixth Committee who had expressed surprise at the length of the Commission's last report. Perhaps in that connexion he could dispel a misunderstanding: if the Commission considered it necessary to provide lengthy explanations in support of its proposals, that was because it was convinced that it bore an immense responsibility in its work of codifying international law. Before expressing in a written formulation a rule which had previously been only a customary rule, and before, where appropriate, proposing its progressive development, the Commission had a duty to furnish detailed explanations of its reasons to the members of the Sixth Committee who, even though they might be experienced jurists, could not be expected to be familiar with all the detail of all the different topics studied by the Commission.

17. He now wished to propose Sir Francis Vallat for the office of Chairman. Sir Francis was an eminent European jurist who had become celebrated both in his own country and abroad and had distinguished himself in the Commission as a Special Rapporteur.

18. Mr. BEDJAOUI, Mr. USHAKOV and Mr. TSURUOKA, after congratulating the outgoing Chairman, seconded the proposal.

Sir Francis Vallat was unanimously elected Chairman and took the Chair.

19. The CHAIRMAN thanked the Commission for electing him and said that he would strive to follow the example set by the previous Chairmen of the Commission. In his opinion, the last session had been exceptionally successful because of the way in which the outgoing Chairman had conducted the Commission's meetings and guided it through its difficulties. He also wished to thank the outgoing Chairman for the excellent way in which he had defended the interests of the Commission in the General Assembly. He thanked all those who had proposed or supported his nomination for their gracious words. He wished, in particular, to assure Mr. Ago that he considered that any techniques that might be adopted to reduce the length of the Commission's reports or make them more manageable must not be at the expense of the quality of the absolutely essential work performed by Mr. Ago and the other Special Rapporteurs.

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

21. Mr. CALLE Y CALLE proposed Mr. Sette Câmara.

22. Mr. ŠAHOVIĆ and Mr. EL-ERIAN seconded the proposal.

Mr. Sette Câmara was unanimously elected first Vice-Chairman.

23. Mr. SETTE CÂMARA thanked the members of the Commission for electing him.

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

25. Mr. USHAKOV proposed Mr. Yankov, an eminent jurist, diplomat and politician, who had represented his country in the United Nations General Assembly for many years and had served as Chairman of the Third Committee of the United Nations Conference on the Law of the Sea.

26. Mr. REUTER, Mr. CASTAÑEDA and Mr. FRANCIS seconded the proposal. They also associated themselves with the congratulations extended to the Chairman and to the first Vice-Chairman and with the tribute paid to the outgoing Chairman for the masterly fashion in which he had conducted the work of the Commission at its twenty-eighth session and for the way in which he had represented it at the thirty-first session of the General Assembly.

Mr. Yankov was unanimously elected second Vice-Chairman.

27. Mr. YANKOV thanked the Commission for electing him.

28. The CHAIRMAN called for nominations for the office of Chairman of the Drafting Committee.

29. Mr. ŠAHOVIĆ proposed Mr. Tsuruoka.

30. Mr. USHAKOV and Mr. AGO seconded the proposal.

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

31. Mr. TSURUOKA thanked the members of the Commission for electing him.

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

33. Mr. EL-ERIAN proposed Mr. Bedjaoui.

34. Mr. PINTO seconded the proposal.

Mr. Bedjaoui was unanimously elected Rapporteur.

35. Mr. BEDJAOUI thanked the Commission for electing him and congratulated the other officers of the Commission on their election.

Adoption of the agenda (A/CN.4/297/Rev.1)

The provisional agenda (A/CN.4/297/Rev.1) was adopted unanimously.

The meeting rose at 5.25 p.m.

1415th MEETING

Tuesday, 10 May 1977, at 12.10 p.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Communications from former members of the Commission

1. The CHAIRMAN said that, before discussing the organization of work for the session, he wished to read out the text of a cable from Mr. Martínez Moreno and of a letter from Mr. Ramangasoavina expressing their best wishes to the Commission and, in particular, their congratulations to the newly elected members. He would, of course, send replies to Mr. Martínez Moreno and Mr. Ramangasoavina on behalf of the Commission as a whole.

Organization of work

2. The CHAIRMAN said that the Enlarged Bureau recommended that the Commission should not meet on Whit Monday, 30 May 1977, which was a public holiday in Geneva, but should meet on Ascension Day, 19 May, which was also a public holiday. If there was no objection, he would take it that the Commission agreed to that recommendation.

It was so agreed.

3. The CHAIRMAN said the Enlarged Bureau recommended that the Commission allot three weeks to the consideration of succession of States in respect of matters other than treaties (item 3 of the agenda), followed by four weeks for consideration of the question of treaties concluded between States and international organizations or between two or more international organizations (item 4 of the agenda), and three weeks for the topic of State responsibility (item 2 of the agenda). If there was no objection, he would take it that the Commission agreed to that recommendation.

It was so agreed.

4. The CHAIRMAN said that the Enlarged Bureau's recommendation regarding item 5 of the agenda (proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by the diplomatic courier (para. 4 of General Assembly resolution 31/176)), was that a group of five members of the Commission be appointed to begin consideration of the item and prepare a number of draft articles. Such a course would not preclude the possibility of appointing a Special Rapporteur at a later stage, but that matter could be considered after the group had reported to the Commission. If there was no objection, he would take it that the Commission agreed to that recommendation.

It was so agreed.

5. The CHAIRMAN said the Enlarged Bureau recommended that Mr. Ushakov be appointed Special Rapporteur for the topic of the most-favoured-nation clause, to replace Mr. Ustor.

6. Mr. USHAKOV said that he would accept the appointment with great pleasure and would do everything possible to ensure that the Commission accomplished the task it had set itself.

7. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to appoint

Mr. Ushakov Special Rapporteur for the topic of the most-favoured-nation clause.

It was so agreed.

8. The CHAIRMAN said the Enlarged Bureau recommended that Mr. Schwebel be appointed Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses, to replace Mr. Kearney.

9. Mr. SCHWEBEL said he would be pleased to accept the appointment, on the understanding that he would be allowed all the time necessary for the topic, but he was fully confident that that would be the case.

10. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to appoint Mr. Schwebel Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses.

It was so agreed.

11. The CHAIRMAN said that the Enlarged Bureau had considered the question of relations between States and international organizations. Mr. El-Erian, the Special Rapporteur, had been requested to prepare a preliminary report,¹ which would be available shortly. It would be possible to allot two or three meetings to the topic, probably under item 9 of the agenda, organization of future work. If there was no objection, he would take it that the Commission agreed to that procedure.

It was so agreed.

12. The CHAIRMAN said that the special meeting to pay tribute to the memory of Mr. Edvard Hambro would probably be held on Monday, 16 May 1977. The Ambassador of Norway was now in the process of contacting Mr. Hambro's widow, for the Enlarged Bureau considered that she should have the opportunity to attend the meeting if she so wished.

13. The Enlarged Bureau had taken the view that it would not be fitting to proceed to fill the casual vacancy caused by the death of Mr. Hambro until after the special meeting had taken place. All pertinent information, including letters from the Asian Group, any communications from Governments indicating their choice, together with the curriculum vitae of the persons concerned and a copy of the so-called gentlemen's agreement, would be distributed to the members of the Commission. It was not customary to engage in a public wrangle on the choice of a candidate to fill a casual vacancy of the kind in question and he sincerely hoped that the Commission's practice in that regard would continue to be followed and that the matter could be settled in the course of the coming week. The best course would be for the Enlarged Bureau to decide as to the date on which the Commission should proceed to fill the vacancy.

It was so agreed.

14. In reply to a question from Mr. CASTAÑEDA, the CHAIRMAN said that, in view of the heavy programme of work, it was likely that only part of a meeting could be devoted to the topic of the law of the non-

navigational uses of international watercourses, chiefly for the purpose of bringing to the attention of Mr. Schwebel, the new Special Rapporteur, any points that the Commission might deem necessary.

The meeting rose at 12.50 p.m.

1416th MEETING

Wednesday, 11 May 1977, at 10.10 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (A/CN.4/301 and Add.1)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE O (Definition of State debt)

1. The CHAIRMAN invited the Special Rapporteur to introduce his ninth report on succession of States in respect of matters other than treaties (A/CN.4/301 and Add.1), and more particularly chapter 1 of the report and draft article O, which read:

Article O. Definition of State debt

For the purposes of the present articles, "State debt" means a financial obligation contracted by the central Government of a State and chargeable to the treasury of that State.

2. Mr. BEDJAOUÏ (Special Rapporteur) said that, in taking up the report before it, the Commission was leaving the study of State property and passing on to that of State debts. Its consideration of the draft articles relating to State property had been only provisional, and it had placed certain articles, and certain expressions used in the articles, between brackets. The questions of State debts was the third aspect of the subject of State succession, the other two being treaties and State property. The Commission had already dealt with the question of succession of States in respect of treaties in a set of draft articles¹ which had been considered by the Plenipotentiary Conference which had met at Vienna from 4 April to 6 May 1977. The question of succession in respect of State property had been dealt with in articles which he had submitted at an earlier stage.² The Commission should confine itself to those three main aspects of the topic of succession of States.

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

² For the text of the articles adopted so far by the Commission, see *Yearbook ... 1976*, vol. II (Part Two), pp. 127-128, document A/31/10, chap. IV, sect. B, sub-sect. 1.

¹ *Yearbook ... 1976*, vol. II (Part Two), p. 164, document A/31/10, para. 173.

3. The present report, which he had been anxious to submit within the agreed time limit, despite serious health difficulties, comprised five chapters. Chapter 1 defined the scope of the subject; chapter 2 dealt with the problem of the third State, and chapter 3 with the non-transferability of "odious" debts. Finally, chapters 4, 5 and 6 studied succession to State debts in the different cases of succession which the Commission had already had occasion to distinguish. Two chapters would be added later: one on succession to State debts in cases of the dissolution of unions of States, and the other on succession to State debts in cases of the separation of one or more parts of a State.

4. The reason why the draft articles presented in the ninth report were not numbered, but identified by letters which did not even appear in alphabetical order, was because he had wished to emphasize the provisional nature of his conclusions and to show that he had not yet taken any firm position regarding the final sequence of the articles or even the necessity for some of them.

5. Since members of the Commission would be able to express their views on the general question of State debts when commenting on chapter I, there seemed no need for a debate on the report as a whole; chapter I dealt with the subject-matter of the study of State debts and with the definition of State debt. He had begun his report by excluding non-State debts and debts contracted by a State other than the predecessor State, before going on to propose a definition of State debt and to draw attention to certain problems raised by succession of States in that regard.

6. The object of the report was to study debts contracted by the predecessor State and the fate of such debts in the event of a succession of States, as well as the guarantees given by the predecessor State for a debt of another party, and the fate of such guarantees. It was therefore appropriate to exclude non-State debts, which were debts contracted by territorial authorities, such as provinces, *départements*, regions, counties, cantons, cities and municipalities, by private enterprises or even by public enterprises possessing legal personality and financial autonomy in relation to the State. The study did not therefore deal in any way with private debts and as far as public debts were concerned it dealt only with State debts.

7. In order to delimit more precisely the concept of State debt and to bring out the distinctions traditionally made by the writers, he had successively contrasted State debts with debts of local authorities, general debts with special or localized debts, State debts with debts of public enterprises, public debts with private debts, financial debts with administrative debts, political debts with commercial debts; external debt with internal debt, contractual debts with delictual or quasi-delictual debts, secured debts with unsecured debts, guaranteed debts with unguaranteed debts, and, lastly, State debts with régime debts termed "odious" debts. Each of those comparisons brought closer the definition of State debt. Since terminology in that field was somewhat fluid, it was important that the Commission should be in a position to take an informed decision on the use of terms.

8. In the light of the comparison between State debts and debts of local authorities, State debt might be defined as a debt contracted by a State as opposed to a local authority, whose territorial jurisdiction was necessarily less extensive than that of the State. In order to contract a debt, a local authority must possess a measure of financial autonomy. Local debts might therefore be defined as debts contracted by an authority possessing such autonomy. They might further be defined as debts proper to the territorial authority which had contracted them or debts proper to the transferred territory, if the authority concerned formed the subject of the territorial transfer giving rise to the succession of States. Debts of that kind, or debts proper to the transferred territory, did not fall within the subject under consideration. It could even be said that they did not, strictly speaking, belong to the subject of State succession, since they were the responsibility of the detached or transferred territory, both prior to and after succession. Having never been assumed by the predecessor State, they could not be assumed by the successor State; they did not concern the State legal order, and the occurrence of a succession of States could not alter that situation.

9. A distinction, should, however, be drawn between debts of that kind and debts contracted by the State but having local implications. The State could incur debts either for the general good of the national community as a whole, or for the benefit of only one part of its territory, which might subsequently be the subject of a transfer and give rise to a succession of States. Thus, a distinction must be drawn between general State debts and special, specialized or localized debts.

10. He had used the term "local debt" to describe a debt contracted by a local authority and not by a State, and the term "localized debt" to describe a debt contracted by a State for the benefit of a particular part of its territory. In distinguishing State debts from other types of debt, the deciding factors were the involvement of the State and the commitment it entered into at the time the debt originated. The fact that the debt was for the benefit of all or only part of the territory was of no consequence.

11. In some cases, it was difficult to determine whether a debt fell into the category of "local debt" or "State debt". In paragraphs 16 to 23 of the report, he had set forth the criteria to be used for distinguishing between localized State debts and local debts. Those criteria, which were not absolutely sure guides, were the degree of financial autonomy of the local authority, the intended purpose and use of the funds, the existence of a special security in the transferred territory, and, above all, the personality of the debtor—whether local authority or central Government.

12. Only limited reliance could be placed on the criterion of financial autonomy. While as a general rule a debt contracted by a local authority in virtue of its financial autonomy could be imputed to that local authority, there had been cases where, despite the existence of such financial autonomy, certain "sovereignty expenditures" covered by a loan had been charged by the central Government to the budget of a colony. Such a device could not conceal the fact that debts of that kind were State debts. That was why, in paragraph 28 of his

report, he had expressed the opinion that a local debt could be said to be a debt contracted by a territorial authority inferior to the State, to be used by that authority in its own territory, which territory had a degree of financial autonomy, with the result that the debt was identifiable.

13. Before turning to the definition of State debt, he wished to specify what States the Commission ought to deal with. A succession of States concerned only the debts of the predecessor State. Debts owed to the predecessor State by the successor State or debts of a third State should not be considered.

14. A third State might contract debts vis-à-vis another third State, the successor State or the predecessor State. In the first case, clearly the succession had no bearing on its debts. In the second case, the fate of its debts was obviously not affected by the fact of the creditor State's becoming a successor State. The fact that the succession had the effect of modifying, by enlarging, the territorial jurisdiction of the successor State did not affect, and should not in future affect, debts contracted with it by a third State. If the successor State did not possess statehood at the time when the third State contracted a debt to it, it was clear that the acquisition of statehood would not cause the successor State to forfeit its debt-claim against the third State. The third case, in which the third State contracted a debt to the predecessor State, involved a debt-claim of the predecessor State against the third State. Such debt-claims were property, and had already been considered by the Commission in the context of succession in respect of State property.

15. Debts of the successor State to a third State or to the predecessor State must also be excluded from the subject-matter under consideration. When a successor State contracted a debt to a third State after it had already acquired the status of successor, its debt was unconnected with the succession of States and could not be considered to form part of the present subject-matter. The only debts of that kind which should be considered were debts resulting from the very fact of the succession of States; strictly speaking, however, those were not debts contracted directly by the successor State itself, but debts transferred to it indirectly as a result of the State succession.

16. Debts which the successor State might assume vis-à-vis the predecessor State could either have no connexion with the succession or could result from the succession. In the former case, they would obviously not come within the subject-matter under consideration; similarly in the latter, since they had been incurred after the succession.

17. Accordingly, only debts of the predecessor State were germane to the present subject. It was the territorial change affecting the predecessor State that set in motion the phenomenon of State succession, which was reflected in a change in the territorial jurisdiction of the debtor State. The whole problem of succession of States in respect of debts was whether that change had any effects, and if so what effects, on debts contracted by the State in question. Such debts might have been contracted to a third State or to the future successor State. In the latter

case, it was clear that the debt was non-transferable, since transferring it would mean extinguishing it.

18. Before giving his proposed definition of State debt, he wished to say that in his report he had felt bound to challenge the definitions given by some writers and by the International Law Association. In his opinion, a simple definition should emphasize the fact that the debt was contracted by the central government and was assumed by it; the use to which it was put was of little importance, since it might benefit all or only a part of the national territory. The definition which he proposed in article O would later be supplemented by definitions of general debt and of special or localized debt. In his definition, he had sought to avoid the difficulties which the Commission had encountered in defining State property, when it had had in mind only property of the predecessor State; since it sometimes proved necessary to refer to the property of other States, the Commission had been obliged to use expressions such as "third State property" and "State property of the successor State", with the result that next year it would have to look again at its definition of State property.

19. With regard to any guarantees which the predecessor State might have given with respect to a debt of another party, the present subject did not concern only debts contracted by the predecessor State, but also other financial obligations it might be under as the result of legal commitments it had undertaken in the form of guarantees. He had not, however, considered it necessary to give a definition of a State guarantee of a debt of a third party.

20. In studying the problems raised by succession in respect of State debts, he had kept to the classification of succession which the Commission had adopted for State property. Those problems were extremely complex, both because of the inherent difficulties of the subject and also because of the diversity of theoretical opinions. Certain theories were favourable to the transfer of State debts and were based on legal principles or concepts such as respect for acquired rights, the theory of benefit (had the debt really benefited the territory?), considerations of justice and equity, common sense, the maxim "*res transit cum suo onere*" and the theory of unjust enrichment. Other theories, opposed to the transfer of State debts, were based in part on an argument derived from State sovereignty: the successor State did not gain possession of the sovereign rights of the predecessor State; it was a matter, rather, of one sovereignty being replaced by another in a territory. They were also based on the nature of the debt, stressing the personal relationship between the debtor and the third-party creditor, which could be not only a State but also an international organization or an individual. Such theories, opposed to the transfer of State debts, had received judicial confirmation in the arbitral award made on 18 April 1925 by Eugène Borel in the case concerning repartition of the Ottoman public debt.³

21. The divergences among historical precedents could be explained by differences as regards (1) the recognition, contained in the solution adopted, of a rule of law; (2) the era concerned; (3) the political circumstances in which

³ See A/CN.4/301 and Add.1, paras. 76 and 195, United Nations, *Reports of International Arbitral Awards*, vol. I (United Nations publication, Sales No. 1948.V.2), p. 529.

the territorial change had taken place; (4) the ratio of forces; (5) the solvency of the parties; and (6) the interests involved and the character and nature of the debts. Those historical precedents would be studied in relation to each type of succession.

22. In this report, he had taken the view that the absence of a treaty stipulating a succession to public debts must be interpreted as a refusal by the successor State to assume such debts. However, the converse was not necessarily true; acceptance of a debt in a treaty "spontaneously and voluntarily" or "as an act of grace" did not mean that that treaty confirmed a rule of succession. As proof of that, he need only mention the treaties concluded between Spain and the Latin American republics which had become independent during the nineteenth century, and certain treaties expressing considerations of expediency or moral obligations, such as the treaties of Versailles, Neuilly-sur-Seine, the Trianon and Saint-Germain-en-Laye.

23. Account must also be taken of the problem of the date of historical precedents. Did a change of practice always nullify the previous practice? Was it necessary, because annexation and colonization were no longer tolerated, to set aside completely the practice relating to the fate of debts in those two cases? Although such cases of succession were in flagrant contradiction with the principles of contemporary international law, some might consider acceptable the solutions to which they had given rise, which amounted to a rejection of State debts. Again, historical circumstances and the ratio of forces between the parties concerned also played an important role. When a territorial change took place peacefully, succession to debts sometimes followed different rules from when it occurred as the result of violence. While there was no doubt that the ratio of forces had a definite influence on the solutions adopted, so also did the "ratio of weakness" resulting from the insolvency of a State. On an entirely different level, even where the fate of State debts was regulated by treaties, the latter might not be respected or implemented. There was also the question of the free consent of the successor State, which must be genuine.

24. The situation was complicated by the variety of the interests involved. The diminished State would wish to pass its debts on to the successor State, but it would have no interest in losing its credit in the eyes of the international community. The taxpayers of the detached territory were not responsible for debts from which they had not profited, and neither were the taxpayers of the successor State, other than those living in the transferred territory. But in that case too, the successor State would have no interest in losing its credit. With regard to the creditor third State, there was between it and the debtor State a personal equation which ceased to exist if there was a change of debtor. However, the creditor State might gain from a change of debtor if the successor State was richer, or more disposed than the initial debtor to discharge its debt. Account must also be taken of the interest of the international community, as expressed by, for example, the World Bank. A sound international legal order required that debts be paid by those who had contracted them. But the international community had no interest in destroying a State for the sole reason that it ought to

discharge its debts. That factor had been taken into account in the affair of the Ottoman public debt after the First World War. Indeed, one of the purposes of international law was to reconcile all the interests involved.

25. Those were the considerations which he had had in mind when defining State debt.

26. The CHAIRMAN said that he was sure he would be interpreting the wishes of all the members of the Commission if he congratulated the Special Rapporteur on his masterly presentation of chapter I of his ninth report.

27. Mr. VEROSTA congratulated the Special Rapporteur on his excellent report and said he was willing to adopt the terminology proposed. He wondered, however, whether the word "or" which appeared in the title, "General debts and special or localized debts", of chapter I, section B, subsection 2, of the report was appropriate, for there were general and special debts which were not localized and also special debts which were localized.

28. Mr. REUTER said he wished to join in the congratulations to the Special Rapporteur on his skilful approach to an extremely difficult subject. While he accepted the general lines proposed in the report, he wished to draw attention to a question which appeared to him to be fundamental, namely: should the factors to be taken into consideration include the legal nature of the source of the debt? As the Special Rapporteur had said in his report, a State debt could arise from a legal undertaking entered into towards not only a foreign State, but also an international organization, for example, the World Bank, or an individual. Such undertakings might be governed by international law: some might be treaties; others, without constituting treaties proper, might also be governed by international law, for they were not subject to the rules of a specific internal law—that was the case in particular in the matter of agreements concluded with an international bank.

29. There was therefore good reason to ask whether account should be taken of the legal source of the debt. When the debt arose from a treaty, could the question of its fate be decided independently of the succession to the treaty, or should it be regarded as being governed by the answer to the problem of succession of States in respect of treaties? In the latter case, it should not be forgotten that succession of States in respect of treaties related only to treaties in the strict sense of the term—namely, agreements in written form concluded between States and governed by public international law—and not to agreements governed by public international law concluded with international organizations, still less to transnational agreements which, though not governed by any specific national law, did not come under general international law.

30. The question to which he referred should be settled before the Commission began its consideration of the draft articles, since it was fundamental and until it was answered, members of the Commission would be obliged to reserve their positions on the solutions proposed.

31. Mr. PINTO said he wished to congratulate the Special Rapporteur on an excellent report which dealt with an extremely complicated subject. It had not been his

intention to speak so early in the debate but he, too, felt some of the misgivings expressed by Mr. Reuter with regard to a possible differentiation between the debt and the source of the debt, not only in relation to treaties, for which a régime was being elaborated elsewhere and with which the Commission's work would presumably have to be consistent, but also in relation to instances where the debt or obligation was contained in documents of other kinds. At the previous session, the Commission had adopted article 12,⁴ which referred to immovable State property and movable State property. Securities, for example, might be governed by municipal law and, in many legal systems, were considered to be movable property. He wondered whether the régime to be elaborated for movable State property would be in keeping with the régime that the Commission was now proposing for debts.

32. Mr. USHAKOV said he joined with the other members of the Commission in congratulating the Special Rapporteur on his clear and concise report. With regard to the subject of "régime debts", which was discussed in the report (A/CN.4/301 and Add.1, para. 46), he would point out that the Soviet Union had not purely and simply "refused to honour Tsarist debts", as was stated in the report. With regard to the war debts, the Soviet Union would have been willing to recognize the claims of certain creditors, if they had themselves recognized its claims with regard to their own debts for the reparation of damage caused by armed intervention on Soviet territory. With regard to the other debts, the Soviet Union had also been willing to negotiate, and some of them had been settled by mutual agreement. It was therefore incorrect to say that the Soviet Union had refused to honour the Tsarist debts.

33. Mr. SUCHARITKUL said he wondered whether the notion of "State debt" should be limited to a strictly financial obligation, as was the case in the definition proposed by the Special Rapporteur in article O. If by State debt was meant an exclusively financial obligation, would the Commission also study State succession in respect of non-financial obligations? If not, the definition of State debt should perhaps be expanded.

34. Mr. ŠAHOVIĆ said he wished to know whether the Special Rapporteur really intended to end his draft articles with the question of succession to State debts, as he had said in introducing his report. It was stated in the Commission's report on the work of its twenty-eighth session that the Commission intended to study other questions, such as those of archives and the peaceful settlement of disputes.⁵ It would therefore be helpful to have some clarification of the Special Rapporteur's intentions with regard to the limits of his study.

35. Mr. DADZIE said he congratulated the Chairman and the officers of the Commission on their election and also the Special Rapporteur on his brilliant presentation of a comprehensive report.

36. The United Nations Conference on Succession of States in Respect of Treaties had been held very recently and the Commission was now dealing with the other

aspect of the subject, namely, succession of States in respect of matters other than treaties. Many State debts arose out of treaty obligations and, if the Commission was tempted to embark on consideration of such debts, it would be venturing into a field that lay outside the limits of the present topic. Perhaps the Special Rapporteur could say whether the Commission should deal with such matters, and thus help the members to formulate their ideas on a subject that was rather unfamiliar. He looked forward to contributing to the discussion, once the boundaries within which the Commission was operating had been clarified.

37. The CHAIRMAN, speaking as a member of the Commission, said he noted that in his report the Special Rapporteur frequently referred to the predecessor State as a "diminished" State. Draft article O was intended as a general article applicable to all types of succession of States. However, it was questionable whether qualification of the predecessor State as a diminished State would be relevant in the case of a uniting of States, in which the predecessor State might not be diminished but enlarged by that type of succession.

38. Again, the definition contained in draft article O specified that a State debt meant "a financial obligation contracted by the central Government of a State and chargeable to the treasury of that State". In countries like his own, which had a federal system, financial debts were very often contracted by a federal State, which was the equivalent of a province in other countries, and guaranteed by the treasury of the State. Consequently, it might be preferable to refer to a financial obligation "contracted by the central Government of a State or chargeable to the treasury of that State".

39. Mr. NJENGA said he congratulated the Chairman and the officers of the Commission on their election and expressed his appreciation of the scholarly report produced by the Special Rapporteur in difficult personal circumstances.

40. He was somewhat concerned about the distinction made between local and localized debts. A local debt incurred by a municipality or an organized section of the community with local autonomy would, if backed by a guarantee from the central Government, be only one step removed from a State debt. In fact, in most cases the creditor would not extend the loan or credit without such a guarantee. The scope of the articles would be unduly restricted if local debts guaranteed by the State were precluded from the subject now under consideration. Moreover, a localized debt, which meant one incurred by the central Government for a particular part of the country, was very similar to a debt of a local community or entity guaranteed by the State. In other words, the financial autonomy used as a basis for the distinction made between a local debt and a localized debt was a matter of degree, for it was always subject to limitations imposed by the central Government. Consequently, the difference between a local debt and a localized debt, when such debts were guaranteed by the central Government, tended to be blurred.

41. The same argument applied in the case of debts of public enterprises that were guaranteed by the State.

⁴ For text, see *Yearbook ... 1976*, vol. II (Part Two), p. 126, document A/31/10, chap. IV, sect. B.

⁵ *Ibid.*, p. 126, document A/31/10, para. 103.

Under certain constitutional arrangements, public enterprises were sometimes completely autonomous, but more often a public enterprise was simply an arm of the central Government that had limited financial autonomy and was usually indirectly accountable to the central Government, which kept watch over its activities. The Special Rapporteur might wish to comment on those points so that ways and means could be found to incorporate that element of a guarantee from the central Government in the definition, and thus broaden the scope of the articles.

42. Mr. VEROSTA said that State succession in respect of State debts raised a question of principle. The draft articles should not, in theory, touch on questions of State succession in respect of treaties, which were the subject of another draft convention. But State debts were not always based on treaties governed by international law: they could also be based on contracts—concluded, for example, with consortia of banks—which were not governed by international law. For instance, after the dissolution of the Danubian monarchy, the financial and economic problems of Austria and Hungary had been settled by treaties—the 1922 Geneva Protocol and the 1931 Lausanne Protocol—governed by international law, whereas the financial and economic problems of Czechoslovakia and Yugoslavia had been settled by more or less private loans granted by a consortium of banks and guaranteed by the State, which were not governed by international law.

Organization of work

43. Mr. QUENTIN-BAXTER said that he wished, first of all, to congratulate the Chairman and the officers of the Commission on their election.

44. He was struck by the contrast between the present situation and the situation at the beginning of the previous five-year period, when the Commission had embarked on a substantial debate on its long-range programme, its methods of work and the balance of its obligations. The attendance of so many members of the Commission at the forthcoming conference on the law of the sea would indeed benefit the Commission itself and enrich the experience of the members concerned. However, it could follow from that, that in the course of the present session, it would be difficult at times to muster enough members to perform the normal work of the Commission. It was also clear that, since it had long been the custom of the Commission to deal early in its session with the difficult and fundamental question of State responsibility, a further strain would be imposed if it had to be dealt with at the end of the session. Experience showed that draft articles on that subject tended to require very lengthy consideration and the officers of the Commission would be faced with a challenge that did not have to be met in normal circumstances.

45. The Commission should never fail to keep under review its relationship with the General Assembly. The question of the length of the Commission's reports, touched on by Mr. Ago at the 1414th meeting,

was but one example of the continuing need to seek a perfect understanding with the General Assembly. In recent years, speakers in the Sixth Committee had singled out for special praise the efforts made by the Commission to review its procedures and, despite the constraints of the present session, the Commission should not lose sight of the need to discuss its methods of work. Obviously, a successor was needed to Mr. Kearney in his capacity as the advocate of a planning committee.⁶ He hoped that, with the attendance of a greater number of members at the end of the present session, some consideration could be given to the long-range programme, the character of the Commission and the way in which the General Assembly looked on its work.

46. The CHAIRMAN, speaking as a member of the Commission, said that he shared the concern expressed by Mr. Quentin-Baxter. The work of the informal planning group had been greatly appreciated in the General Assembly, for almost every speaker in the Sixth Committee had expressed satisfaction at the manner in which the Commission was endeavouring to improve its procedures and organize future work. The question of the informal planning group or committee would almost certainly be raised at the next meeting of the Enlarged Bureau.

47. Mr. EL-ERIAN said that a number of representatives in the Sixth Committee had raised the question of the possibility of issuing the Commission's report in two parts.⁷ He hoped that it would be possible to do so, thus affording more time for Governments and delegations to study the report.

48. Mr. RYBAKOV (Secretary of the Commission) said that it would be possible to issue the report in two parts and, in so doing, facilitate study of the report by delegations in the Sixth Committee. It would mean that after the discussion of perhaps one item the draft articles and related commentaries by the Special Rapporteur would have to be available for approval by about the middle of the session.

The meeting rose at 12.55 p.m.

⁶ *Yearbook ... 1976*, vol. I, p. 298, 1413th meeting, para. 19, and A/CN.4/L.252.

⁷ See *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 243.

1417th MEETING

Thursday, 12 May 1977, at 10.10 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

**Succession of States in respect of matters other than treaties
(continued) (A/CN.4/301 and Add.1)**

[Item 3 of the agenda]

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

ARTICLE O (Definition of State debt) ¹ (continued)

1. Mr. FRANCIS congratulated the Special Rapporteur on the high quality of his ninth report (A/CN.4/301 and Add.1) and of his introductory statement. The presentation of the report by chapters would be of great assistance in understanding a complex subject.

2. In seeking to delimit the concept of State debt, the Special Rapporteur had stressed what he considered to be the essential elements of that concept and also indicated certain elements which he felt should be excepted from it. In that connexion, and with reference to the definition of State debt proposed in article O, he would be grateful if the Special Rapporteur would state whether there could be any special reasons why a State debt could be charged to an institution rather than to the total national resources of a country, as was normally the case.

3. Mr. SUCHARITKUL said that Mr. Reuter had referred ² to the possibility of an agreement concluded by the State with an international organization such as the International Monetary Fund, the World Bank or the Asian Development Bank. Provision must also be made for the case of succession to State debts contracted towards an international organization. International organizations were composed of member States, and the funds of such organizations were derived from contributions by member States—in other words, from State funds. But creditors could include private financial institutions or individual nationals or aliens. In such a case, the financial obligation of the State was a strictly internal obligation, which could not be dealt with within the framework of international law, or at any rate, not until internal remedies had been exhausted. Thus that category of State debts contracted with respect to a private third party, fell within the sphere of State responsibility and should, he thought, be left aside for the time being.

4. Mr. CALLE Y CALLE said that the Special Rapporteur's latest report was as clear and as well documented as the previous ones. That was all the more remarkable an achievement as the Commission was now entering a field in which there were no universal rules of international law: there was no absolute rule which determined succession to debts, whether national debts, public debts, régime debts or others.

5. While it was important to determine the source of a State debt, it was essential to determine who must pay the debt. In other words, it had to be determined whether a debt continued to attach to the entity which had contracted it, or whether, in specific circumstances and because there were good reasons for such a change, the original debtor could be replaced by another. The Special Rapporteur had alluded in his report to what he had

termed the "voluntary and spontaneous" assumption by the republics of the former Spanish America, on their accession to independence, of the State debts of Spain (A/CN.4/301 and Add.1, paras. 281-294). In the case of Peru, at least, the acceptance of the Spanish debt had been less voluntary than it might seem, for it had been a condition imposed by Spain for the recognition of its independence.

6. He supported the definition of State debt proposed by the Special Rapporteur in draft article O, which could form a basis for the elaboration of specific rules relating to the various types of State debt considered later on in the report.

7. Mr. USHAKOV said he fully endorsed the approach which the Special Rapporteur had taken in chapter I of his report in deciding to limit his study to debts of the predecessor State and to exclude from it all other categories of debts. He believed that the Commission should concern itself only with State debts. But what was meant by "State debt"? In his opinion, a "State debt" was a "debt of the State", according to the definition given by Alexandre Sack. That definition, which the Special Rapporteur had quoted in paragraph 60 of his report and which he had criticized as being almost tautological, at least had the virtue of excluding government debts and régime debts. Indeed, it was questionable whether it was appropriate to speak of "government debts", since the Government, as an organ of the State, had no possessions of its own and when it contracted a loan, it did so on behalf of the State. It was equally questionable to refer to "régime debts", since it was not the régime as such but the State which possessed wealth. "State debts" could therefore properly be defined as "debts of the State". That was an extremely important point, since the Commission should concern itself solely with relations between subjects of international law which were governed by public international law. Consequently, only debts contracted by a subject of international law to another subject of international law, and therefore governed by public international law, should be considered. The Special Rapporteur had been right to limit his study to State debts and to exclude other categories of debts since the latter were governed, not by public international law, but by private international law, which reflected various systems of internal law.

8. It might be sufficient to provide that "State debt" meant an international obligation, for since an international legal obligation could arise only between subjects of international law, the study would then be limited to debts contracted by a subject of international law to another subject of international law. However, it might also be stipulated that "State debt" referred to debts of the predecessor State, as the Special Rapporteur suggested in his report.

9. The Special Rapporteur had been right to specify, in his proposed definition in article O, that "'State debt' means a financial obligation", since a debt was invariably a financial obligation. However, it was not always a financial obligation assumed by a State towards another State or towards several States, either together or separately. It might also be a financial obligation assumed by a State towards subjects of international law other than

¹ For text, see 1416th meeting, para. 1.

² 1416th meeting, para. 28.

States—an international organization, for instance. It should therefore be stipulated that a State debt was a financial obligation assumed by a State towards other States or towards other subjects of international law.

10. It might also be appropriate to explain that “State debt” referred to State debts which were lawful under international law. However, it was not really necessary to include an express provision on that point in the draft articles, since it was a presumption which could be brought out quite adequately in the commentary. In the case of the draft articles on succession of States in respect of treaties, the Commission had also presumed that succession of States was limited to valid treaties and had not raised the question of the validity or legitimacy of treaties, a matter which it had considered to be covered by the Vienna Convention on the Law of Treaties.^{3,4} While, therefore, the Commission should proceed on the assumption that the draft articles related only to debts lawful under international law, it did not have to go into the question of the rules determining the legitimacy of debts, since it was not dealing with debts as such but with succession of States to debts.

11. Nor should the Commission concern itself with the manner in which the State had contracted a financial obligation to another subject of international law. The fact that the obligation had been contracted through the central Government or through some authorized private individual was of little consequence: all that mattered was the existence of a financial obligation.

12. The source of the obligation was another extraneous consideration. It was of little importance whether or not an obligation was a conventional one. What was important was that there was a lawful financial obligation. The way in which that obligation had come into being was irrelevant. Indeed, he wondered whether it was appropriate to use the term “contracted”, since the obligation did not necessarily arise from a contract.

13. Succession of States in respect of State debts raised several important questions. As Mr. Sette Câmara had said,⁵ in some States like Brazil, the different states composing the federation could assume their own share of certain financial obligations, and could therefore have debts. The same applied to the Soviet Republics and the Swiss cantons. The question therefore arose whether, in the case of a federal State or a union of States, only debts of the central Government should be taken into consideration, or whether account should also be taken of debts contracted by the component parts of the State. His own view was that the debts of component parts could be taken into consideration if those parts were subjects of international law. The same problem had arisen in connexion with succession of States in respect of treaties, since the component parts of a union of States could conclude treaties when they were subjects of international law. Admittedly, the Commission had left that question

aside in the case of succession of States in respect of treaties, and it might therefore wish to do the same in the present case.

14. A problem also arose in the case of former dependent territories. The metropolitan State or the administering Power might have assumed certain financial obligations towards the territory under its administration. In that case, however, the debts concerned were debts contracted by the predecessor State to the successor State.

15. The question of security and guarantees did not fall within the scope of the present draft articles but belonged to another sphere of international law.

16. The question of “localized debts” arose in cases of the transfer of part of the territory of a State to another State and in cases of separation or uniting of States. However, it was permissible to ask whether it was really the debt that was localized or whether it was not, rather, the property or funds which were the source of the debt and were used for the benefit of the territory that were localized. That was perhaps the most delicate question of all and the most difficult to resolve.

17. Mr. QUENTIN-BAXTER said that the Special Rapporteur’s latest report (A/CN.4/301 and Add.1) represented a work of great scholarship. He was sure that the concentration in the report on the question of State debts did not imply any intention to omit from the final set of draft articles the very important question of archives.

18. The Special Rapporteur had said that the difficult work which lay ahead of the Commission on the subject of State debts could be seen as the counterpart of what it had already done on the question of State property. While it would be dangerous to assume that rules applying to State property would necessarily apply to any other subject, it could be taken as a working hypothesis that guidance as to the right approach to the question of State debts and obligations could be found in the articles on State property which the Commission had already adopted. During the Commission’s consideration of those articles, it had become clear that practice with regard to succession to State property was very diverse, and that international scholars had never really reached agreement on the boundaries of the subject of succession of States in respect of matters other than treaties. The lesson to be drawn from that seemed to be that the study of State succession should be limited to the immediate effects of the change of sovereignty, leaving aside such matters as the relationships of the successor State with private individuals or third States, which belonged to the realm of the primary rules governing State responsibility towards aliens, and so on. The essence of the topic was to be found in article 4⁶ of the articles already adopted, and lay in the conjunction of the change of international personality with the internal law of the predecessor State.

19. That was a concept which he felt must also be applied to the study of succession to the negative elements of State property, namely, obligations. Given that view, he was very sympathetic to what other members of the Commission had said concerning the extent of such obligations.

³ *Yearbook ... 1974*, vol. II (Part One), p. 181, document A/9610/Rev.1, chap. II, sect. D, commentary to article 6.

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. (Hereafter referred to as the “Vienna Convention”.)

⁵ 1416th meeting, para. 38.

⁶ See above, 1416th meeting, foot-note 2.

With regard to the question of guarantees raised by Mr. Njenga,⁷ for example, he considered that, in principle, a debt guaranteed by a State constituted a contingent financial obligation of that State and, as such, came within the scope of the definition of State debt now proposed. It could also be recalled, with reference to the question raised by Mr. Verosta as to whether State obligations were necessarily financial, that the Permanent Court of International Justice had characterized the case of the German settlers in Poland as a matter of succession by Poland to obligations towards people in its territory which had formerly been those of Germany.⁸ He believed, therefore, that the Commission could employ in its approach to the question of succession to obligations principles of the same degree of generality as those it had used in considering succession to property.

20. In that connexion, he drew attention to the problem of the third State, which was discussed in chapter II of the Special Rapporteur's report. The fundamental distinction between succession in respect of treaties and succession in respect of other matters was that the first form of succession necessarily involved the substitution of one international person for another in relations with a third international person or several third international persons, whereas the second involved essentially only two parties, namely, the predecessor State and the successor State. It was precisely for that reason that the Commission had decided to confine its attention to succession to State property and debts, since the property and obligations in the name of an entity other than the predecessor or the successor State would not automatically be affected by the succession as such. If that limitation was maintained, the Commission would, once again, have to consider whether the articles it was now about to draft should represent a full counterpart to those on succession to property, or whether its approach should be more limited. He was not convinced that the latter solution was the right one, although he was very well aware that the application to State debts or other obligations of the categories employed in respect of State property would occasion many problems, including perhaps that of the need to take into account the relationship between positive rights and debts and obligations which were in some way associated with such rights. He had in mind in that respect the private law maxim that it was not possible at one and the same time both to approbate and to reprobate, an idea which it might prove necessary to include in the draft articles at some point.

21. Finally, the Commission might wish initially to adopt a broader concept of a State obligation than that implied by the reference in draft article O to a link with the State treasury. Not all the obligations which the Commission would have to consider were so linked.

22. Mr. EL-ERIAN said he congratulated the Special Rapporteur for a masterly report on a subject concerning which there was a great diversity of precedent and of

theoretical opinion. In general, he agreed with the approach adopted by the Special Rapporteur.

23. The Special Rapporteur had been right to draw attention, in chapter I, section A, of the report, to the fact that in private law the relationship between debtor and creditor was personal, and to question whether the same relationship obtained in international law. Great care should be exercised in drawing analogies between private and international law, for while the former was at the origin of the latter, international law had now become a separate science and obligations under it differed from the obligations between individuals governed by private law. The same comment applied to the reference by Mr. Quentin-Baxter to the possible inclusion of a provision specifying that a benefit must be taken with the attendant obligation. That was so not only because of the differences between international and private law, but also because of the differences between private law systems themselves: in Muslim law, for example, there could be no succession without prior settlement of debts, so that a debt did not pass to the successor but remained attached to the estate of the person who had contracted it.

24. With regard to the relationship between the present topic and that of State responsibility, he agreed with the statement by the Special Rapporteur in the first sentence of paragraph 32 of his report. The Special Rapporteur had obviously taken great care to distinguish between problems which were pertinent to the current study and others which were not problems of State succession proper, but in connexion with which State responsibility might be engaged. The Special Rapporteur had given a sound definition of what constituted State debt and had justifiably avoided using the confusing expression "public debt". He agreed with Mr. Ushakov that the debt must be lawful and must genuinely be the debt of a State.

25. Finally, the Special Rapporteur had been right to point out, in paragraph 92 of his report, that the payment of debts was necessary for the maintenance of a sound international legal order, but that, at the same time, considerations of equity required that the debtor State be allowed to remain a viable entity. To combine those requirements was one of the main challenges before the Commission.

26. Mr. AGO said that, in chapter I of his report, the Special Rapporteur had taken great care to delimit the subject-matter under consideration as precisely as possible. He had thus had to make choices which, as was always the case in matters of delimitation, necessarily involved some element of arbitrariness. The problem was not so much whether the choices were good or bad, but rather whether they were actually in line with the Commission's objectives.

27. The concept of the State adopted by the Special Rapporteur for the purposes of the definition of State debts was one which was normally used in internal law. He excluded the debts of territorial authorities, as well as debts contracted by a non-territorial entity, such as a public establishment, and proposed to take into consideration only the debts contracted by the "central Government". It might be better to refer to a central organ of the State apparatus in order to cover the debts which could, for example, be contracted by a State's

⁷ 1416th meeting, paras. 40 and 41.

⁸ Advisory Opinion of 10 September 1923 on certain questions relating to settlers of German origin in the territory ceded by Germany to Poland, 1923, *P.C.I.J.*, Series B, No. 6.

central bank. What caused him rather more concern, however, was the fact that the concept of the State adopted by the Special Rapporteur was entirely different from the concept which the Commission had adopted in connexion with State responsibility, where the State was considered as a subject of international law presenting external unity, even if it could be broken down internally into a number of persons. In the study of the subject of State responsibility, it had been clearly established that an internationally wrongful act was considered as an act of the State, even if it was, for example, attributable to a municipality, a member State of a federal State or a public establishment. Of course, the Commission was free to adopt, for a different subject, a different concept of the State, but it must realize the consequences which such a choice might entail. If, for example, a State violated an international obligation attaching to a debt and the immediate author of the violation was a territorial authority, the responsibility of that State would be engaged at the international level, but the debt would not fall within the provisions of article O proposed by the Special Rapporteur in the matter of State succession. If the Special Rapporteur intended to exclude the debts of territorial authorities and especially those of public establishments, not for genuine reasons of principle, but merely in order to simplify the study of the subject-matter, it would perhaps be advisable to reflect before adopting as a concept of the State one drawn from internal law.

28. The question of "odious" debts and régime debts, though the Special Rapporteur intended to deal with them later, called for some comments forthwith. In paragraphs 45 to 47 of his ninth report, the Special Rapporteur contrasted State debts with régime debts. He had thus been compelled to use vague concepts such as those of régime and change of régime. The meaning of the word "régime" was unclear. Thus in France, the words *ancien régime* had been used to describe, not a temporary régime but the whole period of the monarchy which had preceded the Revolution. The words "change of régime" could, in extreme cases, apply to a change of State, but, in most cases, they referred to a change of Government. The definition of régime debts formulated by Charles Rousseau and to which the Special Rapporteur had referred was hardly enlightening. According to that definition, régime debts were debts contracted by the State "in the temporary interest of a particular political form" and the term could "include, in peacetime, subjugation debts specifically contracted for the purpose of colonizing or absorbing a particular territory, and, in wartime, war debts".⁹ Such wording left many things in doubt. Was it the interest of the political form which was temporary or the political form itself? It should also be noted that war debts normally came into being after the cessation of hostilities. As Mr. Ushakov had pointed out,¹⁰ the question of the lawfulness of the debt could also be raised, but it was a very delicate one. A debt imposed by an aggressor State as a result of a war of aggression would probably not be considered valid, but a debt imposed by the victorious victim of a war of aggression would not be classified as "odious".

29. The Special Rapporteur had rightly distinguished a special category of debts, described as localized debts, which were debts contracted by the predecessor State for the benefit of a specific part of its territory, which might subsequently separate from that State. In the case of the separation of part of a territory, however, problems of succession to debts could arise even if the debts had not been contracted in the exclusive interest of the part of the territory in question. The case would be simple if, for example, the United Kingdom contracted a debt for the benefit of the development of Northern Ireland and Northern Ireland then separated from the United Kingdom. But what would happen, in such a situation, if the debt had been contracted for the benefit of the territory of the United Kingdom as a whole? It was important that such cases should be taken into account.

30. Referring to a question raised by Mr. Reuter¹¹ and by Mr. Ushakov¹² concerning the source of debts, he pointed out that, in French, it was not improper to refer to a debt *contractée* by the predecessor State since the word *contractée* did not necessarily imply that there was a contract. He would stress, however, that if the debt resulted from a wrongful act, difficulties might be encountered as a result of the fact that the concept of the State was not the same in the present article and in the draft articles on State responsibility.

31. In view of those considerations, he invited the Commission to think again before adopting the proposed definition of State debt.

32. Mr. CASTAÑEDA said that the Special Rapporteur had made an admirable effort at systematization in a very difficult and extremely fluid area in which many of the concepts were imprecise and even the elements of private law were far from clear. Obviously, he had been compelled to make a selection from concepts that were vague and imprecise and a selection of that type necessarily involved some arbitrariness.

33. He agreed basically with the Special Rapporteur's choice of the field of study and fully endorsed the method of gradually eliminating a number of entities related to the State, thus leaving as the core of the study the debt of the predecessor State, either to a third State or to the successor State. The essence of the study was, in fact, the debt of the predecessor State. Indeed, the Special Rapporteur seemed to imply that the report related only to the debt of the predecessor State to a third State because, as he rightly pointed out in paragraph 57 of the report, a decision to transfer the debt of the predecessor State to the successor State would mean cancellation or extinction of the debt. That pertinent observation practically eliminated the debt of the predecessor State to the successor State and, in his opinion, it was the correct way to circumscribe the problem, which therefore centred on the debt of the predecessor State to a third State.

34. However, certain matters still had to be clarified. He assumed that the answer to the question of the source of the debt lay in paragraph 61 of the report, which indicated that, although the Special Rapporteur was

⁹ See A/CN.4/301 and Add.1, para. 47.

¹⁰ See para. 10 above.

¹¹ 1416th meeting, para. 28.

¹² See para. 12 above.

basing his arguments on cases of State loans, it was understood that a State debt might be a commercial, administrative or other debt. It was precisely in that connexion that the Special Rapporteur had been obliged to make a somewhat arbitrary but none the less correct choice. The Commission should consider only patrimonial debts, in other words, debts with a financial content, although it should be noted that the concept of debt was not clearly defined in international law. Even in private law, most legislations defined simply the concepts of debtor and creditor, but not that of "debt" as such. On the other hand, the wider concept of obligation, which might require performance or non-performance in a context that was not necessarily financial, existed in private law. Mr. Quentin-Baxter had referred¹³ to treaty obligations of States towards nationals of another country, a subject which unquestionably related to succession of States. It was nevertheless a separate issue, which the Commission would have to consider in due course.

35. He agreed with the comments by Mr. Ushakov and Mr. Ago on lawful and unlawful debts, but would go even further and assert that a debt must be lawful for it to be regarded as an obligation in law. Therefore, it was to be understood that the study dealt only with lawful debts.

36. The key word "contracted" used in draft article O did not signify a contractual debt but one that was voluntarily assumed by the State. That voluntary aspect of the question therefore excluded all delictual or quasi-delictual acts which might give rise to an obligation. He was not fully persuaded by the reasons advanced by the Special Rapporteur, in paragraph 40 of his report, to justify that approach. It was certainly true that delictual debts, arising from unlawful acts committed by the predecessor State, raised special problems with regard to succession, that the solution of such problems was governed primarily by the principles relating to international responsibility of States, and that delictual debts were of far less importance than contractual debts. However, delictual debts might well be of importance in some instances, and he failed to see why such a substantial category of law as unlawful acts should be excluded from the study. Mr. Ago had mentioned acts by an authority giving rise to the responsibility of the State, but regardless of which organ or entity committed the act, the question arose as to whether or not the Commission should, in general, exclude obligations resulting from something more than voluntary legal acts. His own view was that all acts generating international obligations should be included in the study. It might therefore be advisable to replace the words "contracted by" in draft article O by the words "chargeable to", and thus broaden the scope of the definition, if the Special Rapporteur could agree.

37. Further examination was required of the concept of a debt incurred by a local authority but guaranteed by the State, since it would be difficult to determine whether the debt was a local debt or a State debt. Moreover, very difficult problems arose in connexion with localized debts. At the previous session, during the discussion on succession to State property in the case of separation of parts

of a State. Mr. Njenga had given the excellent example of a dam whose cost of construction had been paid by all parts of the predecessor State and which might be attributed to the successor State in whose territory it was situated.¹⁴ In the context of a debt incurred for the construction of a dam, it would be difficult to distinguish between local or localized benefit and benefit to the country in general. While he had no objection to the approach adopted by the Special Rapporteur, in that case it would be necessary to consider very carefully the kinds of problem that might arise.

38. Lastly, on the topic of régime debts, the Special Rapporteur rightly pointed out in paragraph 46 of his report that régime debts must be regarded as State debts. Consequently, the problem of a succession of Governments, as opposed to a succession of States, did not at present arise. Later, during the discussion of chapter III of the report, the Commission would be able to establish whether the phenomenon of succession of States entailed the transfer of régime debts to the successor State and whether the Special Rapporteur's conclusions in that connexion were correct.

39. Mr. ŠAHOVIĆ said that the general debate on chapter I of the report was proving very useful. It was important to bear in mind the orientation the Commission had so far given to its study of succession of States in respect of matters other than treaties. That orientation was based on an empirical analysis which should bridge the gap and resolve the contradictions between doctrine and jurisprudence. In order to formulate modern rules appropriate to current needs, the Commission should make a special effort to study the practice followed after the Second World War in respect of succession to State debts, particularly by international banks. As there were no universally acceptable customary rules in that field, the general debate should be continued and, in accordance with the Commission's practice, the formulation of definitions should be left until the final stage of its work.

40. With regard to the definition of State debt contained in draft article O proposed by the Special Rapporteur, it was important to stress the international aspects of the problem, although the internal organization of the State should not be overlooked. In his report, the Special Rapporteur had begun by studying the concept of debt as such, but he had then rightly considered that concept from an international point of view.

41. In order to reach a definition of State debt, the Commission ought therefore to take account of the outcome of the current discussion with regard to the internal and international aspects of the functions of the State and also of the definition of State succession, which emphasized the idea of territory. Thus it would be better for the Commission to wait until it had considered the other chapters of the report because it first had to settle the question of relations between the predecessor State, the successor State and third States.

42. Lastly, the question of succession to State debts, which basically involved the transfer of the debts of the predecessor State to the successor State, was one which involved two sovereignties. His own opinion was that,

¹³ See para. 19 above.

¹⁴ *Yearbook ... 1976*, vol. I, p. 230, 1400th meeting, para. 6.

in the final analysis, the successor State should express its will, regardless of the legal aspects of the problem.

The meeting rose at 1.10 p.m.

1418th MEETING

Friday, 13 May 1977, at 10.35 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Organization of work (*continued*)*

1. The CHAIRMAN said that the Enlarged Bureau had recommended that the special meeting to pay tribute to the memory of Mr. Edvard Hambro should be held on Monday, 16 May 1977, at 3 p.m. Unfortunately, Mrs. Hambro would not be able to attend, but the Norwegian Ambassador would be present at the meeting.

2. Mr. QUENTIN-BAXTER suggested that the participants in the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, currently being held in Geneva, be informed of the special meeting, which they might well wish to attend.

3. The CHAIRMAN said that arrangements would be made to inform the secretariat of the Diplomatic Conference. If there were no objections, he would take it that the Commission agreed to the recommendation of the Enlarged Bureau.

It was so agreed.

4. The CHAIRMAN said the Enlarged Bureau had also recommended that the Commission should hold a closed meeting at 10 a.m. on Thursday, 19 May 1977, for the purpose of filling the casual vacancy caused by the death of Mr. Hambro. If there were no objections, he would take it that the Commission agreed to that recommendation.

It was so agreed.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/301 and Add.1)

[Item 3 of the agenda]

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

ARTICLE O (Definition of State debt)¹ (*continued*)

5. Mr. YANKOV congratulated the Special Rapporteur on a very scholarly report which contained many

thought-provoking ideas and reflected great breadth of vision.

6. He agreed with the principal preliminary conclusions and, in general terms, with the definition contained in draft article O, which he regarded not as the final outcome of the Special Rapporteur's analysis but as a valid and stimulating basis for further discussion. While he concurred with the Special Rapporteur's premise, set forth in paragraph 2 of the report (A/CN.4/301 and Add.1), that "a debt might be viewed as a legal obligation upon a certain subject of law, called the debtor, to do or refrain from doing something for the benefit of a certain party, called the creditor", it was difficult to see why such a very broad concept had been reduced in the Special Rapporteur's proposed definition, to a financial obligation chargeable to the treasury of the State. The question arose of other obligations, to do or to refrain from doing something, which did not derive from international treaties and were not expressed in financial terms. In other words, the basic concept appeared to be much wider than the actual definition, which contained several elements, namely, the financial nature of the debt, the fact that it should be contracted in some way and the fact that it should be chargeable to the treasury of the State. He could accept for the moment the restrictive definition of State debt, but certain matters still had to be clarified. As a new member, he was not acquainted with the background of the earlier discussion of the topic, but he wondered whether the Special Rapporteur should not also consider other instances of obligations to do or to refrain from doing something for the benefit of a certain party, which were not of a financial nature and, therefore, were not chargeable to the treasury of the State.

7. His doubts concerning the harmony between the basic premise contained in paragraph 2 and the definition itself were reinforced by other parts of the report, more particularly paragraph 61, in which the Special Rapporteur introduced a broader concept of State debt. There were several possible courses of action. Either the general concept should be restricted so as to be in keeping with the Special Rapporteur's conclusion, as crystallized in the proposed definition, or the Special Rapporteur might for the time being focus his attention on financial obligations but keep open the possibility of studying wider obligations of the predecessor State towards the successor State or a third State. For example, how would the fishing or transit rights granted to a third State under a municipal law of the predecessor State with respect to a particular territory be affected if the territory in question were transferred to the successor State as a consequence of a succession of States?

8. The Commission was, of course, dealing with the realm of international law and, in the present instance, the subject must be the State. Like Mr. Ushakov,² he experienced some difficulties in clearly differentiating between the situations regarding local and localized debts. The arguments advanced by the Special Rapporteur were convincing, yet there appeared to be some lacunae and it would be useful if more light could be shed on that aspect of the problem.

* Resumed from the 1415th meeting.

¹ For text, see 1416th meeting, para. 1.

² 1417th meeting.

9. Lastly, in the definition, it might be preferable to replace the word "contracted" by a more general term, such as "assumed", thereby taking into account other justified lawful obligations which were not necessarily based on contract.

10. Mr. RIPHAGEN said that he wished first to congratulate the Chairman and the officers on their election and also the Special Rapporteur on an excellent report.

11. He was inclined to share the view of Mr. Šahović³ that it was perhaps premature at the present stage to hold a lengthy discussion, let alone take a decision on the definition of State debts. It was not yet known whether and to what extent the rules of general public international law had or might, in terms of their progressive development, have anything very definite to say on the subject under consideration. In practically all cases of State succession, the question arose whether the fact that jurisdiction over territory, together with State property, passed from the predecessor State to the successor State should also entail some passing to the successor State of the burden of government, in particular, the financial burden. The passing of jurisdiction over territory from one State to another normally involved the possibility of levying taxes, which were one of the most important sources of State income. Again, some of the State property which passed, without compensation, to the successor State might, economically speaking, be the counterpart of a debt contracted by the predecessor State. Accordingly, the question also arose as to whether some of the financial burden of the predecessor State, which was rightly deprived of some of its powers of taxation and some of its State property, should not in some measure be shared or taken over by the successor State. Moreover, the predecessor State might simply disappear. However, such cases involved the rights and interests of the creditor rather than the relationship between the predecessor and the successor States, although the extent to which that was a matter of concern for rules of general public international law remained to be discussed.

12. For the moment, he had some doubts as to whether rules of general international law should, or even could, give abstract answers to the questions that arose in respect of the effects of State succession on State debts. It seemed significant that a number of articles proposed by the Special Rapporteur were couched in negative terms, for they said quite a great deal about what State succession did not entail in the matter of State debts. The negation of unjust, unreasonable or inequitable so-called rules or principles sometimes posited by Governments or writers was in itself a positive contribution to the task in hand, but it would be desirable to see something even more positive, if that were possible.

13. In any event, he also agreed with Mr. Šahović that the Commission should proceed empirically, on the basis of modern State practice, although some points might cause difficulty because they lay somewhat outside the scope of lawyers. For instance, in more modern cases of State succession, the final solution appeared to have been based not so much on the legal character of the

State debts involved as on considerations relating to the over-all financial position of the States concerned, more particularly their capacity to pay. After all, a debt of State A was an asset to the creditor only in so far as State A was able to pay, but capacity to pay often depended upon the internal and external economic policy followed by the State in question. Like individuals, Governments to some extent determined their own capacity to pay their debts by choosing the ways in which they spent their income and/or their capital. Municipal law fully resolved the problem in the case of individuals, but it was not such an easy matter at the international level. Another troublesome question was the possible monetary, as opposed to financial, aspect of State debts. It could be claimed that he was seeing problems where none existed, but the fact remained that the solution adopted in some modern instances of State succession might have been based, at least partly, on considerations of monetary policy.

14. At an earlier meeting, Mr. Ago had referred to financial obligations contracted by the central bank of a State.⁴ In many countries, the central bank had a very special position and function. Its assets and debts were not of quite the same character as the assets and debts of the central Government. Consequently, the fate of its debts and assets in a case of State succession might call for special treatment—treatment different from that applicable to State property and State debts in general. The definition proposed by the Special Rapporteur allowed for that possibility, but it was a point that could be studied further.

15. Mr. THIAM said that he shared most of the views expressed by the Special Rapporteur in his ninth report, which was a worthy successor to his previous reports. In the present report, the Special Rapporteur studied succession in respect of State debts and, naturally, had begun by attempting to define the scope of that concept. At the current stage of his work, the Special Rapporteur had reached the logical conclusion that a State debt was, in the strict sense of the term, the debt of a State, and that the subject-matter should be limited to debts of the predecessor State. He had reached that conclusion after drawing a number of distinctions designed to determine what debts were State debts; thus, he had reviewed local, localized, delictual, odious and other forms of debts. Those various categories of debts were not very clearly defined and it was often difficult to determine the category to which a particular debt belonged. Thus, it was permissible to ask whether local debts contracted by decentralized authorities were really the debts of those authorities. It was not always easy to establish in what capacity the governor-general of an overseas territory acted, since he performed the duties both of head of the local executive and of representative of the central Government. When a governor-general wished to contract a loan, he had first to approach the authorities of the central Government. A debt contracted in that manner, in the interests of a local authority but through a procedure involving the central Government, might be considered by some as a local debt and by others as a State debt.

³ *Ibid.*, para. 41.

⁴ 1417th meeting, para. 27.

16. With regard to localized debts, they were ultimately characterized by the use to which they were put, for they were debts contracted by the central Government in the interests of a local authority. There again, it was often difficult to establish which debts fell into that category. It might perhaps be preferable to speak of "State debts assigned to a local interest".

17. Delictual or quasi-delictual debts, which could more accurately be termed debts of delictual or quasi-delictual origin, raised a problem already mentioned by Mr. Ago. The draft articles on State responsibility already adopted by the Commission⁵ provided that the internationally wrongful act of a territorial authority was the responsibility of the State, whereas, according to the report under consideration, debts of delictual or quasi-delictual origin should not be covered by the articles relating to succession of States in respect of matters other than treaties. That problem could be resolved in the definition of State debt. The definition proposed by the Special Rapporteur should be broadened, since he considered that delictual and quasi-delictual debts were still debts of the predecessor State.

18. To sum up, he was in broad agreement with the cautious approach adopted by the Special Rapporteur and had no doubt that the discussions to follow would enable the points which were still obscure to be elucidated.

19. Mr. TSURUOKA said he associated himself with the tributes paid to the Special Rapporteur for his admirable report. There was a great deal that he would wish to say on the many problems dealt with in that document, but as Chairman of the Drafting Committee, he would have occasion to express his views to that Committee.

20. Mr. SCHWEBEL said he wished to compliment the Special Rapporteur on an admirable report that was terse, stimulating and full of insights.

21. Paragraph 46 of the report (A/CN.4/301 and Add.1) stated that régime debts "may be repudiated". It was certainly true that, from time to time, such debts were repudiated, but he wondered whether the Special Rapporteur meant that régime debts could be repudiated legally. Again, he would like to enquire whether, in the statement in paragraph 81 to the effect that annexation and colonization were no longer tolerated by modern law, the Special Rapporteur was speaking in normative terms of positive law. Instances of annexation had occurred since the entry into force of the Charter of the United Nations, and colonies, although relatively few in number, still existed. In paragraph 92 of the report, the Special Rapporteur had very judiciously struck a balance between considerations of equity and the requirement of a sound international legal order that debts should be paid by the party responsible to the exact extent of its responsibility. In paragraph 93, on the other hand, after stating that international law had created a legal order without means of enforcement, the Special Rapporteur had concluded that it was therefore rather difficult to recognize a principle of succession to State debts as a rule of law. A grave

deficiency of international law was the absence of adequate means of enforcement, but it did not necessarily follow that rules of law did not exist.

22. Lastly, he had been impressed by the force of Mr. Riphagen's remarks and shared his disquiet and unease. The Commission was perhaps missing some point but, in a field that was new to him, it was difficult to say at the present stage exactly what the point was.

23. Mr. DADZIE said that he would like, once again, to extend his congratulations to the Special Rapporteur on having produced an admirable report in circumstances of ill-health. In general, he had no difficulty in accepting the report as it stood, and his remarks were prompted simply by a spirit of brotherhood and co-operation and to assure the Special Rapporteur of his interest in what was a very difficult task.

24. Unlike Mr. Yankov,⁶ he could not agree with the statement in paragraph 2 of the report that a debt could be viewed as a legal obligation upon a certain subject of law, called the debtor, to do or refrain from doing something, to effect a certain performance, for the benefit of a certain party, called the creditor. On the other hand, he experienced no difficulty with regard to the definition proposed in draft article O. The broader concept that Mr. Yankov considered should be included in the definition in order to accommodate all kinds of obligations would not be relevant, since a debt, at least in English, was essentially a financial obligation, one under which the debtor was obliged to pay a certain sum of money to the creditor. The reference in paragraph 2 to doing or refraining from doing something, or effecting a certain performance, touched on a contractual relationship which might not necessarily involve the payment of a debt. He could easily have accepted the view that a debt arose as a result of the performance of something by the creditor for the benefit of the debtor, who was then under a financial obligation to pay the creditor. Perhaps the Special Rapporteur could consider that point. The Commission was in fact dealing with debt situations, in other words, with something to be understood as nothing more than an obligation to make amends by payment of money. All the other considerations mentioned earlier might be the subject of other branches of international law, but the Commission would doubtless accept the fact that a debt was necessarily a financial obligation, and, for the purposes of the study, a financial obligation of the State. He had no objection to specifying which arm of the State was to pay the debt, although that was basically a matter for the State itself to decide.

25. The Commission was, therefore, concerned with the non-performance of an obligation, for non-performance would lead to condemnation of the State, which would be required to pay a sum of money, in other words, a debt and nothing more than a debt. Consequently, it would be unsatisfactory to encumber the definition by allowing it to encompass situations which did not involve a debt. Moreover, the financial obligation must be expressed in liquidated terms; the problems created by unliquidated debts were only too well known. Indeed, it was a rule that,

⁵ *Yearbook ... 1976*, vol. II (Part Two), pp. 73-75, document A/31/10, chap. III, sect. B, subsect. 1.

⁶ See para. 6 above.

even in the case of claims, problems arose if the debt was not liquidated. The parties had to agree to liquidate the debt before it lawfully became a debt. Consequently, the definition should refer to a financial obligation upon a State to pay a certain sum of money and, in his view, it must always be a liquidated sum of money. The Commission was not concerned with how a State incurred a debt; the point of departure was the existence of a State in the case of State succession, and the problem was to determine whether or not such a debt passed from the predecessor State to the successor State.

26. The Special Rapporteur had drawn valuable distinctions between different types of debt, but they should not, in his opinion, find a place in a definition. In the case of a guaranteed debt, the liability of the State was incurred only upon the failure of the debtor to meet the obligation. It would not be advisable to deal with the mechanics of the way in which the debt was incurred, or the intermediate stages, whether or how the State accepted liability. He had no objection to the concept of a local debt, because the territory concerned, after its separation from the State, would continue to be responsible for that debt. However, in the case of a localized debt earmarked for a particular locality, the criterion of benefit to the locality concerned would call for proof of non-abuse by the predecessor State before the successor State could become liable for the debt. That was especially true in the case of newly independent States. Everybody was aware that the predecessor State or former metropolitan State sought to pass on many kinds of liabilities to newly independent States. The newly independent State would have to be completely satisfied that its liability did not relate to benefits which had also been gained by the metropolitan State in general.

27. With regard to the lawful or unlawful nature of debts, commented on by previous speakers, it was obvious that, for a relationship to exist between the creditor and the debtor, the debt itself must be lawful and enforceable. Reference had also been made to the repudiation of régime debts. Again, it was quite obvious that a successor State would not agree to a debt incurred in circumstances that were inimical to it. Moreover, in many countries of the world, one régime was sometimes replaced by another régime that was completely different in concept and philosophy and which would naturally take steps to repudiate certain debts. He therefore hoped that the Commission would give further consideration to the very interesting subject of régime debts.

28. Finally, he took the view that delictual debts were important. If a State was condemned for a delict and damages were awarded to the other State, a debt situation arose and the responsible State was obliged to pay the debt. He ventured to suggest that the Special Rapporteur reconsider his decision to attach less importance to delictual debts.

29. Mr BEDJAoui (Special Rapporteur) said that the questions raised during the debate related principally to the choice of subject and its scope and limits, and to the definition of State debt.

30. With regard to the choice of subject, Mr. Šahović had wondered why, in his ninth report, he (the Special

Rapporteur) had left the question of State property, consideration of which had not been completed, and that of other types of property, consideration of which had not yet been started, and moved on to the question of State debts. He had asked what were the Special Rapporteur's intentions and plans in that regard, recalling that in its report on its twenty-eighth session, the Commission had referred to the possibility of considering also the question of archives and that of the procedure for the settlement of disputes.⁷ He had not forgotten those questions, which he had already broached in his third, fourth, fifth and sixth reports,⁸ relating not only to State property but also to other public property, and he could revert to them at a later stage if the Commission so wished. In 1973, however, the Commission had decided to restrict its study to State property⁹ and in 1976 it had further decided, as he had suggested in his eighth report, to treat State property *in abstracto* and not *in concreto*,¹⁰ thus abandoning the idea of making a distinction based on the specific nature of the property (currency, archives, treasury, etc.) and dealing with each of those types of property in a separate article. If the draft on succession of States in respect of matters other than treaties was to be completed in the reasonably near future and was not to become obsolete, the Commission must abide by its decision to limit its study to State property and exclude all other categories of public property.

31. He intended to turn to the question of State archives at a later stage, and would probably be submitting a report on that subject in 1978. He would also be returning to the question of the settlement of disputes, but before tackling that, it would be wiser to wait until State debts had been dealt with, so that the text to be adopted could apply both to State property and to State debts. In any case, the United Nations Conference on Succession of States in Respect of Treaties had not yet examined the question of the settlement of disputes, so the Commission could wait until the Conference had adopted the relevant article, which it could then adapt to the present draft. There was therefore no urgency over that question.

32. With regard to State succession in respect of other matters, a question on which Mr. Šahović wished to know his intentions, he said that, as was clear from his first report, in 1968,¹¹ his original plans had been very ambitious. At that time, he had contemplated the possibility of considering not only public property and public debts—subjects which had now been narrowed down to State property and State debts—but also the question of succession to the legislation and judicial organs of the predecessor State, the question of nationality and acquired rights, and the question of territorial régimes, referred

⁷ 1416th meeting, para. 34.

⁸ *Yearbook ... 1970*, vol. II, p. 131, document A/CN.4/226; *Yearbook ... 1971*, vol. II (Part One), p. 157, document A/CN.4/247 and Add.1; *Yearbook ... 1972*, vol. II, p. 61, document A/CN.4/259, and *Yearbook ... 1973*, vol. II, p. 3, document A/CN.4/267.

⁹ *Yearbook ... 1976*, vol. II (Part Two), p. 124, document A/31/10, para. 90.

¹⁰ *Ibid.*, p. 130, document A/31/10, chap. IV, sect. B, introductory commentary to section 2 of part 1 of the draft, para. (7) of the commentary.

¹¹ *Yearbook ... 1968*, vol. II, p. 94, document A/CN.4/204.

to by Mr. Yankov, which had subsequently been included in the study of succession of States in respect of treaties. However, if the Commission was to respond as quickly as possible to the needs of the international community as expressed by the General Assembly, it would be wise to limit its consideration of succession matters to State property and State debts which, together with treaties, formed the three aspects of State succession. He had in fact announced his intention to proceed directly, in his ninth report, to the study of succession to public debts, in all probability confining this to succession to State debts; in so doing, he was merely conforming with the instructions of the General Assembly in its resolution 3315 (XXIX), as indicated in the Commission's report on its twenty-eighth session.¹²

33. Mr. Njenga had been right in emphasizing¹³ the importance of debts contracted by entities such as public establishments or local authorities and in observing that those categories of debts were in part subject to State control. However, it was not always possible to assimilate them to debts of the State itself; on the other hand it was not possible to ignore them completely. In his opinion, the Commission should limit the scope of its study so as to avoid adding to the complexity of the subject; if it mixed debts of the State proper with debts of local authorities or enterprises, it would have great difficulty in obtaining a clear view of the subject. That was a problem which had not escaped him and which he had emphasized both in his report and in his oral statement.

34. Mr. Njenga had also been right to emphasize the role of the guarantee furnished by the State for a local debt contracted by a local organ. A guarantee of that kind was extremely important for the creditor, who had known the central Government particularly and reposed his confidence in it. Mr. Njenga had justifiably stressed that localized debt in a region came very near to local debt guaranteed by the State. The concern expressed by Mr. Njenga on that point was similar to that of Mr. Sette Câmara, who had pointed out¹⁴ that, in a federal State like Brazil, debts contracted by the various States were guaranteed by the treasury of the federal State.

35. He had no intention of neglecting the role of the guarantee; in fact, he believed that that role should be examined and clarified in the context of succession of States. He had laid great emphasis on the importance of the guarantee in chapter V of his report, which dealt with succession to debts in the case of newly independent States. He had shown that the freedom of a colony to contract a loan in the exercise of its financial autonomy was, as Mr. Thiam had emphasized,¹⁵ largely illusory, since the backing of the metropolitan Government was needed. Such loans were contracted by virtue of an act of the metropolitan parliament, as could be seen from the cases of the Indonesian and Malagasy loans which

he had cited in his report.¹⁶ The freedom of the colony to contract a loan was even more illusory when the administering Power offered its own guarantee to the creditors, as in the case of loans granted to dependent territories by international bodies such as the World Bank. That guarantee was very extensive; the guarantee agreements negotiated by the World Bank provided that the administering Power was responsible for the debt as "primary obligor, and not as surety merely".¹⁷ That was why he had proposed an article—article G—providing that the predecessor State continued to be bound by the debt by reason of the guarantee which it had given.¹⁸

36. Mr. Njenga had felt that it was perhaps going too far to exclude from the study the debts of public enterprises, since such enterprises were controlled by the Government and could take no action without its agreement. As he had acknowledged in his report, it was extremely difficult to distinguish between a debt of an enterprise and a debt of the State, since the criterion of budgetary autonomy was not always a completely sure guide for differentiating between State debts and local debts or debts of public enterprises. Budgetary autonomy was a matter of degree, and the central Government limited it at its discretion.

37. With regard to the problem raised by the definition of State debt, Mr. Šahović¹⁹ and, later, Mr. Riphagen²⁰ had expressed the view that it would be more prudent not to define State debt until its various aspects had been considered. On the other hand, other members had taken the view that the question of the definition should be dealt with immediately, and accordingly that the two fundamental problems it presented should be settled first, namely, the problem of the source or origin of the debt, raised by Mr. Reuter,²¹ and the problem of the status of the State as a subject of international law in its relations with other subjects of international law, raised by Mr. Ushakov.²²

38. Other members had wondered whether State debt should not be regarded as a strictly financial obligation. He agreed with Mr. Ushakov that, by definition, a debt could only be financial.²³ Obligations must not be confused with debts: an obligation could be either financial or non-financial, whereas a debt was always a financial obligation.

39. The problem of non-financial obligations had been largely resolved by the Commission during its consideration of succession of States in respect of treaties, when it had studied certain objective territorial régimes created for the benefit of one or more States. The obligations concerned were non-patrimonial obligations arising from

¹⁶ See A/CN.4/301 and Add.1, paras. 307-309 and 312-317 respectively.

¹⁷ *Ibid.*, para. 274.

¹⁸ *Ibid.*, para. 374.

¹⁹ 1417th meeting, para. 41.

²⁰ See para. 11 above.

²¹ 1416th meeting, para. 25.

²² 1417th meeting, para. 7.

²³ *Ibid.*, para. 9.

¹² *Yearbook ... 1976*, vol. II (Part Two), p. 126, document A/31/10, para. 103.

¹³ 1416th meeting, paras. 40 and 41.

¹⁴ *Ibid.*, para. 38.

¹⁵ See para. 15 above.

frontier, navigation or other treaties which had been the responsibility of the predecessor State and which could remain the responsibility of the successor State. Such non-financial obligations could be created not only by treaty but also by custom. They might be passive obligations, imposing a *non facere* requirement on the State to refrain from committing certain sovereign acts so as to respect the interests of one or more States, or positive obligations imposing a *facere* requirement on the State to accept acts of foreign States in its own territory. In his first report²⁴ he had proposed studying those obligations from the standpoint of objective territorial régimes, as a subject-matter of succession to be considered on the same basis as debts. Since that time the Commission had studied that question in the context of succession of States in respect of treaties. However, it had dealt with it only from the point of view of territorial régimes established by treaty—although such régimes could also be established by custom—as it had been considering the matter in connexion with succession of States in respect of treaties. The Commission had in fact exceeded the scope of succession of States in respect of treaties, since it had referred not only to treaties but also to frontier régimes and other territorial régimes created by treaties, thus confusing treaties as a matter susceptible of succession and treaties as an instrument of succession. The Commission had thus dealt with succession to objective régimes established by a treaty.

The meeting rose at 1 p.m.

²⁴ See foot-note 11 above.

1419th MEETING

Monday, 16 May 1977, at 3.10 p.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Tributes to the memory of Mr. Edvard Hambro

1. The CHAIRMAN, declaring open the special meeting which the Commission had decided to hold to honour the memory of its dear and distinguished friend, the late Ambassador Edvard Hambro, said that a tribute of silence had been paid to Mr. Hambro's memory at the first meeting of the current session on the proposal of the Legal Counsel of the United Nations. A similar tribute had been paid by the recent United Nations Conference on Succession of States in Respect of Treaties. On the proposal of the Senior Legal Officer in charge of the

Seminar on International Law, the thirteenth session of that Seminar was to be entitled the "Edvard Hambro Session".

2. He had received a telegram from Sir Francis Vallat, in which Sir Francis expressed deep regret at his inability to attend the special meeting and, after recalling Mr. Hambro's close links with the United Kingdom, his sadness at his passing and his conviction that Mr. Hambro's work would be his monument. He had also received a telegram from Mr. Pinto, who was likewise unable to be present, in which he paid tribute to Mr. Hambro as an internationalist of vision and creativity, whose precise and incisive mind had no patience with needless verbiage and irrelevant detail, and as a warm and generous spirit. Through his untimely death, the Commission had lost an outstanding lawyer, a great gentleman and a great European. Mr. Pinto asked the Chairman to convey his message of condolence to Mrs. Hambro and the Permanent Representative of Norway to the United Nations Office.

3. Mr. Hambro's death had cast a shadow of sorrow over the first session of the new Commission. It had been at the beginning of a new and brilliant mission in Paris and a new term as member of the Commission, two tasks dear to his heart, that Mr. Hambro had been taken away by the irrevocable call of destiny. If ever there had been a life completely dedicated to the cause of international law and international relations, it had been that of Edvard Hambro. He had indeed been born into international life, for his father had also been one of Norway's most distinguished diplomats. Both men had headed supreme international bodies, for his father had been President of the League of Nations Assembly, while the Commission's late friend had been President of the twenty-fifth session of the United Nations General Assembly.

4. Edvard Hambro had been born in Oslo in 1911 and had obtained a law degree at the University of Oslo before going on to take a doctorate in political science at the Graduate Institute for International Studies of the University of Geneva. His curriculum vitae thereafter was so rich and so impressive that it was difficult to make even a summary of it. He had been Ambassador of Norway in important capitals and had undertaken numerous diplomatic and special missions; he had given countless lectures and courses at the Hague Academy of International Law and in nearly every important university throughout the world; he had held numerous honorary degrees and played an important role in scores of arbitration cases; and he was the author of a long list of books and articles. Mr. Hambro's life was well-known to all members of the Commission, because it was intertwined with the history of contemporary international life, of which it unquestionably constituted an important part. It was enough to single out the beginning and the end: as a young man of 35, he had been appointed Registrar of the International Court of Justice and had published the very first book of commentaries on the Charter of the United Nations, he had died as President of the Institute of International Law, the learned society to which he had been so devoted.

5. In the five years in which they had worked together, he had learned to admire in Mr. Hambro qualities which

were not recorded in a curriculum vitae: his modesty, his friendliness, his ever-present good humour and his kindness, behind which had lain the magnitude of his culture, the brilliance of his intellect, and the soundness of his experience. Thomas Lynch had written that "wisdom is not hard voiced and frowning, but benign and approachable", and, even in illness, Edvard Hambro had never been worried and depressed, but always ready for a joke.

6. In closing his own tribute to the memory of Mr. Milan Bartoš three years ago, Mr. Hambro had prophetically quoted some lines from Samuel Butler:

Yet meet we shall, and part, and meet again,
Where dead men meet, on lips of living men.

While the physical vacancy left by Mr. Hambro's departure would be filled, that could never be so of the vacuum left in the hearts of his friends, who had been accustomed to enjoying his warm comradeship, admiring his learned spirit and benefiting from his concise comments, rich in wisdom and experience.

7. Mr. AGO said that Edvard Hambro's death had been a cruel loss for the Commission and for the international community as a whole. Edvard Hambro, who had been admired and loved, had set an example by devoting his entire life to problems of peaceful international relations, as an active participant in political bodies and delegations representing his country, as a judge on some of the highest international tribunals, and as a teacher and a man of learning.

8. With respect to the first of those aspects, he recalled that during the war Edvard Hambro had taken refuge first in the United States of America and then in London, where he had acted as secretary to the Minister for Foreign Affairs of the Norwegian Government. As soon as peace had been restored, he had been a member of the first Norwegian delegations at San Francisco and at the United Nations and had taken part in the earliest activities of the United Nations as Chief of the Organization's Legal Section. He had been a member of the Norwegian delegation at various international conferences and had been elected President of the United Nations General Assembly in 1970. For five years, he had been a member of the Norwegian Parliament, which had benefited from his experience in international life.

9. As to the second aspect, Edvard Hambro had for years held many high positions. He had been Registrar of the International Court of Justice and a member of various international tribunals, conciliation commissions and other similar bodies. He himself had had Edvard Hambro as a colleague on the Franco-German Arbitral Board for the implementation of the Treaty of the Saar, the very existence of which had helped to put the final seal on peace between France and Germany.

10. With regard to the third aspect, as a graduate of the University of Oslo and the Graduate Institute for International Studies of the University of Geneva, Edvard Hambro had had a very full international training. He had taught at Bergen and at Oslo and had been a visiting professor at American and British universities. He had directed the Dag Hammarskjöld Seminar at the Hague Academy of International Law, and the Curatorium of

that Academy had appointed him to teach at Bangkok. He had been elected a member of the Curatorium only two weeks before his death. The Institute of International Law, which had appointed him President, would miss him at its forthcoming session at Oslo, which he had been looking forward to and for which he had done everything possible. As for his contribution to the International Law Commission, Mr. Hambro had given an example which it would be difficult to equal. The members of the Commission who had known him, and had had the pleasure of listening to his speeches, so full of learning and wisdom, and of being honoured by his friendship would always miss him and faithfully cherish his memory.

11. Mr. EL-ERIAN said that nothing about Edvard Hambro had been ordinary: neither his appearance, which had been both commanding and impeccable, nor his convictions, which had been deep and intense, nor his intellect, which had been powerful and subtle, nor his wit, which had been rich and sharp.

12. To the family of the United Nations, Edvard Hambro had been the distinguished Registrar of the International Court of Justice, an outstanding President of the General Assembly, the eminent Permanent Representative of Norway in New York and Geneva, and an active participant in innumerable meetings and conferences. To students and practitioners of international law, he had been—to mention only a few of his works—co-author of the standard work on the Charter of the United Nations and the author of the monumental work on the case law of the International Court of Justice. He had brought to both those works first-hand knowledge, acquired in the former case through active participation in the San Francisco Conference, and in the latter through long years of devoted service as Registrar of the International Court. To his colleagues he had been the eminent jurist and distinguished diplomat, the wonderful raconteur whose reserve of anecdotes and humour had been inexhaustible. He had been a man who had set for himself and for others high standards of performance, a colleague known for his energy and dynamism, his precision and brevity, his punctuality and incisiveness, his impatience with mediocrity and banality.

13. And to many members of the Commission, as to all his friends, Mr. Hambro had been a kind comrade who would be remembered for his warmth and affection. At one point during Mr. Hambro's Presidency of the General Assembly, he (Mr. El-Erian) had had to compress a complex statement into the allotted ten minutes in order, as he had thought, to avoid provoking a conflict between Mr. Hambro's feelings as a friend, who might have allowed him to speak longer, and his duties as a President, who might have ruled him out of order. When they had spoken about the matter afterwards, Mr. Hambro had replied that there would have been no conflict at all, for, for him, friendship would have prevailed.

14. Edvard Hambro had been a staunch believer in an international order where the rule of law would replace force, institutionalized relations would replace power politics, and co-operation would replace conflict. He had devoted his life tirelessly and unswervingly to his ideals and, over and above his official functions as Ambassador

of Norway and member of the Commission and his active participation in international conferences, he had played an important role in the founding of the Dag Hammarskjöld Foundation and been the first President of the Dag Hammarskjöld Seminar. Young jurists from his own region who had attended the Foundation's seminars had spoken of their heartfelt gratitude for Mr. Hambro's kindness and help. He had not slowed down even when his health had begun to fail. In the last year of his life, he had completed the seventh volume of the case law of the International Court of Justice, which had won general praise and appreciation, and had attended the annual meeting of the International Peace Academy and presided over one of its committees. In his very last weeks, he had been closely involved, in his capacity as its illustrious President, in the preparations for the Oslo session of the Institute of International Law.

15. A belief in, devotion to, and work for an international order had been the driving force and inspiration of the life of Edvard Hambro. He hoped they would continue to play the same role for his friends and students.

16. Mr. TSURUOKA said that, for him, Mr. Hambro's death had meant the loss of a teacher, a colleague and a friend. Mr. Hambro had been an expert in international law, in the law of the United Nations in particular, a distinguished colleague in New York and at Geneva, and a faithful and devoted friend. Japan had had to wait until 1956 to be admitted to the United Nations, and during the years of waiting which had followed the end of the war, it had been in part through Mr. Hambro's works that Japanese officials had been able to study the new world organization. Mr. Hambro had thus been an invaluable guide for them on the road that led to the United Nations.

17. He had known Mr. Hambro in New York when he had been Permanent Representative of Norway, and had thus been able to develop a friendship with him and admire the effective and courteous way in which he had presided over the United Nations General Assembly in 1970. In the International Law Commission, he had appreciated Mr. Hambro's wisdom and profound knowledge of international law. He had also had an opportunity to enjoy Mr. Hambro's hospitality during a private mission to Oslo. In conclusion, he wished to express his sincere condolences to Mrs. Hambro.

18. Mr. ŠAHOVIĆ said that he had worked with Edvard Hambro for nearly 20 years in the Sixth Committee of the General Assembly, at the Diplomatic Conference on Humanitarian Law and in the International Law Commission. He had followed Edvard Hambro's efforts to contribute to international peace, the implementation of the principles of the Charter and the development of a new international law. As a man with an active mind and concrete ideas, Edvard Hambro had insisted on full respect for positive law, but he had always had its progressive development in mind. He had been direct and open, demanding of others and of himself. He had contributed not only to the practice, but also to the doctrine, of international law and his work had made him an authority for all those who were interested in the Charter of the United Nations and the International Court of Justice.

19. Edvard Hambro had been a true friend of Yugoslavia, where he had many faithful friends. The lecture which Edvard Hambro had given on the Antarctic Treaty and the United Nations during his last visit to Belgrade a little more than a year ago had aroused the greatest interest. He wished to express his deep regrets to Mrs. Hambro and to the Norwegian Government.

20. Mr. DADZIE said that, while he had not had the pleasure and honour of being a colleague of Mr. Hambro in the Commission, he had long known him as a fellow member of the Sixth Committee of the General Assembly, of which Mr. Hambro had been one of the leading lights. His personal acquaintanceship with Mr. Hambro dated from a colloquium organized in 1964 by the Carnegie Endowment for International Peace which had ultimately led to the elaboration of the 1967 Protocol to the 1951 Convention on the Status of Refugees. Mr. Hambro's great sense of humour, his remarkable gift for co-operation and his notable juridical acumen had contributed in outstanding measure to the success of the colloquium, just as his personal qualities had made the breaks between meetings all the more enjoyable.

21. He considered it a great privilege to have known and worked with Mr. Hambro, a great son of Norway, the memory of whose friendliness, cheerfulness, understanding, modesty, and, above all, wisdom would remain indelibly in his mind. Mr. Hambro's death had robbed his friends, colleagues and students of a great jurist and a great human being.

22. Mr. CALLE Y CALLE said that it was with the same grief as previous speakers that he wished to pay tribute on behalf of himself, Mr. Castañeda, Mr. Francis, and Mr. Díaz González to a very close and dear friend and colleague.

23. He had come to know Mr. Hambro in 1949 when Peru and Colombia had taken a case of diplomatic asylum to the International Court of Justice, and he had been able to admire his serenity, his very thorough training and his political good sense. The International Court had had in Mr. Hambro one of its most able officials. All students of the law had benefited both from his rich collection of the case law of the Court and from his other works, particularly his commentary on the Charter of the United Nations. In 1970 it had been a great pleasure to him to attend the session of the United Nations General Assembly presided over by Mr. Hambro, an occasion which had seen not only the Silver Jubilee of the Organization, but also the approval of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. As a member of the Commission, his own experience had been enriched by contact with Mr. Hambro, a good, wise, and exemplary man, whose life had been entirely devoted to the cause of advancing international relations. Mr. Hambro's death represented a very deep loss for the academic and political world and for the Commission. All the members of the Commission would preserve an inextinguishable memory of him to whom they were now paying individual and collective tribute as a man and a jurist.

24. Mr. BEDJAOUÏ said that the death of Edvard Hambro, an engaging man in very respect, had filled him with sadness and he shared the family's sorrow. As a distinguished jurist, statesman, teacher, judge and diplomat, Edvard Hambro had led a rich and varied life, but its many facets had a common denominator, namely, his contribution to international law. Indeed, through his functions, missions, and professional and scientific activities, he had made a notable contribution to international peace and to better understanding among peoples. He had always had an open mind about the world's problems and had never approached them with preconceived or doctrinaire ideas. His friends would always remember his smiling efficiency and his sense of humour.
25. He had been part of the same diplomatic corps as Mr. Hambro when Mr. Hambro had been the Norwegian Ambassador in Paris and he had thus had numerous opportunities to appreciate Mr. Hambro's many qualities and, in particular, his extreme simplicity. No better tribute could be paid to a man who knew no boundaries, whose mind was open to the problems of the world and the third world, than to elect an Asian to replace him—since it seemed that an Asian should rightly occupy the seat left vacant by Edvard Hambro, whose full life had been an example of brotherly love for all mankind.
26. Mr. USHAKOV said that he had been deeply grieved by the death of Mr. Hambro, a remarkable personality, a great son of his country, indeed, a son of all mankind, for those who worked for international law also worked for the cause of mankind, world peace and understanding among nations.
27. Mr. Hambro, whose entire life had been devoted to international law, had begun his career with the publication in Paris in 1936, at the age of 25, of a work on *l'Exécution des sentences internationales*. That exceptional beginning had been followed by 40 years in the service of international law and the service of his country as a diplomat. Mr. Hambro had been one of the founders of the United Nations and, in 1946, had published a commentary on the Charter of the United Nations. He had been the President of the General Assembly in 1970 and the first Registrar of the International Court of Justice.
28. He requested the Ambassador of Norway to convey his sincere condolences to Mr. Hambro's family and to the Norwegian Government.
29. Mr. QUENTIN-BAXTER said that, while he had naturally long known Mr. Hambro for his scholarship, he had come to know him personally only at the beginning of the last session of the Commission, but had quickly come to value his friendship. His own decision to seek re-election to the Commission had been due in no small measure to Mr. Hambro's encouragement. It was also to Mr. Hambro that he owed his familiarity with the writings of Sigrid Undset, and he treasured the volume of her works which he had given him. He also remembered how, when his interest in the Antarctic Conference had brought him to New Zealand, Mr. Hambro had studied the people of the country in his own way and had noticed things about them that amused him and had found in them a simplicity which had given him great pleasure.
30. All members of the Commission would recall how, with a grip on the arm and a statement that, while perhaps somewhat dogmatic, also contained a plea for reassurance that his view was correct, Mr. Hambro would comment on some remark made in the Commission or in the day's newspaper. It was that mixture of forthrightness and simplicity, of suspicion of humbug and real appreciation of the true values of life, that would have made Edvard Hambro challenge mere formal tributes; but he would undoubtedly have been deeply moved by the spontaneity of what had been said at the current meeting.
31. It was typical of Mr. Hambro that, even during his illness, he had always had time for others less fortunate than himself. Further keys to his character had been his immense love and knowledge of literature, his desire to master not merely the formal expressions but also the idioms of every language he had learnt, and his letters which had expressed the pith of an idea in just a few words. Mr. Bedjaoui had been very close to the truth when he had spoken of him as a man who knew no boundaries. He had wished to strip the world of all that was artificial and disingenuous, but had never sought to set himself apart in it. He had taken an honest and justified pride in all his many achievements and their recognition. The essence of his contribution had been to show that the law was not a thing apart and was only of full value as an instrument of service to the world in the hands of men who belonged to the world and who combined devotion to the law with appreciation of the richness of human life. He would be remembered therefore as a constructive critic who had loved the world in which he had worked and had contributed greatly to it.
32. Mr. FRANCIS said that his first personal contacts with Mr. Hambro dated from the 1960s, in the United Nations, where he had seen that while both a diplomat and a jurist Mr. Hambro always remained a gentleman of the highest order. At the session of the General Assembly presided over by Mr. Hambro, he himself had been the beneficiary, in respect of a statement which he had expected to be ruled out of order but which Mr. Hambro had subsequently agreed was justified, of the magnanimity which had been typical of a man of such great humility and generosity. The members of the Commission would miss his outstanding erudition, his profound sincerity and his undoubted authority, but above all they would miss a devoted friend and a good man. He hoped the words which had been spoken at the present meeting would go some way towards consoling Mr. Hambro's family for their loss. Unlike Shakespeare's Julius Caesar, there was no evil, but only good to live on after Edvard Hambro.
33. Mr. THIAM said that he associated himself with the homage paid to Mr. Hambro, whose qualities as a diplomat and jurist he did not need to recall. The Commission had lost a worthy member and each of its members had lost a friend. Edvard Hambro's simplicity, kindness and spontaneity had been greatly appreciated, as had his sense of humour and the anecdotes he had recounted. As Mr. Bedjaoui had said, Mr. Hambro had had an open and universal mind. He had dealt with problems in an unbiased manner and without preconceived ideas,

adopting a practical approach which demonstrated that his legal culture was based on vast experience.

34. He wished to express his sincerest condolences to Mr. Hambro's family and to the Government of Norway.

35. Mr. SCHWEBEL said that, while he had not had the privilege to work with Mr. Hambro in the Commission, he was happy to say that he had been a personal friend both of Mr. Hambro and of his family. He had been able to see that, during his period in New York, Mr. Hambro had devoted himself with his characteristic warmth and skill to numerous activities, including the sometimes dry proceedings of the American Society of International Law. Mr. Hambro had been a man of impeccable integrity and great idealism, a passionate democrat and anti-nazi, and a man of the world in the fullest and best sense of the term. He had been an ardent believer in international law, to whose development he had so splendidly contributed. He had enjoyed life and radiated gaiety, and it had been a joy to be with him in his large family. He had been a man with an extraordinary capacity to give and attract affection. His death was a genuine loss to all who had known him, especially his friends.

36. Mr. NJENGA said that death had deprived the world of one of the greatest of contemporary jurists. Despite their short acquaintance, he had been able to appreciate Edvard Hambro as one of the finest minds he had ever met. He had viewed him as a father figure to whom he could look for guidance, for his greatness had lain not only in his works and his concise and lucid statements in international forums, but also in his kindness as a man and his appreciation of the views of others. He hoped the Permanent Representative of Norway would convey to Mr. Hambro's family and the Norwegian Government his sincerest condolences.

37. Mr. SUCHARITKUL said that he shared the feelings of sadness and sympathy expressed by the speakers who had preceded him; he also wished to express his sincere condolences to the Government of Norway and to Mr. Hambro's family. The Government and people of Thailand would not forget the role which Mr. Hambro had played in diplomatic conciliation between the countries of South-East Asia.

38. He had met Mr. Hambro in 1952, when Mr. Hambro had been Registrar of the International Court of Justice and had given a lecture at Oxford on the functioning of the Court. He had worked with Mr. Hambro in the Sixth Committee since 1960 and at the Hague Academy of International Law, particularly at the session which the Academy had held at Bangkok in January 1974. It had been Mr. Hambro who, as a member of the Bureau of the Institute of International Law had, in 1973, proposed that he (Mr. Sucharitul) should participate in the work of the Institute.

39. Mr. Hambro had left behind him many followers whom he had personally inspired and trained. He expressed the sincere hope that Mr. Hambro's spirit of humanitarian and brotherly co-operation would continue to prevail in the Commission, thus contributing to the progressive development of international law.

40. Mr. JAGOTA said that it had not been his privilege to know Mr. Hambro personally; he was simply a distant

admirer of a great jurist and practitioner in international relations whose published works on the International Court of Justice and on the Charter had been the first source material with which he had been acquainted, and which he appreciated immensely. His most abiding impression of Mr. Hambro had been gained at the twenty-fifth session of the General Assembly, a very important session at which Mr. Hambro had served as President and one which had taken several crucial decisions on matters dear to Mr. Hambro's heart, more particularly the adoption of the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. The Declaration had elaborated on the principles of the Charter, of which Mr. Hambro had been one of the chief authors. Mr. Hambro had also been involved in other extremely important decisions on matters such as the United Nations Development Decade and the law of the sea. He wished to associate himself with the tributes that had been paid by members of the Commission and to express, through the Chairman, his sincere condolences to Mr. Hambro's family and to the Government of Norway.

41. Mr. YANKOV said that he wished to join in the homage to the memory of a great jurist who had made a remarkable contribution to many facets of international law, to a scholar of rich experience dedicated to the rule of law and to a diplomat who had served the international community, the United Nations, in such distinguished fashion. Mr. Hambro's election as President of the twenty-fifth session of the General Assembly had been a well-deserved tribute to his abilities and to his faith in international law and in the institutionalization of international law through a universal organization like the United Nations. When Edvard Hambro was Chairman of the Sixth Committee, representatives on the Sixth Committee had ignored his ruling to dispense with the customary congratulations on the election of the Chairman and, with deep conviction, had expressed their admiration for the jurist, the diplomat and the man who was their Chairman at that time. Mr. Hambro had been rightly praised as not only a scholar but also a man of responsibility, modesty, generosity and integrity and someone who knew how to encourage the young. In the words of the French poet: "*Un seul être vous manque et tout est dépeuplé*". Great men were irreplaceable because, in some sense, their contribution to the world was unique. Of course, mankind would continue to produce great men, but the loss of those who had departed would always remain in the hearts and minds of men. He wished, through the Chairman, and the Permanent Representative of Norway, to express his most sincere condolences to the family of the late Edvard Hambro.

42. Mr. RYBAKOV (Representative of the Secretary-General, Director of the Codification Division) said that, upon the death of Mr. Hambro, in a letter to the Government of Norway, the Secretary-General had paid tribute to Mr. Hambro's outstanding personal qualities and his great contribution to the codification and progressive development of international law. The Director-General of the United Nations Office at Geneva and the Legal Counsel of the United Nations deeply regretted that

they had been unable to attend the present meeting, but both would have endorsed the many tributes paid to the memory of a remarkable man. It was difficult to express in more eloquent terms what had already been said by the members of the Commission. While it might perhaps at times have been possible to disagree with Mr. Hambro, no one could question the sincerity of his beliefs or of his arguments in the causes that he had defended. Members of the Office of Legal Affairs, particularly members of the Codification Division who had known Mr. Hambro for many years, had looked on him as not only a scholar and a diplomat but also as a true friend who would always remain alive in their hearts.

43. The CHAIRMAN said he wished to express the Commission's appreciation of the presence at the meeting of H.E. Mr. Johan Cappelen, Permanent Representative of Norway to the United Nations Office at Geneva, Mr. Humbert, Secretary-General of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Ambassador Serup, Head of the Danish Delegation to that Conference, Professor Seyersted, who had worked for so many years with the late Mr. Hambro, and Mr. Schreiber, who had long been the Director of the Division of Human Rights.

44. Mr. CAPPELEN (Permanent representative of Norway to the United Nations Office at Geneva) said that, on behalf of Mrs. Hambro and the Government of Norway, he wished to express his gratitude for the generous tribute paid by the Commission to the memory of his fellow countryman, colleague and friend, Mr. Edvard Hambro. Mrs. Hambro had been deeply touched by the Commission's message to her, by its decision to hold the special meeting and by its thoughtfulness in inviting her to attend. She would indeed have been present, had not an airline strike upset her arrangements to travel to Geneva. She had requested him to inform the Commission that the special meeting was a great encouragement to her. She, more than anyone else, knew what the Commission had meant to her late husband.

45. His Government had also held Edvard Hambro, a brilliant son of Norway, in the highest esteem, and had placed the fullest confidence in him at all times. Speaking as a friend and colleague of Edvard Hambro, he wished to thank all the members of the Commission for the kind words they had spoken about Mr. Hambro, who had always looked forward eagerly to the sessions of the Commission, where he had been able to discuss his beloved subject of international law among kindred spirits greatly admired for their expertise and their personal qualities, and where friendships had been formed that had extended across frontiers and across legal systems. It was therefore especially fitting and moving that the Commission should have decided to pay tribute to the memory of Mr. Hambro at one of its official meetings.

46. Speaking as the official representative of his country, he also wished to express the appreciation and thanks of his Government. Members of the Commission were elected in their personal capacity, but they were none the less nationals of their countries, to which their reputations

were a credit. The Government of Norway was therefore highly appreciative of the deep respect shown by members of the Commission for the memory of Mr. Hambro.

47. The CHAIRMAN said that the records of the special meeting would be forwarded to Mrs. Hambro and to the Government of Norway, with an appropriate covering letter.

The meeting rose at 5.10 p.m.

1420th MEETING

Monday, 16 May 1977, at 5.30 p.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (continued)* (A/CN.4/301 and Add.1)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (continued)

ARTICLE O (Definition of State debt)¹ (continued)

1. Mr. BEDJAOUI (Special Rapporteur), replying to a question raised by Mr. Reuter² and several other members of the Commission concerning the source of State debts, said that the question called for two clarifications.

2. First, the topic for which he had been appointed Special Rapporteur in 1967 had then been entitled "Succession in respect of rights and duties resulting from sources other than treaties" and the parallel topic had been entitled "Succession in respect of treaties".³ Succession of States could be considered either from the point of view of sources or from the point of view of subject-matter. From the point of view of sources, a distinction could be made between succession from treaties and succession resulting from sources other than treaties. From the point of view of the subject-matter of succession, a distinction could be made between succession to treaties and succession to matters other than treaties. But in 1963, the Commission had inadvertently included in the title of one of the topics a reference to the

* Resumed from the 1418th meeting.

¹ For text, see 1416th meeting, para. 1.

² 1416th meeting, para. 28.

³ *Yearbook ... 1976*, vol. II (Part Two), p. 122, document A/31/10, para. 79.

sources of succession, and in the title of the other, a reference to the subject-matter of succession. Not only had the entire topic of State succession thus lacked uniformity, but the study entrusted to him had soon proved not to be feasible. For instance, it would not have been possible to study the fate of State property and debts if it had been settled by a treaty. Consequently, in the first report he had submitted in 1968, he had invited the Commission to apply a single criterion to the delimitation of the two topics relating to State succession. Referring to the subject-matter of succession, the Commission had then adopted the titles "Succession in respect of treaties" and "Succession in respect of matters other than treaties"⁴ respectively. There had, however, been nothing to prevent either of the Special Rapporteurs from referring to sources. In that connexion, the fate of State property and debts, considered to be the subject-matter of succession, could be decided either by a legal provision relating to State succession or by a treaty concluded by the predecessor State and the successor State. Mr. Pinto had rightly drawn a parallel with article 12, one of the articles relating to State property which the Commission had adopted provisionally.⁵ A comparison with article 13 would have been even more pertinent because, in that provision, the Commission had gone so far as to determine the validity of succession agreements, in other words, the source of the successor State's obligation.

3. The second clarification called for by the question of the source of State debts related to two phases which should be clearly distinguished. The transfer of a debt to the successor State meant an obligation to succeed to an obligation. The source of the predecessor State's obligation could be either a treaty or a quasi-treaty, in other words, a contract concluded by a State with a transnational corporation or a foreign corporation or individual. The predecessor State's obligation therefore had its own source, while the source of the successor State's obligation could be either a rule of international law relating to State succession or an agreement between the predecessor State and the successor State. The pre-existing obligation of the predecessor State, considered to be the State debt, which was the subject-matter of succession, should not be confused with the possible obligation of the successor State to succeed to that obligation of the predecessor State. In the case of succession to State property, the Commission had confined itself to taking for granted the existence of the predecessor State's right to such property. It had not been able to go so far as to take into consideration the source of that right of property or to seek to determine whether that source was valid and legitimate, because it would then have had to trace all the former owners of the property. Since the State's right of property was assumed to be valid and legitimate, the rules relating to succession of States in respect of State property must therefore be limited to determining whether the successor State had the right to succeed to that right. Similarly, succession to debts must involve only the possible obligation of the successor State to succeed to an obligation. In the draft articles on succession

of States in respect of treaties,⁶ the Commission had also, as a matter of principle, established a presumption of the validity of the treaty and the legitimacy of the succession and it had expressed them in a provision—echoed in draft article 2 on succession of States in respect of matters other than treaties⁷—which stated that only the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations, were to be taken into consideration.

4. The problem of the source of the predecessor State's debts therefore had two aspects, namely, that of the legal nature of the obligation, which depended on whether the debt had been contracted by treaty, by quasi-treaty or contract or as a result of judicial or arbitral decision, and that of the validity or lawful character of the source of the obligation. That second point was considered to have been settled. With regard to the first, the fact that he had referred in the definition of State debt, to an obligation "contracted" by the State did not mean that he had been referring to the treaty or contractual nature of the financial obligation of the predecessor State. The word "contract" was used in its usual sense and did not imply a reference to the nature of the source or to the exclusion of certain sources. Moreover, the source was considered to be lawful.

5. He had, however, had to make two exceptions. The first related to "odious" debts, in connexion with which he had alluded to the problem of the lawful character of the debt and its source. The reason why he had referred to such debts was twofold. It was, first, because there was abundant doctrine on the subject and, secondly, because he had not wanted to give the impression, by not dealing with that question at all, that odious debts were normally transferable. Moreover, not all debts of that kind were unlawful. A régime debt could be considered to be odious by the successor State, even if it was not unlawful in origin. At the same time, a war debt could be perfectly lawful and valid if the war had been one of self-defence to repel an aggression.

6. In paragraph 40 of his report (A/CN.4/301 and Add.1), he had made a second exception for delictual or quasi-delictual obligations, which he had very briefly contrasted with the contractual obligations of the predecessor State. In making that comparison, which was one of many comparisons of categories of debts, he had indicated that the Commission did not have to deal with delictual debts. The only purpose of such comparisons was to fix the terminology and show how many different categories of debts there were. He ought probably to have been more exact and less categorical in his assertions. In view of the remarks made by Mr. Castañeda,⁸ which he fully supported, he therefore intended to change that part of his report.

7. Summing up, he said that, in dealing with succession of States it was necessary to refer to sources, but only to those sources which had given rise to an obligation on the part of the successor State. It had therefore to be deter-

⁴ *Ibid.*, para. 83.

⁵ See 1416th meeting, para. 31.

⁶ *Ibid.*, foot-note 1.

⁷ *Ibid.*, foot-note 2.

⁸ 1417th meeting, para. 36.

mined whether what was involved was a customary rule of law relating to State succession, an agreement concluded by the successor State and the predecessor State, or a unilateral decision by the successor State to accept the obligation to assume the debt. In principle, the Commission did not have to deal with the source of the debt since the predecessor State had a financial obligation, whatever its origin might be. He nevertheless agreed with Mr. Castañeda that in general, obligations resulting from something other than voluntarily concluded legal instruments should not be excluded. That did not mean that there was any need to deal with the problem of sources, their nature, their variety and their lawful character. Mr. Castañeda had proposed that the words "financial obligation contracted by the central Government of the State" be replaced by the words "financial obligation chargeable to ...": that wording would suffice to cover all kinds of financial obligations, whatever their origin, assuming that that origin was of a lawful character.

The meeting rose at 5.50 p.m.

1421st MEETING

Tuesday, 17 May 1977, at 10.10 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (continued) (A/CN.4/301 and Add.1)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (continued)

ARTICLE O (Definition of State debt)¹ (concluded)

1. Mr. BEDJAOUÏ (Special Rapporteur), continuing his statement, said he wished to address himself to the question of the status of the subjects concerned, in one way or another, in a succession to State debts. He had identified the debtor State with the help of elements contained in the definition of State debt. Most members of the Commission had expressed their agreement with him, although some had wished to go further and others not so far. For instance, Mr. Ushakov,² anticipating chapter II of the report, relating to the creditor third State, would like

to make it a requirement that not only the debtor but also the creditor should be a subject of international law. In Mr. Ushakov's view, succession to State debts should be governed by public international law, not by private international law; he saw State debt as an international obligation governed by international law and establishing a relationship solely between subjects of public international law. In a spirit of co-operation, Mr. Ushakov had made a number of ingenious suggestions for improving the definition set forth in article O. Those suggestions were not only extremely interesting but would be most useful to the Drafting Committee. In particular, Mr. Ushakov had suggested that State debt should be defined as a financial obligation of the State vis-à-vis one or more other States or one or more other subjects of international law, or as a financial obligation of the predecessor State vis-à-vis one or more third States. In making that suggestion, Mr. Ushakov had wished to specify that both the debtor and the creditor must be subjects of international law.

2. The status of subject of international law had also been invoked by Mr. Sucharitkul,³ but in a contrary sense. Mr. Sucharitkul wished to stipulate that State debt could be contracted not only to a creditor third State but also to a private creditor. For the time being, he (the Special Rapporteur) had addressed himself only to the question of the status of the debtor, which must be that of a State, leaving the status of the creditor to a later stage. Mr. Calle y Calle, who shared his view, had considered that the creditor did not necessarily have to be a State, but had added that, in matters of succession of States, it was important first to establish who was the debtor.⁴

3. Mr. Ago⁵ had agreed that the debtor must be a State, but had felt that the concept of the State adopted by the Special Rapporteur was a concept of internal rather than international law. Mr. Ago would have preferred a concept of the State similar to that which had been adopted for the subject of State responsibility. Externally, the State would be perceived as a single and indivisible entity, although, internally, it might be made up of a number of separate entities. Just as the wrongful act of a territorial authority was held to be a State responsibility, so would the debts of territorial authorities and public enterprises be regarded, for the purposes of State succession, as State debts. Of course, as he (the Special Rapporteur) had indicated in stressing the limited reliance that could be placed on the criterion of financial autonomy, it was sometimes difficult to state positively that certain local debts or debts of public enterprises were not State debts. However, it was hardly conceivable that every kind of local or public-enterprise debt could be regarded as a State debt at the international level. Problems of State responsibility differed in many respects from those of State succession, especially succession to debts.

4. Mr. Ago's reasoning was based solely on the case of a debt of delictual origin. But practically all debts which

¹ For text, see 1416th meeting, para. 1.

² See 1417th meeting, paras. 7 et seq.

³ *Ibid.*, para. 3.

⁴ *Ibid.*, para. 5.

⁵ *Ibid.*, para. 27.

formed the subject of a succession were debts of non-delictual origin. Moreover, in the case of debts of delictual origin, before debts involving the territory of a State could be considered as State debts, a suitable point would have to be found for establishing a parallel between succession to debts and State responsibility. That could not be the stage of the imputation to the State of the violation of an obligation committed by a subordinate entity, but must, rather, be the later stage of reparation, which commenced once responsibility was engaged. At that moment, the violation of the international obligation could entail pecuniary reparation—in other words, a debt. At that stage, it was in fact the subordinate entity which assumed the debt of delictual origin, as a charge to its own budget. Thus, the wrongful act of the subordinate entity engaged the responsibility of the superior entity, which was the State, but at the reparation stage, the focus redescended to the lower level of the subordinate entity to whose own budget the debt was charged. But it was at that point that the succession of States applied. Mr. Ago would like to return to the State level, whereas the debt no longer concerned the State, nor was it covered by the succession of States, as was clear from the remainder of his report.

5. There were also important differences as regards the effects. The violation of an international obligation by a subordinate entity invariably engaged the responsibility of the State, whereas, in State succession, the territorial change might have no effect on debts. That was the case with local debts, as Mr. Quentin-Baxter had noted.⁶ Since local debts never concerned the predecessor State, they could not concern the successor State. Consequently, the phenomenon of State succession had no effect on them. For it to be otherwise, those debts would have to be fictitiously imputed to the predecessor State, and then be transferred to the successor State through the effect of the succession of States. However, such a fiction would be pointless, since it would ultimately lead to the *status quo ante* and would not affect the destiny of such local debts in any way.

6. There remained the case of the debt of a major public establishment operating on a nation-wide scale, such as the debt of a national railway company. In such a case, everything depended on the internal law of the predecessor State; it was that law which determined whether or not the debt was a State debt, and that depended on whether the establishment concerned enjoyed real financial autonomy *vis-à-vis* the State. Mr. Ago's idea that all debts should be regarded as State debts must be either accepted or rejected in its entirety. It was not possible to select one local debt rather than another or one public enterprise debt rather than another and say it was a State debt. Indeed, if there were an applicable criterion in that regard, it would not be a criterion of international law but could only be a criterion of the internal law of the predecessor State. That would mean going into details of internal law, which was precisely what Mr. Ago's proposal was intended to avoid. He (the Special Rapporteur) certainly would not claim that the debt of a major public establishment, such as a national or nationalized company performing a State

public service, could never be regarded as a State debt, but that depended on considerations of internal law, which were not the concern of the Commission.

7. As between the subject of State responsibility and that of succession to State debts, there were also differences concerning the law applicable. The violation of an international obligation by a subordinate entity of the State was governed by public international law, namely, the law of State responsibility. On the other hand, debts other than State debts, such as local debts or debts of enterprises of a public character, were governed by private international law or even by the private law of the predecessor State.

8. To treat local debts and debts of public enterprises as State debts would bring into question the Commission's previous decisions, particularly as regards State property. It was not possible to adopt different concepts of the State for property and for debts. Up to the present, State property had been defined in such a way as to exclude completely the property of internal entities subordinate to the State. Mr. Ago himself had in fact collaborated in the definition of State property, which had been defined in terms of the internal law of the predecessor State. As Mr. Quentin-Baxter had observed, it was now important to obtain a minimum of parallelism between the property régime and the debt régime.

9. To treat the debts of subordinate entities of the State as debts of the State itself would inevitably lead to unacceptable solutions and dilemmas. In the area of decolonization, for instance, there would be a choice between two solutions only. To rule that all debts were transferable would mean, for instance, that Libya, as a former Italian colony, ought to have been made responsible for all the debts of metropolitan Italy, even debts contracted for the development of a particular region such as Sicily. To adopt the opposite solution, namely, that debts were non-transferable, would mean that Libya, or Ethiopia, ought not to have assumed the local debts of the colonized territorial entities which they had once been, or those of the public establishments and enterprises belonging to those colonies. Such a solution would be unacceptable to the former administering Power, which would have to continue to accept responsibility for those debts until they were extinguished. It was the intermediate solution, which involved making a distinction between State debts and debts of entities subordinate to the State, which he (the Special Rapporteur) was proposing. That was the solution which had been chosen by the Franco-Italian Conciliation Commission set up under the Treaty of Peace with Italy, of 10 February 1947, to settle at the local level, in a just and equitable manner and without prejudice to financial disputes between the States concerned, the property and debt problems of communes separated, detached, divided or dismembered by the new frontiers.⁷

⁷ Franco-Italian Conciliation Commission, "Dispute concerning the apportionment of the property of local authorities whose territory was divided by the frontier established under article 2 of the Treaty of Peace: decisions Nos. 145 and 163, rendered on 20 January and 9 October 1953 respectively" (United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No. 64.V.3), pp. 501-549.

⁶ *Ibid.*, para. 20.

10. The definition of State debt set forth in draft article O had led Mr. Francis to wonder⁸ whether such debt was chargeable to the resources of a public body or establishment or to the resources of the State as a whole. In his view, a debt of that kind was chargeable to the State's budget as a whole, since the body concerned had its own financial existence and economic activity. Mr. Quentin-Baxter had expressed a similar concern when he had questioned whether State debt should be so narrowly defined as to imply that it was chargeable only to the treasury of the State.⁹

11. Mr. Sette Câmara had placed particular emphasis on that part of the definition which provided that the debt was chargeable to the State. In connexion with State guarantees, Mr. Sette Câmara had advocated¹⁰ the adoption of a definition which encompassed both State debt and State guarantees for a non-State debt, and had accordingly suggested that the conjunction "and" which appeared in the proposed definition before the words "chargeable to the treasury of that State" be replaced by the word "or". While sharing Mr. Sette Câmara's concern, he did not consider that that suggestion would solve the problem. It was certainly possible to envisage similar solutions for State debts and for State guarantees, but, from a legal point of view, the two cases could not be treated in a definition as identical. It might solve many problems right away to say that State debts—but not State guarantees—could be defined in terms of two alternative, non-concurrent elements, namely, debt contracted by the State or debt chargeable to the treasury of the State. As was clear from chapter V, of the report, relating to newly independent States, the debt which imposed the heaviest burden on new States was not the State debt contracted by the metropolitan Power on behalf of the colony, but the debt of the colony itself which had been contracted by its organs. Accordingly, Mr. Sette Câmara's suggestion might lead to more just and more equitable solutions, since it would enable the administering Power to be made responsible for debts which otherwise would simply be regarded as debts of the colony itself.

12. The question of parallelism between the articles relating to State property and those relating to State debts had been raised at the 1417th meeting by Mr. Quentin-Baxter and Mr. El-Erian. Some degree of parallelism was clearly necessary, since property and debts represented, respectively, assets and liabilities which were correlated. Mr. Quentin-Baxter therefore proposed that the articles on property should be taken as a basis for drafting the articles on debts. That was what he had tried to do, but there were limits to what was possible in that regard, since, as far as property was concerned, the predecessor State and the successor State were the only parties concerned, whereas, in the case of debts, a creditor third State might also be involved. The existence of that creditor third party often made it impossible to follow the model established for property. The situation with regard to succession to debts was to be compared, rather, with

the situation with regard to succession to multilateral treaties, and it was with the latter type of succession that a certain parallelism should be established, as he had done in chapter II, relating to third States.

13. To return to the problem of localized State debts, he wished first to reply to Mr. Verosta, who had observed¹¹ that certain special debts were not necessarily localized. He agreed, with Mr. Verosta on that point; "special debt" was not his own expression but that of the Soviet jurist Alexandre Sack, who contrasted that type of debt with the general debt of the State. It was because, for the reason given by Mr. Verosta, the expression "special debt" was not wholly satisfactory that he had preferred the expression "localized State debt".

14. There were two categories of localized State debts, namely, debts implying a deliberate act of the State and, as Mr. Castañeda had put it,¹² debts chargeable to the State under a rule of international law. First, there were localized State debts where the proceeds had been applied in one portion only of the territory but which benefited the inhabitants of the entire State; that was the case, cited by several members, of a dam which supplied electricity to the entire territory of a State, or of national defence works, or a commercial port. Secondly, there were localized State debts which were characterized not only by the fact that the proceeds had been applied in the part of the territory transferred but also by the fact that such proceeds had benefited that part of the territory exclusively; that was the case when a State invested the proceeds of a loan in a region to meet the specific requirements of that region, such as the construction of a purely local railway or the building of health or education establishments.

15. As Mr. Ushakov had emphasized,¹³ the problem of localized State debt was extremely delicate. He (the Special Rapporteur) had started from the financial involvement of the State and had reached the conclusion that there could be two types of localized State debts but that he should combine that category to those debts which had benefited the region in question exclusively. It was certainly easier to secure acceptance for the transfer of that type of debt to the successor State.

16. Mr. Schwebel had made two points.¹⁴ Referring to his (the Special Rapporteur's) statement that annexation and conquest were no longer tolerated by contemporary international law, Mr. Schwebel had drawn attention to cases of annexation and the existence of colonies subsequent to the adoption of the United Nations Charter. To raise that point was to come back to the problem of the origin of the succession of States. Article 2¹⁵ provided that the draft articles should apply only to the effects of a succession of States occurring in conformity with international law, thus excluding any cases of succession occurring irregularly through annexation or conquest. Mr. Schwebel's second point related to the fact that

⁸ 1417th meeting, para. 2.

⁹ *Ibid.*, para. 21.

¹⁰ 1416th meeting, para. 38.

¹¹ *Ibid.*, para. 27.

¹² See 1417th meeting, para. 36.

¹³ *Ibid.*, para. 16.

¹⁴ 1418th meeting, para. 21.

¹⁵ See 1416th meeting, foot-note 2.

public international law did not provide for any means of enforcement, a situation which complicated the problem of enunciating its rules. Mr. Schwebel had added, however, that the lack of enforcement machinery did not imply the absence of juridical norms of international law. Generally speaking, he shared Mr. Schwebel's opinion: the development of public international law had been *sui generis* and juridical norms had evolved with greater rapidity and facility than had enforcement machinery. There was no denying that that disparity deprived public international law if not of its credibility, at any rate of some of its impact on international relations.

17. The many suggestions made during the debate should enable the Drafting Committee to work out a satisfactory definition. He accordingly proposed that draft article O be referred to the Drafting Committee.

18. Mr. AGO, after thanking the Special Rapporteur for the copious explanations he had provided, said he agreed that succession of States, particularly in respect of matters other than treaties, was a subject that had to be distinguished from State responsibility for internationally wrongful acts. With regard to the definition of the scope of the subject decided upon by the Special Rapporteur, he had emphasized that any definition of that kind was necessarily arbitrary.¹⁶ He had said that it was possible to consider the concept of the State, for the purposes of the matter of succession to State debt, either in a restrictive sense, as the Special Rapporteur had done, or in a broader sense. Some of the Special Rapporteur's comments could be convincing and he recognized that, as far as local authorities were concerned, the problem was more theoretical than practical, since debts of local authorities seldom raised problems of State succession.

19. He was, however, reluctant to subscribe to the Special Rapporteur's approach to debts of public establishments. Supposing, for instance, that the Italian administration for the railways, which belonged to the State, contracted a loan to develop the Italian railway network. If Sicily subsequently separated from the Italian State, the problem of succession to a part of that debt would arise in the same way as if Brittany were to separate from France, after a loan for similar purposes had been contracted by SNCF, which was a separate public establishment of the State. The fact that SNCF was not a direct branch of the State administration would not justify the application of a different rule. If the Special Rapporteur's restrictive approach were adopted, it would probably be necessary to provide for proceeding by analogy in the case of certain debts which were not included in the restrictive concept of State debts. Since, however, the definitions adopted provisionally by the Commission were always subject to subsequent review, he would not press the point.

20. Nevertheless, before article O was referred to the Drafting Committee, it was necessary to remove an ambiguity which perhaps resulted from the fact that frequent reference had been made to obligation with respect to debts, obligation being understood to mean an international obligation. There was thus a tendency to regard State succession as succession to an international

debt to a State or to another subject of international law. In fact, however, the idea of State debt covered debts of any kind. While it was true that the debtor was a State and therefore a subject of international law, the same was not true of the creditor. State debt existed whether the State issued Treasury bonds within the country for the development of a particular sector, or whether it contracted a loan for that purpose from a neighbouring State or a foreign bank. State debts meant all debts contracted by the State, whoever the creditors might be. If the subject were so defined as to exclude debts to individuals, and in particular to nationals, the majority of State debts would probably be excluded from it, since they were not contracted to another subject of international law.

21. Mr. SCHWEBEL said that he entirely agreed with the view expressed so cogently by Mr. Ago in connexion with the international personality of creditors.

22. As to local debts, which the Special Rapporteur had suggested should be set aside because they were not relevant to the law of succession of States, he could accept the Special Rapporteur's reasonable argument that, since the predecessor State was not responsible for local debts, it followed that the successor State was not responsible for them either. Nevertheless, the Commission might consider the question whether action by the predecessor State which prevented the local authority from servicing a debt engaged the responsibility of the predecessor State. If it did, was not the successor State equally bound to refrain from action that would prevent the local authority from continuing to service the debt?

28. He assumed that, in the case of a localized debt, the goal was to ensure that the debt was apportioned according to the benefit gained, even though that goal might well prove difficult to achieve in practice. He had in mind the example of the construction of a port in a colonial territory, financed through a loan shared by the metropolitan State and the World Bank, and designed to export iron ore for processing in factories situated in the metropolitan State. Such a port was obviously of benefit to the metropolitan State. On the other hand, after its accession to independence, the former colonial territory, or successor State, would be free to use the iron ore for a variety of purposes and to sell it to any buyer. As a fixed asset, the port would, over the long term, clearly benefit the successor State. Considerations of equity, therefore, would suggest that the successor State ought to assume at least a portion of the debt incurred for the construction of the port, even though the port had not been built exclusively for its benefit. There were many examples of that kind—for instance, an electricity plant might produce electric power in excess of the needs of the successor State, which could sell the excess power to neighbouring areas. In that case, the successor State would benefit from the plant and should, presumably, assume an appropriate portion of the debt incurred in order to set up the plant.

24. Mr. SUCHARITKUL said that, although he accepted the Special Rapporteur's arguments in favour of limiting the subject-matter to succession to debts considered only as financial obligations, he still saw two problems.

¹⁶ 1417th meeting, para. 26.

25. First, in the practice of a number of States, the concept of debt was not understood as meaning only a financial obligation. In the Thai civil code, for instance, which had been adopted in 1900, the word "debt" was used as synonymous with "obligation". Under Anglo-Saxon common law, as the practice had developed, the system of "writs" made it possible to initiate proceedings for the recovery not only of financial debts, but also of debts for professional or personal services. Moreover, the Special Rapporteur himself had used the expressions "obligation" and "debt" almost interchangeably, particularly in paragraphs 142 and 143 of his report.

26. The other difficulty arose out of the fact that a loan contracted by a central Government could be subject to various conditions. For example, in the case of an economic development project for a territory, the creditor might impose on the debtor an obligation not to use a certain other country's means of transport. It might also impose a positive condition, such as an obligation to purchase capital goods from a certain country. It was for those reasons that he felt that the definition of State debt should be amended if it was to be limited to purely financial obligations.

27. Mr. USHAKOV said that he was fully satisfied with the Special Rapporteur's explanations and agreed that draft article O could be referred to the Drafting Committee. With regard to Mr. Ago's observation that a State debt was not simply a debt governed by international law, he said that, in the general provisions relating to succession of States in respect of State property and, in particular, in article 5, the Commission had made it clear that State property meant "property, rights and interests which, on the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State". It should, of course, be noted that other public property, such as the property of territorial authorities, could also be involved. The Commission had, however, limited its definition to State property. With regard to debts, the definition should also be limited to international debts, in other words, debts assumed by a subject of international law to another subject of international law. Later on, the Commission might try to decide whether there were perhaps other debts governed by international law. To avoid interminable complications, it would be better for the time being to speak only, as the Special Rapporteur proposed, of debts contracted by the predecessor State to other subjects of international law.

28. Mr. BEDJAOUÏ (Special Rapporteur) said he should make it clear, for the benefit of Mr. Sucharitkul, that the Commission was not considering succession of States in respect of obligations in general, but, rather, succession in respect of debts, which were only one form of obligation among others. That was why he had assimilated debts to obligations, it being understood that the obligations in question were financial ones. Obligations of a non-financial nature which might be attached to certain loans should be dealt with in a set of draft articles relating to succession of States in respect of non-financial obligations which the Commission could consider more fully if it so wished. For the time being, the Commission was confining its efforts to a consideration

of succession of States in respect of debts, in other words, in respect of obligations that were exclusively *financial*.

29. Referring to the example of railway companies given by Mr. Ago, he said that a loan contracted by a genuine State corporation would not give rise to any difficulties. If the loan had been contracted by a public establishment, such as SNCF, the matter would have to be settled by internal law, which could treat such a debt as a State debt. It should be remembered that the Commission had already decided that by State property was to be understood property legally belonging to the predecessor State. It was not concerned with hypothetical cases such as those Mr. Ago had mentioned of what would be the fate of property belonging to railway companies; that was a matter for internal law.

30. Both Mr. Ago and Mr. Schwebel had expressed the opinion that the creditor might not necessarily be a State; their observations had paved the way for the introduction of chapter II of the report. Mr. Schwebel had also referred to action which the successor State could take in order to prevent a local authority from ensuring the servicing of or the payment of annuities and interest on, a local debt. That problem was, however, not relevant to the subject under consideration because it implied an act or omission by the successor State which accordingly would fall within the scope of State responsibility. Lastly, Mr. Schwebel had quoted the example of a colony which, when it had achieved independence, would benefit from the construction of port installations financed through a loan from the predecessor State or from the World Bank. That example actually supported his (the Special Rapporteur's) own position. Indeed, what was to be feared was not that the successor State, as a colony which had become independent, might not assume responsibility for part of the debt, but rather that it might be compelled to assume the debt in its entirety, on the pretext that the World Bank had concluded the loan with the central organ of the colony and that the predecessor State had merely given its guarantee. In using the example of a loan contracted by organs of the colony, he was completely tied by the very restrictive definition of State debt and, thus, had to consider that it was the colony that had contracted the loan, although in actual political fact it was the predecessor State which had done so. However, because of the guarantee which the predecessor State had given, it could be asked to assume responsibility for the debt. If the debts contracted by the metropolitan State for the benefit of the colony had to be imputed to the newly independent State, other considerations would have to be taken into account; otherwise, in the last analysis, the former colony might conceivably find itself obliged to buy back its own territory from the former Administering Power, after colonial exploitation. That was a problem which would be dealt with in chapter V.

31. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer draft article O to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹⁷

¹⁷ For the consideration of the text proposed by the Drafting Committee, see 1447th meeting, paras. 3 and 12-26.

ARTICLE R (Obligations of the successor State in respect of State debts passing to it),

ARTICLE S (Effects of the transfer of debts with regard to a creditor third State),

ARTICLE T (Effects, with regard to a creditor third State, of a unilateral declaration by the successor State that it assumes debts of the predecessor State) *and*

ARTICLE U (Expression and effects of the consent of the creditor third State)

32. The CHAIRMAN invited the Special Rapporteur to introduce chapter II of his report (A/CN.4/301 and Add.1), and, in particular, draft articles R, S, T and U, which read:

Article R. Obligations of the successor State in respect of State debts passing to it

In the relations between the predecessor State and the successor State, a succession of States entails the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as pass to the successor State in accordance with the provisions of the present articles.

Article S. Effects of the transfer of debts with regard to a creditor third State

State debts or fractions of State debts which, pursuant to the present articles or to agreements concluded between the predecessor and successor States, pass from the former to the latter do not, at the date of the succession of States and in consequence only of such transfer, become debts of the successor State vis-à-vis the creditor third State.

Article T. Effects, with regard to a creditor third State, of a unilateral declaration by the successor State that it assumes debts of the predecessor State

The debts of a predecessor State do not become, at the date of the succession of States, debts of the successor State in consequence only of the fact that the successor State has made a unilateral declaration by which it decides to assume responsibility for them.

Article U. Expression and effects of the consent of the creditor third State

The consent of the creditor third State to be bound by an agreement concluded between the predecessor State and the successor State, or by a unilateral declaration by the successor State, concerning State debts in a succession of States can result from the intention expressed or conduct engaged in by the third State or from any formal or tacit act by that State.

Such consent entails, with regard to the creditor third State, the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as pass to the successor State.

33. Mr. BEDJAOUI (Special Rapporteur) said that chapter II of his report, which was devoted to the problem of the third State, dealt with the status of the creditor, whereas chapter I, which proposed a definition of State debt, dealt exclusively with the status of the debtor. There was thus a clear correlation between those two chapters, which complemented one another. That meant that chapter II would deal with the same problems as had been dealt with in chapter I in connexion with the source of the obligation and, in particular, the status of the creditor, which could be a State, an international organization, or a foreign public or private enterprise—in other words, a subject of public international law, or a legal

person in foreign internal public law or again a physical person in foreign internal private law. It could therefore be questioned whether only the State should be taken into consideration as creditor. Before dealing with that problem, however, it was first necessary to consider the legal position of the creditor third State vis-à-vis the protagonists of the succession of States, namely, the predecessor State and the successor State.

34. The succession of States as such created an exclusive legal relationship between the predecessor State and the successor State. It ought not therefore to affect the creditor State—or, at least, it ought not to affect it without its consent.

35. The succession of States raised the problem of whether the rights and obligations which benefited or were incumbent upon the predecessor State should be transferred to the successor State. There lay the first difference between the problem of succession to rights—State property—and that of succession to obligations—State debts. In succession to State property, the problem was whether the successor State could benefit from property belonging to the predecessor State. The legal relationship thus existed only between the predecessor State and the successor State, for the patrimonial rights in question concerned them only. It had therefore been easy, in the case of succession to rights, to exclude the third State by saying that it was not affected by the legal relationship involved in the transfer or non-transfer of property from the predecessor State to the successor State. The Commission had thus been able to adopt an article X relating to the absence of effect of a succession of States on third State property.

36. But although a bilateral relationship existed in the case of State property, the same was not true in the case of the financial obligations of the predecessor State. He was not considering, for the time being, debts assumed by the predecessor State to the State which was to become the successor State, for it was quite obvious that such debts did not affect the third State and that they came within the context of the bilateral relationship between the predecessor State and the successor State. But in considering the predecessor State's debts to a third State, the legal relationship created by the succession of States between the predecessor State and the successor State was no longer just a bilateral relationship; it was a triangular relationship. It was therefore not possible to proceed in the same way as in the case of property, where the third State was not affected, for in the case of the predecessor State's debts to a third State, there were debt-claims to be taken into account—i.e., property belonging to the third State—and such property could not be dealt with by simply excluding the third State from the legal relationship between the predecessor State and the successor State.

37. Nevertheless, the rules of State succession which governed the fate of financial obligations—in other words, their transfer or non-transfer from the predecessor State to the successor State—had a relative effect, which was limited solely to the bilateral relationship created by the succession of States between the predecessor State and the successor State. The partial or total change of debtor to which those rules gave rise was not auto-

matically applicable in relation to the creditor third State. Before those rules could affect the creditor third State, it was necessary for the latter to express its consent to the legal novation involved.

38. The parallelism between the fate of property and of debts in the case of a succession of States was thus limited by the nature of the subject-matter, since property involved two partners and debts could involve three. A parallelism might, however, then be established between succession to debts and succession to treaties. It was on a twofold parallelism of that kind that draft articles R, S, T and U were based.

39. Draft article R, which related to the obligations of the successor State in respect of State debts passing to it, was based directly on the corresponding article 6 on State property.¹⁸ Although it established a parallel between property and debts, draft article R indicated the major difference between property and debts, for it expressly stated that the rule enunciated had a relative effect, limited solely to the legal relationship between the predecessor State and the successor State. That indication had been unnecessary in article 6 because in the case of State property the relationship was solely bilateral, but in draft article R it was essential in order to reserve the rights of the creditor third State. The words "In the relations between the predecessor State and the successor State", at the beginning of draft article R therefore meant that the succession of States in respect of State debts created a legal relationship between the predecessor State and the successor State with regard to the debts between the predecessor State and a third State, but that the succession could not, in itself, create a direct legal relationship between the creditor third State and the successor State which had just assumed its predecessor's debts.

40. The succession of States thus had the effect of creating a new legal relationship between the debtor predecessor State and the successor State and enabling the former to shift on to the latter all or part of its debt—its financial obligation—to the creditor third State. However, the effects of the succession of States stopped there. The new "predecessor State/successor State" relationship did not affect the third State. It did not have the effect either of automatically extinguishing the old "predecessor State/third State" relationship or of automatically replacing it with a new "successor State/third State" relationship in respect of the debt in question.

41. A parallel between the problem of debts and the problem of treaties in cases of succession of States had been drawn in draft articles S, T and U.

42. Draft article S, which related to the effects of the transfer of debts with regard to a creditor third State, was modelled on article 8 of the draft articles on succession of States in respect of treaties adopted by the Commission in 1974.¹⁹ In paragraph 106 of his report (A/CN.4/301 and Add.1), he had referred to the initial treaty relationship existing between the predecessor State and the third State; that reference might suggest that the source of the debt lay exclusively in that treaty relation-

ship. In order to take account of the pertinent observations made by Mr. Castañeda during the discussion of chapter I of his report,²⁰ it would be preferable to refer simply to a "*de jure* relationship", the source of which could be an agreement or anything else. That *de jure* relationship, which had existed between the predecessor State and the creditor State, became the subject, either by application of a succession treaty—i.e., a devolution agreement between the predecessor State and the successor State—or by application of a rule of State succession, of a specific legal arrangement between the predecessor State and the successor State in respect of the debt in question.

43. When the predecessor State and the successor State established such a legal arrangement by application of a devolution agreement, the third State, in consequence of its debt-claim, possessed a right which the predecessor State and the successor State could not dispose of at their discretion. The general rules of international law concerning treaties and third States embodied in articles 34 to 36 of the Vienna Convention²¹ quite naturally applied in such a case.

44. The agreement between the predecessor State and the successor State was not designed to be detrimental to the interests of the creditor State; rather, it was designed to protect the third State's debt-claim. As the Commission had stated, however, "the language of devolution agreements does not normally admit of their being interpreted as being intended to be the means of establishing obligations or rights for third States".²²

45. He had therefore taken the liberty of proceeding by analogy and he had proposed a draft article S, based on article 8 of the draft articles on succession of States in respect of treaties. Draft article S meant that the customary or contractual rule by which all or part of the predecessor State's debt would be transferred to the successor State did not, in itself, have the effect of binding the creditor third State. The creditor third State had to express its consent to the transfer. Until such consent had been expressed, the predecessor State was not released from its debt to the creditor third State and the third State did not have a claim against the successor State equal in nature and amount to that which it had had against the predecessor State. By making a debt-claim against the successor State, the creditor third State expressed its consent to the change of debtor.

46. Draft article T, which related to the effects, with regard to a creditor third State, of a unilateral declaration by the successor State that it assumed debts of the predecessor State, had been prompted by similar concerns and based on article 9 of the draft articles on succession of States in respect of treaties. According to that article, if the successor State decided unilaterally to assume the predecessor State's debts, such a unilateral declaration would be to the advantage of the predecessor State and also, theoretically, to that of the creditor State, for it would safeguard the debt jeopardized by the territorial

¹⁸ See 1416th meeting, foot-note 2.

¹⁹ See 1416th meeting, foot-note 1.

²⁰ 1417th meeting, para. 33.

²¹ See 1417th meeting, foot-note 4.

²² *Yearbook ... 1974*, vol. II (Part One), p. 184, document A/9610/Rev.1, chap. II, sect. D, article 8, para. (5) of the commentary.

change, which might have diminished the debtor predecessor State or even have caused it to disappear. However, except in the case where the predecessor State totally disappeared, the creditor State might have a political or material interest in refusing to agree to the change of debtor and in rejecting the unilateral declaration. It could base its decision on the personal relationship which it had had with the predecessor State. It might also consider that the successor State had taken over either too small or too large a share of the predecessor State's debt and that, consequently, its interests were not adequately protected. Two considerations were therefore to be taken into account—the solvency, respectively, of the predecessor State and the successor State as assessed by the creditor State, and the nature and quality of the political relations between the creditor State on the one hand and the predecessor and successor States on the other. Thus there was no automatic creation of a relationship between the successor State and the third State.

47. The questions how the consent of the creditor third State could be expressed and what effects such consent had were the subject of draft article U, which related to the expression and effects of the consent of the creditor third State. The first paragraph of that article provided that consent was expressed with regard either to an agreement concluded between the predecessor State and the successor State—a debt devolution agreement, or to a unilateral declaration by the successor State that it was willing to assume the debts of the predecessor State. The problem was whether a debt could be transferred from the predecessor State to the successor State simply by an agreement or unilateral declaration, or whether such transfer could not also be required by a rule of the law of State succession. In the latter case, it had to be determined whether, despite the existence of a rule of international law requiring the transfer of the debt, the consent of the third State was necessary. The rule in question would, in a way, be a relative or conditional rule, a rule in a state of suspension, which would have no effect vis-à-vis the creditor State until the latter gave its consent.

48. He had many doubts on that point and would be inclined to say that, in such a case, there was no enforceable rule of public international law applicable on the one hand, to the relations between the predecessor State and the successor State, and on the other, to the relations between the creditor third State and the two other States. On the face of it, he did not see how there could be a viable legal rule which would link the predecessor State to the successor State but which would have full effect between the predecessor State and the successor State and between those two States and the creditor third State only when that third State had given its consent. Either there was a rule of succession drawn from international law—and it must then apply to all the States involved in the triangular relationship—or the consent of the third State was necessary in which case it would seem pointless to speak of the existence of a rule of succession drawn from international law. That was why draft article U did not refer to the prior existence of such a rule of public international law. It was, in fact, in the rule embodied in draft article U, in which there was a meeting of the will

of the third State and the will of the successor State, on the one hand, and a meeting of the combined wills of the predecessor State and the successor State, on the other, that the genuine rule of international law was to be found. It was that triangular relationship which could lead to the change of debtor, with all the legal consequences which such a change could have for the creditor third State.

49. Draft articles R, S, T and U nevertheless left unresolved the question whether only State debt-claims should be considered or whether it was also necessary to consider the debt-claims of other subjects of international law, such as intergovernmental organizations and international financial institutions, and those of private persons, such as foreign multinational corporations. That was the question which he intended to deal with next.

The meeting rose at 1 p.m.

1422nd MEETING

Wednesday, 18 May 1977, at 3.10 p.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (continued) (A/CN.4/301 and Add.1)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPporteur (continued)

ARTICLE R (Obligations of the successor State in respect of State debts passing to it),

ARTICLE S (Effects of the transfer of debts with regard to a creditor third State),

ARTICLE T (Effects, with regard to a creditor third State, of a unilateral declaration by the successor State that it assumes debts of the predecessor State) *and*

ARTICLE U (Expression and effects of the consent of the creditor third State)¹ (continued)

1. The CHAIRMAN said that he wished to apologize for his unavoidable absence during the initial part of the session and to express his pleasure at the progress which had been made during that period under the guidance of the first Vice-Chairman.

¹ For texts, see 1421st meeting, para. 32.

2. Mr. BEDJAoui (Special Rapporteur) said that, in introducing chapter II of his report (A/CN.4/301 and Add.1), he had started from the assumption that the creditor could only be a State. He now proposed to tackle the problem of the status of the creditor and to address himself to the question whether there were not creditors other than States. If the creditor was an international organization or an international financial agency, the problem was not difficult to resolve, for such organizations or agencies could be called "subjects of international law". The problem remained, however, where the creditor was a multinational or transnational corporation or a natural or legal person under internal private law and a national of a foreign State. That problem was parallel to that of the status of the debtor, which had been considered in chapter I, in connexion with the definition of State debt. Should the creditor also be required to have the status of a State or, at least, that of a subject of international law, interpreted in the broad sense to include an inter-state organization? Or should the stress be laid on the fact that the subject in question was that of State debt, and that therefore what mattered most was that the *debtor* should be a State? He had approached that problem with some diffidence and relegated it to a foot-note² taking the view that the main consideration was that the debtor should be a State. He had not overlooked the important problem of the status of the creditor, but he had had at least three reasons for limiting his study to the debt-claims of a subject of international law.

3. First, he had taken into consideration the need to establish a parallel between succession to State debts and succession to State property. According to the draft articles concerned with State property, property of the third State could be defined as State property belonging exclusively to the third State in its capacity as a subject of international law, the third State having been defined in article 3³ as "any State other than the predecessor State or successor State". Debt-claims of the third State were, precisely, State property of the third State as so defined. It would thus be inadvisable to adopt a different definition with respect to the creditor third State. According to the definition contained in the articles already adopted, "State property of the third State", which included its debt-claims, should be interpreted strictly as applying to State property belonging to the third State and not to an inferior entity or to a natural person who was a national of that State. The definition of the creditor third State in the draft articles relating to State debts ought similarly, therefore, to cover only debt-claims belonging to the third State, to the exclusion of debt-claims belonging to other entities.

4. He had also considered the question of acquired rights, which had been dealt with in his second report,⁴ and in particular the problem of the alleged acquired rights of nationals of a foreign State, whether natural or legal persons.

5. Lastly, he had taken into account the problem of diplomatic protection, which would arise if all debt-

claims, whether of the third State itself or of its nationals, were regarded as third State debt-claims under international law. In fact, foreign investors were subject to the laws of the debtor State in which they had invested and to the jurisdiction of the courts of that State. That was the import of the "Calvo clause", according to which any contract concluded by the State with an alien and any concession granted to an alien must stipulate expressly that such alien was subject to the laws of the State and to the jurisdiction of its courts and waived any claim to diplomatic protection. That clause, which placed aliens on the same legal footing as nationals, was to be found in the constitutions of most Latin American countries—Bolivia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Peru and Venezuela. Article 32 of the Peruvian Constitution provided that, "in so far as property is concerned, aliens shall enjoy the same status as Peruvians and may in no case claim special status in that regard or claim diplomatic protection". Similarly, article 27 of the Constitution of Mexico provided that "the State may accord the same right to aliens, provided that they declare to the Ministry of Foreign Affairs their willingness to be regarded as Mexicans in so far as [their] property is concerned and undertake not to claim the protection of their Government with respect to any matters relating thereto, on pain of being declared deprived of the property thus acquired, which shall devolve to the nation". Under the Calvo clause therefore, the debt-claim of a foreign natural or legal person could not be regarded as a debt-claim on the same footing as that of a foreign State. That did not mean that the debt-claim of a foreign natural or legal person should not be recognized, but merely that its fate was assimilated to that of a debt-claim held by a natural or legal person who was a national of the predecessor State. In other words, the change of debtor resulting from the transfer of the debt to the successor State occurred without the necessity of the consent of the third State of which the creditor was a national. The consent of the third State was necessary only in the case of a debt-claim belonging to that State in its own right, and not to its nationals. Consequently, in the case under consideration, what was involved was simply a bilateral relationship between the predecessor State and the successor State.

6. It was for those reasons that, for the purposes of the articles proposed in chapter II of his report, he had considered only States as creditors.

7. He suggested that the Commission deal first of all with articles R, S, T and U, which concerned the debt-claim of the third State as a subject of international law. Those articles did not appear to him to present any difficulties, since they established a parallel between succession to debts and succession to treaties, both of which created a triangular relationship between the predecessor State, the successor State and the third State.

8. After dealing with those articles, the Commission should examine separately the question of the debt-claims of aliens, whether natural or legal persons. It might decide either to disregard such debt-claims and consider only State debt-claims, thus considerably limiting the subject, or to declare such claims admissible, in which case it could easily settle the problem in two

² A/CN.4/301 and Add.1, foot-note 68.

³ See 1416th meeting, foot-note 2.

⁴ *Yearbook ... 1969*, vol. II, p. 69, document A/CN.4/216/Rev.1.

stages. First, it would have to leave the definition of State debt proposed in article O "open", merely stating that State debt was a debt assumed by the State, without specifying to whom—in other words, defining debt solely in terms of the debtor, and leaving in suspense the question of the nature of the creditor. It would then have to supplement articles R, S, T and U with a new article V, which would state, first, that aliens under private law were assimilated to nationals of the predecessor State in so far as the fate of their respective debt-claims was concerned, and secondly, that the fate of such debt-claims of private persons, whether nationals or aliens, was determined, in the context of succession of States, by a bilateral legal relationship (predecessor State/successor State), and not by a triangular legal relationship—in other words, that the consent of the third State whose national was a creditor of the predecessor State was not necessary.

9. Mr. CASTAÑEDA supported the Special Rapporteur's suggestion that articles R, S, T and U should be supplemented by an article concerning creditors other than States. Nothing in article O⁵ excluded from the definition of State debt which it contained debts owed by a State to private individuals. A clear explanation of what the Special Rapporteur intended to be the scope of article O was to be found in foot-note 68 of his report which stated: "There is a 'State debt' of the predecessor State even if the creditor is a foreign private person; it is enough simply for that debt to have been contracted by the Government of the predecessor State".

10. He agreed entirely with articles S, T and U and also with the Special Rapporteur's contention with regard to article R that the novation occurred only in the legal relationship between the successor and the predecessor States.⁶ He did not, however, accept that, as stated in article R, "a succession of States entails the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State". Succession alone was not sufficient to give rise to such effects; it was, in fact, a generally recognized principle of law, and one which underlay all the four articles under consideration, that there could be no change in the identity of the debtor unless the creditor agreed thereto. For that reason, and in order to be consistent with the provisions of the second paragraph of article U, some means should be found of stating in article R that the effects to which it referred were dependent on the expression by the creditor third State of its consent to the substitution of the successor for the predecessor State as its debtor.

11. Mr. VEROSTA said that the title of chapter II of the report—"The problem of the third State"—was significant, since it raised the question whether the rules relating to succession in respect of State debts should apply only to debts contracted by the predecessor State to another State, or whether they should also apply to debts contracted by the predecessor State to another State, or whether they should also apply to debts con-

tracted by the predecessor State to other subjects of international law.

12. Those other subjects of international law could be unions of States, which had a legal personality distinct from that of the States which composed them. For instance, Montenegro had had debts to the Austro-Hungarian monarchy, which had not been a third State but a union of two States—Austria and Hungary—having an international personality distinct from that of the two States composing it. When Montenegro had united with the Kingdom of Serbia in 1918, its debts to the Austro-Hungarian monarchy had passed to the new Kingdom thus established. Those were debts not to a third State, but to another subject of international law, the real Austro-Hungarian union.

13. While the expression "creditor third State" could perhaps be accepted as covering confederations and unions of States, it could not possibly cover international organizations such as the United Nations or international financial agencies such as the World Bank or the International Monetary Fund. There might be a case where a multinational State Member of the United Nations which had not paid its contributions for several years was dissolved without having paid its debt to the United Nations, and new States were formed on its territory and admitted to membership of the United Nations. There could then be a passing to the successor States of the debt contracted by the predecessor State to the United Nations, a creditor subject of international law.

14. It should thus be made clear in the title of chapter II that the rules concerning debt-claims of the third State also applied to debt-claims of other subjects of international law.

15. Mr. THIAM noted that the Special Rapporteur had not taken a final position on the question whether the creditor must be a State or whether it could equally well be another subject of international law, leaving it to the Commission to settle that question.

16. In his view, the four articles R, S, T and U were closely connected. The idea embodied in those articles could be summed up in three main points: a succession of States could not of itself affect the rights of a creditor third State; it could not of itself create new legal links between the creditor third State and the successor State; and, for there to be a substitution of debtor, there must be agreement between the creditor third State and the successor State, whence the need, emphasized by Mr. Castañeda, for the creditor third State to express its willingness for the debt owed to it to be transferred to the successor State. He endorsed that approach, which seemed to him to be logical and to take into account both the interests of the creditor third State and those of the successor State.

17. As regards article S, it stated, on the one hand, that debts passed from the predecessor State to the successor State and, on the other, that they did not become debts of the successor State vis-à-vis the creditor third State; that gave the impression that the status of such debts was uncertain and that the holder of the debt-claim was unknown. Article S ought therefore, he thought, to be reworded.

⁵ 1416th meeting, para. 1.

⁶ 1421st meeting, para. 39.

18. That reservation apart, he fully endorsed the Special Rapporteur's approach to the problem of State debts, on the understanding that a more thorough examination would be made of debts contracted to subjects of international law other than States.

19. Mr. AGO said that it was important to define precisely the limits of the subject under consideration. He had no objection to its being restricted, provided there was no possible ambiguity. It could be limited to succession of States with regard to debts of the predecessor State to a third State, or it could be expanded by adding to the third State other subjects of international law, or it could be expanded still further by adding to subjects of international law foreign private persons, whether natural or legal. However, such persons were always foreign creditors. In the consideration of succession of States in respect of State debts, on the other hand, "State debt" was used to mean primarily succession with respect to the public debt—the debt contracted by the State to its own citizens (Treasury bonds, etc.). It would be perfectly feasible to decide to exclude that aspect, but it would then be necessary to amend the definition of State debt given in article O, which clearly included debts contracted by the State to individuals and to its own nationals in the first instance. Moreover, debts contracted by a State to a foreign State were often recorded in an international treaty: it could therefore be said that that matter related in part to the succession of States in respect of treaties, whereas debts contracted towards individuals who were nationals related solely to the topic at present under discussion.

20. He had nothing against the Special Rapporteur's approach to the problem, but it did seem to him essential to define clearly the limits of the subject from the outset, so as to avoid any misunderstanding.

21. Mr. SETTE CÂMARA said that the fundamental principle underlying the articles proposed by the Special Rapporteur in chapter II was that succession, whilst creating a special relationship between the predecessor State and the successor State with regard to a debt owed by the former to a third State, could not of itself create a direct relationship between the successor State and the third State; for such a relationship to arise, there must be some form of expression of consent by the third State to the assignment of the debt from the predecessor to the successor State. However, in paragraph 101 of his report (A/CN.4/301 and Add.1) the Special Rapporteur made a subtle distinction between the transfer of obligations and that of rights: he said that certain obligations of the predecessor State to third parties were transferred to the successor State independently of any manifestation of will on the part of the predecessor or the successor State, but that such transfer did not extinguish the predecessor State/third State relationship, nor—contrary to what had been decided in article 6 concerning State property—establish a new successor State/third State relationship. That explained the text of article R, which confined the effects of succession in respect of debts to the relations between the predecessor and the successor State. The Special Rapporteur explained, in paragraph 103, that the predecessor State retained its debtor status and responsibility for the debt to the third State; novation or assign-

ment of rights could take place only with the consent of that third State.

22. He found the distinction between the treatment of obligations and that of rights difficult to understand. It was his view that, once an obligation had been transferred by the predecessor to the successor State, the corresponding rights of the creditor third State should also be transferred. If those rights could not be transferred without the intervention of the third State, might not the same be true of obligations? The third State might not agree that an obligation towards it should be extinguished for the predecessor State and arise for the successor State, which it might, for instance, consider a less reliable debtor.

23. With regard to chapter II, section C, of the report, he found the reference in paragraph 106 to the possibility that the fate of a debt could be settled through a devolution agreement inconsistent with article 8 of the draft articles on succession of States in respect of treaties,⁷ recently adopted by a conference of plenipotentiaries, and which provided that devolution agreements were nothing but a statement of intentions and could not of themselves bind the successor State or assign to it rights or obligations of the predecessor State. The text of article S proposed by the Special Rapporteur seemed also to refer to devolution agreements, since it spoke of "agreements concluded between the predecessor and successor States" which were in force at the date of succession. His own view was, that in addition to their inability to transfer to the successor State debts owed by the predecessor State to a third State, devolution agreements were incapable of themselves of giving rise to a novation of obligations as between the predecessor and the successor States; such a change would require a fresh expression, once it had become a sovereign entity, of the will of the successor State to be bound by those obligations.

24. Article T was more in line with article 9 of the draft articles on succession of States in respect of treaties, since it was couched in general terms, stating that the debts of the predecessor State did not become debts of the successor State in consequence only of a unilateral declaration by the latter. Unlike article S, article T did not contain the qualification "vis-à-vis the creditor third State", which implied the possibility of the debts being transferred to the successor State vis-à-vis the predecessor State. The Commission should continue to give identical treatment to unilateral declarations and devolution agreements, as it had done in its draft articles on succession of States in respect of treaties.

25. He had similar misgivings with regard to article U, for he did not think that devolution agreements and unilateral declarations by a successor State should be dealt with as if they were normal means for the expression of consent by such a State to assume debts, or in other words as valid and binding acts to which the third State could subscribe. First, he thought that the problems raised by article U pertained more to the field of succession of States in respect of treaties than to the present topic. Secondly, he maintained his reservations with regard to the references to agreements, which sounded very

⁷ See 1416th meeting, foot-note 1.

much like devolution agreements, and to unilateral declarations by the successor State. Thirdly, he had reservations concerning the wide admission of tacit consent for which the article provided. To emphasize his reservation, he read out the text of article 35 of the Vienna Convention.⁸

26. Mr. CALLE Y CALLE said that the Commission was concerned with debts of an international nature and should therefore restrict the definition of State debt which it proposed to give in article O to debts contracted by and owed to subjects of international law. Subject to that reservation, he believed that the article should be couched in the most general terms possible.

27. He had at first felt the same misgivings with regard to article R as Mr. Castañeda, but considered, after re-reading it, that they were adequately catered for by the stipulation that the effects of succession to which it referred would be subject to the "provisions of the present articles", namely, articles S, T and U. Those articles made it clear that novation could occur only if the debts in question were transferable and if the creditor State clearly expressed its agreement to the change. In his view, article R, if not parallel to, had at least been inspired by article 8 of the draft articles on succession of States in respect of treaties, and was sufficiently clear. It and the other articles under consideration could now be sent to the Drafting Committee.

28. Mr. QUENTIN-BAXTER said that he had no difficulties with regard to article R, since it dealt, in the same form of language as had the corresponding article on succession to State property, with a relationship between the predecessor and the successor States. However, with regard to the other articles under consideration, he was somewhat apprehensive about a seeming reversion to issues that involved treaty relationships.

29. He shared the view that the term "State debts" should have a sufficiently broad connotation to include all debts that passed from the predecessor State to the successor State, regardless of whether the creditor happened to be a State. On the other hand, he had many reservations concerning the concept of State debts. While he could readily believe that there might be a need for special subsidiary rules on the important and complex question of succession to financial obligations, as yet he saw no reason to suppose that the broad principle applicable to such obligations did not also apply to other kinds of obligations.

30. In its consideration of succession in respect of matters other than treaties—succession to State property, for example—the Commission was concerned essentially with a relationship between two international persons, namely, the predecessor State and the successor State. It was certainly true that, having moved on from State property to State obligations, the Commission was now also dealing with a third party, for the transfer of responsibility for a debt necessarily involved a creditor. In that instance, however, the questions that arose lay chiefly within the realm of internal law rather than international law. Article 5 of the draft established that

State property meant "property, rights and interests which, on the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State". The rules of international law which governed State succession intersected the rules of internal law which delineated and, in some sense, even created the property that was the subject of the succession. In that connexion, he saw no difference of principle between rights and obligations and believed that the proper subject of the present study was obligations which, according to the internal law of the predecessor State, were owed by that State. The point at which the third State's interests in that matter were raised to the international level by international agreement was something that went beyond the present draft articles and came under the heading of succession in respect of treaties.

31. He had no wish to make an easy and superficial equation between property and debt or between rights and obligations. Succession to obligations might well follow different and more complex rules than did succession to rights. Nevertheless, some assistance should be sought from the Commission's conclusions with regard to property, rights and interests. The Commission had felt, in that case, that it could confine the consequences of the draft articles to the very moment of the occurrence of succession, and had taken for granted the basic proposition that the internal legal order was not changed merely as a result of a succession of States. Cases in which the predecessor State itself was, according to its internal law, the owner of the property were cases in which a transfer was necessary and inevitable. In his view, that represented a good starting point for considering the question of debts or other obligations.

32. One of the difficulties of the subject of State succession was that even the best authorities had marked off its boundaries in very different ways. Examples discussed in textbooks often related to other issues, many of which fell within the category of State responsibility, by which he meant State responsibility considered as a series of norms regulating a State's duties towards a third State or towards nationals of the third State or even, in modern international law, towards its own nationals. In the case of State property, it had seemed sufficient to allow State responsibility to cover everything that might occur after the actual moment of succession, but perhaps that course would not prove so easy in the matter of State obligations, since the successor State might regard the succession itself as a factor that had a bearing on its duties or its freedom of action with regard to property in which a third State or nationals of the third State had an interest.

33. The best approach would be for the Commission to discuss the problems posed by doctrine and State practice when it came to consider in sequence the various types of succession that it had already identified in dealing with State property. It was not his intention to exclude the very important issue of the rights of third States in a succession of States, an issue that might have to be discussed in some detail, but at the present stage the Commission was concerned only with the relationship at the international level between two States, a predecessor State and a successor State. Naturally, in dealing with that relationship, nothing should be done to prejudice the

⁸ See 1417th meeting, foot-note 4.

position of the third State or to reduce its options. It was an elementary principle of the law of treaties that an arrangement between two parties could not be binding on a third party. Again, in some cases of State succession the predecessor State might well disappear without trace and, if the third State had no established right of recourse against the successor State, it had no effective rights of any kind. Later on, it would have to be remembered that a third State must be protected not only from infringements of its sovereignty but also, to some extent, from arbitrary conduct on the part of a successor State.

34. Mr. SUCHARITKUL said that he fully supported all the proposals made by the Special Rapporteur in chapter II of his report. He nevertheless wished to draw attention to the general interests of creditor States, such as Japan and Thailand, which had to be borne in mind when considering some of the events taking place in South-East Asia. The Special Rapporteur had rightly taken account of the triangular relationship between the predecessor State, the successor State and the creditor third State and had, accordingly, taken the creditor third State into consideration in draft articles T and U.

35. According to the typology of succession adopted by the Special Rapporteur, the predecessor State could disappear, in the event of annexation or unification. In that case, the consent of the creditor third State was neither helpful nor even necessary; what was important was the willingness of the successor State to succeed to the debts of the predecessor State. The Commission might learn something from the solutions adopted in that respect following the unification of Viet Nam. The present Viet Nam had already succeeded to many of South Viet Nam's rights and debts, particularly in ESCAP, and it had succeeded to the debts which South Viet Nam had contracted with the Asian Development Bank. In addition to the element of negotiation between the predecessor State and the successor State, which was very important, it was necessary to establish the criteria to be adopted by the successor State and the creditor State for determining the conditions for novation.

36. Mr. FRANCIS said that he agreed with Mr. Castañeda's comment concerning the scope of article R.⁹ In general he could accept articles R, S, T and U and the principles enunciated therein, but it would be advisable to incorporate in article R a provision requiring the application of article U as a condition for the extinction of the obligations of the predecessor State.

37. At the start of the discussion on the present topic, he had had an open mind on the question of whether application of the draft articles should be confined to inter-State indebtedness. Unfortunately, he was now faced with something of a dilemma. Mr. Quentin-Baxter had already referred to article 5, concerning State property, and article 11 dealt with the passing of debts owed to the predecessor State by virtue of its sovereignty over, or its activity in, the territory to which the succession of States related. In his report, the Special Rapporteur discussed guarantees given by the predecessor State for debts contracted by local authorities. If it was agreed that guarantees could be given to entities other than States

for obligations incurred by local authorities and if it was borne in mind that the Special Rapporteur made provision for such guarantees, it would be noted that chapter IV of the report, dealing with succession to debts in the case of the transfer of part of a territory, contained a definition of a general State debt which could cover obligations incurred by the predecessor State not only vis-à-vis a third State but also vis-à-vis its own nationals and other nationals. Should the Commission decide to restrict the scope of application of the articles, it might be open to the criticism that it sometimes dealt with situations affecting entities other than the State and at other times appeared to ignore them. He would prefer a flexible approach so that the draft articles were not confined to an inter-State relationship.

38. Mr. USHAKOV said, that unlike Mr. Ago, he thought that debts created by treaty were not part of the subject-matter of succession of States in respect of treaties, because it was not enough for a State debt to have its source in a treaty clause; it was also necessary for that clause to have been implemented. If a State or another subject of international law had pledged a loan to the predecessor State, but had not honoured its pledge, there was no debt; the fate of the treaty was of little consequence. If the treaty clause related to a loan which had actually been made, there was a debt, but, if the treaty was considered invalid as a result of State succession, the debt itself would not be invalid. Succession to treaties therefore had no effect, even on debts created by treaties. The phenomenon of succession affected only the fate of treaties or, in other words, their possible maintenance in force and the conditions for their maintenance in force.

39. Moreover, a State debt could come into being otherwise than by an agreement between States. As Mr. Verosta had indicated, the predecessor State might not have paid its contributions to the United Nations. A State debt could also come into being because the international responsibility of the State had been engaged as the result of an arbitral award or a judgment of the International Court of Justice. If only part of a treaty pledge for a loan had been honoured, the proportion of the debt which would pass from the predecessor State to the successor State would reflect the proportion of the pledge that had been honoured.

40. With regard to article X, adopted provisionally by the Commission and relating to the absence of effect of a succession of States on third State property, he noted that the Commission had considered that the property of a third State located in the territory of the predecessor State or the successor State was not affected by the succession of States. The draft articles were, however, not intended only for predecessor States and successor States; they contained general rules which would also apply to third States. If such rules were codified customary rules, they would be compulsory for all States and, if they were rules of the progressive development of international law, they would apply to the States parties to the future convention, if the draft did eventually take the form of a convention.

41. Thus, with regard to part I of the draft, relating to State property, the provisions of article 12, paragraph 1, for example, applied to third States because, when a part

⁹ Para. 10 above.

of the territory of a State was transferred by that State to another State, and the predecessor and successor States agreed that the State property of the predecessor State passed to the successor State, the third State was bound to respect that agreement in respect of the State property of the predecessor State located in its own territory. Similarly, in the case of the uniting of two or more States, the third State was bound to consider the property of the predecessor States located in its own territory as the property of the unified State. Such rules were therefore presumed to be rules of general international law. In draft articles R, S, T and U, however, it was presumed that the third State was not bound by the special rules embodied in other parts of the draft. The situation was nevertheless the same: any third State would be bound by those rules if they were customary rules and, if they were rules of progressive development it would be bound by them only if it was a party to the future convention.

42. The articles on State property related not only to the passing of certain property to the successor State, but also to the modalities for such passing which might take the form of a unilateral declaration, an agreement between the predecessor State and the successor State, or a notification to the third State. The articles at present under consideration contained only rules relating to the passing of certain debts. They should be supplemented by rules relating to the modalities of such passing, whether in the form of a notification, negotiations, a conciliation or arbitral procedure or a judgment of the International Court of Justice. The articles under consideration were thus perhaps somewhat premature, with the exception of article R, in which the Special Rapporteur had tried to enunciate a general rule on the passing of State debts to the successor State.

43. Although it was always dangerous to enunciate general rules before special rules had been worked out, the provisions of article R were so general in nature that it seemed acceptable. He would nevertheless propose that it be worded along the following lines:

A succession of States entails the extinction of the State debt of the predecessor State or of part of that State debt and the passing of that State debt or of part of it to the successor State or States in accordance with the provisions of the present part.

That wording would reflect the Special Rapporteur's intentions and remedy some of the shortcomings of the present wording of article R. It was better to speak of State *debt* rather than State *debts* and not to speak of obligations in that connexion, since a State debt was, according to the definition given in article O, already an obligation.

44. Going back to the definition of the concept of State debt, he said that he wished to draw attention to the existence of two categories of debts. If, for example, the Soviet Union contracted a debt to a Swiss bank, it could be asked whether the debt agreement was a treaty in international law or a contract between the Soviet Union considered as a legal entity under Swiss civil law, and a Swiss bank. In the latter case, the Soviet Union would automatically accept the jurisdiction of Swiss courts and the contract would be governed by Swiss private law; it would not be affected in any way by the rules of international law.

45. With regard to the comment by Mr. Ago¹⁰ that a State could have a debt to its own nationals, he said that such a possibility was not one of the Commission's present concerns. In the case referred to by Mr. Ago, the matter would have to be decided by the internal law of the successor State. Of course, every State was sovereign and could assume debts to its own nationals, but such debts had nothing to do with international law. Moreover, if a State acted as a legal entity according to its own civil law or according to the civil law of the State to which it had contracted a debt, any problems of succession which might arise would be governed by the applicable civil law or by the rules of private international law, which would contain a *renvoi* to the appropriate national law. Consequently, a State debt in international law implied a financial obligation of a State to another subject of international law. In all other cases, the source of the debt lay in a civil law contract, governed by private law. Even if what he had just stated was incorrect, he thought that the Commission must, for the time being, limit itself to debts involving two subjects of international law, and only later consider other debts which might be governed by international law.

The meeting rose at 6 p.m.

¹⁰ See para. 19 above.

1423rd MEETING

Thursday, 19 May 1977, at 11 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Filling of casual vacancies in the Commission (article 11 of the Statute) (A/CN.4/299 and Add.1-2)

[Item 1 of the agenda]

1. The CHAIRMAN said that, in letters addressed to the Chairman of the Commission, the Chairmen of the Asian Group for the months of February and May 1977 respectively had asked that the vacancy in the Commission left by the death of Mr. Edvard Hambro should be filled by an Asian candidate in accordance with the gentleman's agreement of representation in the Commission.¹ In addition, in April 1977, the Permanent Representative of Norway to the United Nations, writing to the Secretary-General on behalf of the five

¹ See 1414th meeting, para. 14.

Nordic countries, had said that the Governments of those countries shared the opinion that the balanced representation in the Commission of forms of civilization and legal systems, which was the aim of the gentleman's agreement but which had not been respected in the elections held at the thirty-first session of the General Assembly, should be maintained.

2. He announced that, at a private meeting, in accordance with its Statute, the Commission had elected Mr. Abdul Hakim Tabibi, of Afghanistan, to fill the vacancy caused by the death of Mr. Edvard Hambro.

3. Mr. Tabibi had been invited to take part in the Commission's proceedings.

The meeting was suspended at 11.05 a.m. and resumed at 11.20 a.m.

Welcome to Mr. Tabibi

4. The CHAIRMAN congratulated Mr. Tabibi on his election and said that he was glad to welcome back one who had been a respected member of the Commission for many years.

5. Mr. TABIBI thanked the Commission for the great honour it had done him by electing him a member, thereby restoring the balance for by the gentleman's agreement which had not been respected at the thirty-first session of the General Assembly. He was fully aware of the need for a new international legal order and would do his utmost to meet the expectations and aspirations of the peoples of the third world. He regretted only that the occasion of his rejoining the Commission should have been to replace so worthy a man, so eminent a jurist and diplomat, and so dear a friend as Edvard Hambro.

Succession of States in respect of matters other than treaties (continued) (A/CN.4/301 and Add.1)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (continued)

ARTICLE R (Obligations of the successor State in respect of State debts passing to it),

ARTICLE S (Effects of the transfer of debts with regard to a creditor third State),

ARTICLE T (Effects, with regard to a creditor third State, of a unilateral declaration by the successor State that it assumes debts of the predecessor State) *and*

ARTICLE U (Expression and effects of the consent of the creditor third State)² (continued)

6. Mr. SCHWEBEL said that he shared the views expressed by Mr. Francis³ on the question whether the draft articles should cover not only debts between States

but also debts that a State incurred through borrowing from a non-State party. He fully agreed with Mr. Castañeda⁴ that the definition of State debt contained in article O was an appropriate one, for it did not exclude creditors other than States. Similarly, he could agree that it was apparent from the foot-note to paragraph 96 of the report (A/CN.4/301 and Add.1) that non-State parties did fall within the scope of the draft. Consequently, he questioned the relevance of the Special Rapporteur's references⁵ to the Calvo clause, which was an expression of national law, and in some instances of constitutional law, but not one of customary or conventional international law. Obviously, no State could cite its national law in derogation of its international obligations. Mr. Ago⁶ had commented pertinently that if the Commission was to deal solely with inter-State debts, it could be argued that the draft articles on succession of States in respect of treaties were sufficient, for the origin of inter-State debts—if not always, at least frequently—lay in treaties.

7. For both legal and practical reasons, he was inclined to suggest that the draft should encompass loans to the State from non-State entities of a public international character, such as loans of the World Bank, which were expressly governed by international law, and also loans by non-State entities of a private character, such as loans by bank consortia, which in many cases were not governed by international law.

8. If a loan contract was based on the national law of the predecessor State, surely the successor State was obliged under customary international law to accord due respect to the law of the predecessor State in so far as it had a bearing on private parties and private rights and obligations; otherwise, the responsibility of the successor State might be engaged. It could even be inferred that, under the terms of the draft articles, the successor State was not obliged to assume inter-State debts but was bound to assume debts to parties based on the national law of the predecessor State, to the extent that it was the successor to that law. Again, if the consent of a third State was seen to be required for novation of a debt, such consent might be expressed by a third State on behalf of its nationals who were creditors of the predecessor State and, it could be argued, of the successor State.

9. He sought to raise those questions because the protection of international law extended to alien property and contractual rights, even though those rights were created by national law—a view adopted in much of the law on State responsibility for many hundreds of years and one that should be taken into account in considering the law of State succession. While the protection of international law did not afford any guarantee of such rights, it none the less covered arbitrary or discriminatory action by a State against aliens and would cover repudiation of a debt in circumstances in which repudiation was arbitrary. It was by no means certain that his arguments could be dismissed with the reply that they could only be weighed, if at all, when the Commission came to deal with State responsibility. In his opinion, a clear-cut

² For texts, see 1421st meeting, para. 32.

³ 1422nd meeting, para. 37.

⁴ *Ibid.*, para. 9.

⁵ *Ibid.*, para. 5.

⁶ *Ibid.*, para. 19.

differentiation could not be made between areas of concern that had substantive links both in fact and in precedent.

10. Apart from legal reasons, there were practical grounds for ensuring that the draft articles took cognizance of loans to States from non-State parties. The bulk of existing debt consisted of loans from such parties and there appeared to be no reason to assume that time would alter that situation. The Commission would not help to maintain the flow of international capital, including the flow of loans from private parties, which, as recent history had demonstrated, were of vital importance to the developing countries, if it excluded such loans from the terms of the draft articles. It should also be remembered that, in a changing world, State borrowers might merge into larger, or split into smaller, sovereign States. It would not be enough to suggest that the Commission should deal with inter-State loans now and with loans from non-State parties later on. In proceeding with its work, the Commission should deal with the whole of the real world of international finance.

11. Mr. NJENGA said that the Special Rapporteur was to be congratulated on his efforts in drafting articles R, S, T and U. In dealing with a triangular relationship, it was not easy to make each article complete in itself and the provisions of those articles must be seen together if their full meaning was to be understood. Consequently, while article R seemed to refer solely to the effects of succession for the predecessor and the successor States, it should be read in conjunction with article U, which showed that those effects were in fact dependent on the consent of the creditor third State. If the Commission felt that some reference to that consent should be included in article R, it could easily be added by the Drafting Committee.

12. With regard to article S, he shared the fears expressed by Mr. Sette Câmara.⁷ At first sight, it suggested that the devolution agreements to which it seemed to refer established firm rights and responsibilities for the successor State. There was, however, great danger in suggesting that either devolution agreements or unilateral declarations could have such an effect. The Commission had rightly taken the view, when discussing succession of States in respect of treaties, that devolution agreements and unilateral declarations represented no more than an expression of intent on the part of the successor State—an intent which, moreover, might not always have been entirely freely expressed—and had therefore relegated them to a very minor position. It would be for the Drafting Committee to correct the impression given by article S as it stood, that devolution agreements could do more than was in fact the case. Perhaps, indeed, nothing would be lost if article S were deleted and only some form of article T retained, for the latter provision gave a description of the force of unilateral declarations which was entirely correct.

13. With regard to article U, all members of the Commission would appreciate that the Special Rapporteur's intention in allowing the creditor third State to assent to

or reject arrangements between the predecessor and the successor States, or unilateral declarations by the successor State, was to ensure that its rights were secured. However, the article as it stood went—no doubt unintentionally—too far, in that it not only enabled the creditor third State to protect its own interests, but in fact gave it a sort of power of veto over decisions by the predecessor and successor States concerning the succession to the debts owed to it. The third State would even be able to reject a change of debtor in the case of localized debts, which typically passed to the successor State. Some means must therefore be found, perhaps by the Drafting Committee, of limiting the creditor third State's power with regard to the final outcome of succession to debts.

14. Since the Commission was dealing with international law, it was only right that it should confine its study to debts contracted between subjects of international law. He readily admitted Mr. Schwebel's point that the flow of loans which they received from private bodies was very important to the developing countries, but that was not a matter which came within the framework of international law. On that point, he agreed entirely with the statement of position made by Mr. Ushakov at the previous meeting.⁸ There were ways in which a private creditor could seek recourse, through his Government, to an international tribunal, but the local remedies provided by the laws of the State of which he was a creditor were often entirely adequate and should be exhausted first. The Commission had already been reminded that the constitutions of many Latin American countries gave foreigners the same rights as nationals, and the same was true, for example, of the Constitution of Kenya, which allowed both foreigners and nationals to approach the local courts when they felt their interests had been harmed by, say, nationalization. Consequently, there did not seem to be any reason to mention foreign private creditors in the draft articles under discussion. It was, indeed, not until there had been a denial of justice that, under the rules of State responsibility, action at the State level would be required to protect the foreign creditor. A very difficult situation would be created if a State were liable to be taken before an international tribunal every time it took an action which affected a foreigner. He accordingly construed the foot-note to paragraph 96 of the Special Rapporteur's report, to which Mr. Schwebel had referred,⁹ as meaning that State debts could exist where the creditor was a foreign private person, but that the interests of such creditors were protected by the normal rules already in existence. On the other hand, provision should be made in the draft articles for the situation in which the creditor of the predecessor State was an international organization.

15. Mr. JAGOTA said that the Special Rapporteur opened chapter II of his report with a limited definition of "the third State", whereas in draft article O¹⁰ he had proposed a definition of "State debt" which was somewhat open-ended, in that there was no indication of the identity of the creditor. The question therefore arose, with

⁸ *Ibid.*, paras. 44 and 45.

⁹ See para. 6 above.

¹⁰ See 1416th meeting, para. 1.

⁷ *Ibid.*, para. 23.

regard to chapter II, whether creditor States only or all types of creditors should be considered.

16. It was increasingly the case, as had already been pointed out, that the creditors of States were financial institutions, private bodies or individuals. The Special Rapporteur had suggested that the study should at first be limited to creditors who were States, with the question of other types of creditors being considered at a later stage. The Commission itself had followed a somewhat similar approach in its study of the law of treaties, by considering separately the questions of treaties concluded between States and treaties concluded between States and international organizations or between two or more international organizations. The Special Rapporteur's suggestion, however, raised the problem of when the Commission would consider the other types of creditors and of what would happen to debts owed to them if it did not do so. In his view, it was not sufficient to say that such debts would be covered either by customary international law or, by analogy, by the rules governing debts owed to States. What was required was a broadening of the scope of chapter II to include debts owed not only to States but also to other subjects of international law. That would extend the provisions of the chapter to, first, unions of States, concerning which the Commission would have to decide whether it was the union itself which was a subject of international law or whether only its members had international personality, and secondly, international financial institutions and other subjects of international law, of which it would be necessary to give examples.

17. There would then remain the question of creditors who were natural or juridical persons, which would include both individuals and multinational corporations. The Special Rapporteur had referred in that connexion to the Calvo clause and had said that the matter was subsumed in domestic law and therefore not relevant. He had also referred to the question of diplomatic protection, but that was not germane to succession, since it was a matter of denial of justice and therefore of the protection of the interests of the State whose nationals had suffered that wrong. There was still, however, the possibility that the debt claims of private creditors might have been guaranteed by the State of which they were nationals, and that that State might have entered into an investment guarantee agreement with the State which was the recipient of the credits. Assuming that its nationals could seek local remedies in the recipient State, would the guarantor State have any right of recourse to the successor State in the event of a succession? He believed that the Commission should study all such problems before eliminating any of them from consideration in the draft articles, and should then explain the reasons for its choice, so as to give guidance to others on how far the rules it was seeking to elaborate would be applicable, *mutatis mutandis*, to cases not covered in the articles.

18. He gathered from paragraphs 100 and 101 of the report that the basic theory behind the articles the Special Rapporteur was now proposing was that two situations were involved in succession to State debts, namely, that which obtained between the predecessor and the successor State, and that of the "creditor third State" and,

mutatis mutandis, of the other types of creditors. The problem was thus seen as being very different from that of succession to State property, and the Commission was asked with regard to debt obligations to visualize the triangular relationship as if it were dealing with the law of treaties. While the situation between the predecessor and the successor State was regulated by the law of succession, protection was provided for the creditor by the requirement that it consent to the change of debtor. The Special Rapporteur's approach was probably sound.

19. Mr. Ushakov, however, had argued that the requirement of consent by the creditor was merely procedural and that the creditor was therefore governed by customary international law rather than by the provisions the Commission was elaborating. If that was so, the Commission must state clearly by what substantive law the creditor was governed and what would be his rights if he did not give his consent. On the other hand, Mr. Njenga had claimed¹¹ that the requirement of consent gave an inequitable power of veto to the creditor. Perhaps those differing views were the result of deficiencies in the drafting of the articles under consideration. But if the requirement of consent had been only procedural, there would have been no mention in article U of the concept of implied consent. And if that requirement had really established a power of veto, the purpose of protecting the creditor would have been defeated, which was not the case.

20. It was stated in paragraph 101 of the report that the action of the law of succession would not have the effect of automatically extinguishing the relationship between the predecessor State and the creditor third State "except where the predecessor State entirely ceases to exist". That exception should be clearly stipulated in articles R, S, T and U, as should the rules which would apply in the event that the predecessor State did in fact disappear. To that end, it would be necessary to study the relevant State practice, as, for example, in the case of Viet Nam, to which Mr. Sucharitkul had already drawn attention.¹²

21. He agreed with Mr. Castañeda¹³ that there should be no contradiction between articles R and U. His own opinion was that the inclusion in article R of the phrase "in accordance with the provisions of the present articles" made it sufficiently clear that the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State, to which the article referred, were subject to the consent of the creditor third State mentioned in article U. If that was not the case, the link between the two articles must be stated in article R.

22. On the question of the correspondence between article S and article U, he noted that article S stated that debts could pass "pursuant to the present articles or to agreements concluded between the predecessor and successor States", but that article U spoke of the consent of the creditor third State in relation only to the latter of those modalities of succession. If the passage of debts "pursuant to the present articles" was also subject to the

¹¹ See para. 13 above.

¹² 1422nd meeting, para. 35.

¹³ *Ibid.*, para. 10.

consent of the creditor, that should be made clear in article U.

23. Finally, he wished to raise the question of counter-claims held by the predecessor State against the creditor third State, of which the Special Rapporteur had said that they were rights and would therefore automatically pass to the successor State, pursuant to article 6 of the draft articles.¹⁴ The matter would, however, require further study, for while the consent of the creditor third State would not be necessary for passage of the right of the predecessor State to receive money from it, it would be necessary for passage of the duty of the predecessor State to pay money to it. The predecessor State might therefore find itself in the difficult situation of having lost its set-off claim against the creditor third State while remaining responsible for its original debt to that State.

24. Mr. ŠAHOVIĆ said that he did not clearly understand the scope of the draft articles submitted by the Special Rapporteur in chapter II of his report; there was some doubt in his mind about the exact meaning of draft article R in particular. He thought that article R was intended as a general provision corresponding to article 6, which explained the legal effects of a succession of States, but in view of the triangular relationship described by the Special Rapporteur, the purpose of that general rule should be made clearer. What, for instance, was the actual relationship between the predecessor State and the successor State? The wording proposed by the Special Rapporteur was not sufficiently clear on that point and could be improved and further clarified, as suggested by Mr. Ushakov.¹⁵ The link between article R and article U should be stressed, as Mr. Castañeda had said,¹⁶ and, in article R, account should be taken of the triangular relationship between the predecessor State, the successor State and the third State, for the Special Rapporteur had shown that that relationship was essential.

25. As the Special Rapporteur had indicated in paragraph 58 of his report, the debts of the predecessor State were the basic subject-matter of the current study. After giving a very general definition of State debt in article O, however, the Special Rapporteur seemed to have lost sight of the primary objective of the study and to have immediately taken a position on the question of the third State. What was now needed, therefore, was first to define the boundaries of the concept of State debt and clarify the relationship between the predecessor State and the successor State, and then to consider the question of the debt-claims of private persons, whether natural or legal.

26. He understood the idea contained in draft articles S, T and U, but, like Mr. Riphagen,¹⁷ he thought it could have been worded positively and expressed in a single article.

The meeting rose at 1 p.m.

¹⁴ See 1416th meeting, foot-note 2.

¹⁵ 1422nd meeting, para. 43.

¹⁶ *Ibid.*, para. 10.

¹⁷ 1418th meeting, para. 12.

1424th MEETING

Friday, 20 May 1977, at 10.10 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Schwebel, Mr. Sette Câmara, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/301 and Add.1)

[Item 3 of the agenda]

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

ARTICLE R (Obligations of the successor State in respect of State debts passing to it),

ARTICLE S (Effects of the transfer of debts with regard to a creditor third State),

ARTICLE T (Effects, with regard to a creditor third State, of a unilateral declaration by the successor State that it assumes debts of the predecessor State) *and*

ARTICLE U (Expression and effects of the consent of the creditor third State)¹ (*continued*)

1. Mr. EL-ERIAN said that, as he understood chapter II of the Special Rapporteur's report (A/CN.4/301 and Add.1) and the discussion on it, the articles which the Commission was now considering envisaged a situation in which there was succession according to the provisions of those articles in respect of a State debt—succession which gave rise to a triangular relationship between the predecessor State, the successor State, and the creditor third State. In formulating rules governing that triangular relationship, the Special Rapporteur had laid down two principles: the first, with which all members of the Commission seemed to agree, was that the succession led to the termination of the relationship between the predecessor and the successor States; the second was the general principle which applied in relation to personal status and obligations in civil law systems, namely, that there was a subjective element in the situation of debt. The Special Rapporteur appeared to have adopted that second principle out of a desire to co-ordinate the present draft articles with those the Commission had produced on succession in respect of treaties;² the consequence of that adoption was that he had made provision for the exercise of an option by the creditor third State. Articles S, T and U then showed how the situation of that State would be affected by an occurrence of succession. In

¹ For texts, see 1421st meeting, para. 32.

² See 1416th meeting, foot-note 1.

principle, he agreed with the Special Rapporteur's approach.

2. Mr Schwebel had said³ that there were many other situations to be regulated than were at present covered in the draft articles. While all members of the Commission would undoubtedly like the articles to be as comprehensive as possible, that would raise problems of methodology. He would therefore like to hear the Special Rapporteur's views on how the articles could be broadened to cover the points Mr. Schwebel had mentioned. He differed from Mr. Njenga⁴ in that he interpreted article U as giving the creditor third State not a "power of veto", but an option. Perhaps Mr. Njenga's fears could be allayed by the reformulation of the article by the Drafting Committee, which would also be the body to deal with the point raised by Mr. Ushakov⁵ concerning the links between the articles now under consideration and subsequent parts of the draft.

3. Mr. DADZIE said the Special Rapporteur had said that the relationship between the States concerned by succession to State debt was necessarily triangular, involving the predecessor and successor States and the creditor, which could be a State, a legal entity or a private individual. The purpose of introducing such a relationship was said to be to secure the interests of the creditor, by giving him the option to accept or decline the transfer of the State debt. His own opinion, however, was that the existence of such an option could give rise to serious problems and retard or obstruct the succession, rather than advance it. If the concept of the triangular relationship was to be retained, he hoped the Special Rapporteur would make provision for such situations as that in which the creditor refused consent to a transfer to which the parties most closely concerned, namely, the predecessor and successor States, had agreed, or that in which the creditor refused consent and such refusal could be considered unreasonable or inequitable. To his mind, however, there were obvious advantages in retaining only the relationship between the predecessor State and the successor State and eliminating the requirement of consent by the creditor. The creditor should not be able to interfere in the passage of the debt. His interests would be sufficiently protected if the rules provided that notice be given him of where his debt lay after the succession had occurred. A further argument in favour of limiting the relationships considered to that between the predecessor State and the successor State was the fact that the Commission was concerned with no more than how responsibility for debt would pass between those two entities in the event of succession.

4. As a consequence of those views, his main objection to article R was that it included the phrase "in accordance with the provisions of the present articles", for articles S, T and U all referred in some way to a requirement of consent by the creditor. He hoped the Special Rapporteur would be able to reword article S so as to remove the impression it now gave that such a requirement existed; his own suggestion was to delete from the article the

words "do not". Similarly, he hoped that article T could be reworded to obviate the necessity for the consent of the creditor to a unilateral declaration. Finally, he considered that article U should be omitted. Other speakers had already commented on the question of express or implied consent and the need for rules which, in keeping with the objective of the progressive development of international law, would ensure that, in the event of a succession, State debt passed smoothly from the predecessor State to the successor State.

5. Since the Commission's concern was with the fate, not of individual financial obligations of the State but of such obligations in general, he shared Mr. Ushakov's view⁶ that it would be more appropriate if the draft articles referred to "State debt" rather than "State debts".

6. He could not agree that the Commission should automatically leave out of its study debts which had been contracted under domestic law. His own view was that, when a relationship could be established between a debt so contracted and international law, as when a private creditor sought a remedy through the intermediary of the State of which he was a national, the debt in question would come within the scope of the draft articles. On the other hand, since he agreed with the Special Rapporteur that a debt must be a financial obligation, he felt that no account should be taken of situations in which the debtor was obliged to do or not to do something other than merely reimburse or service a financial debt. The Commission would have to consider whether such situations came within its terms of reference only if the additional obligation could, in the final analysis, be resolved into a financial obligation.

7. Mr. RIPHAGEN said that if it was true, as he had already argued,⁷ that the question of the impact of State succession on the State debt of the predecessor State arose in connexion with the facts that jurisdiction over territory, including in particular the right to levy taxes, and State property passed to the successor State, and that those facts in turn raised the problem of some degree of sharing by the successor State of the financial burdens of the predecessor State, it was, in principle, irrelevant whether the financial burden of the predecessor State consisted of debts towards third States or towards creditors of some other kind, even private persons. In either case, what was at issue was primarily the relationship between the predecessor and the successor States, or the question whether, and to what extent, the latter should assume the burden of the former. So long as the Commission dealt with only the legal relationship between the predecessor and successor States, it would encounter no insuperable problems. The difficulties would appear only if and when an attempt was made to project the legal relationship between the predecessor and the successor States on to the legal relationship between the predecessor State and/or the successor State and the creditor, in other words, to translate the relationship between the predecessor and successor States into what article R termed "the extinction of the obligations of the

³ 1423rd meeting, paras. 6 *et seq.*

⁴ *Ibid.*, para. 13.

⁵ 1422nd meeting, para. 41.

⁶ *Ibid.*, para. 43.

⁷ 1418th meeting, para. 11.

predecessor State" and the "arising of the obligations of the successor State". At that point, the question would arise whether rules of public international law had anything to do with the relationship between the creditor and the predecessor or successor State. The Special Rapporteur contended that those rules were relevant when the creditor was a third State, but not when it was not a subject of international law. Personally, he doubted whether a distinction between creditor States and other creditors was useful in the context with which the Commission was concerned.

8. For one thing, the debt relationship between the predecessor State and a third State was not necessarily governed solely by rules of public international law. On the other hand, the relationship between the predecessor and/or the successor State and a private creditor was not necessarily entirely beyond the purview of rules of general public international law. It would be difficult, however, to spell out in detail in the draft what was the legal impact of the predecessor State/successor State relationship on the legal relations of each of those States with the creditor, whatever the latter's identity. For instance, doubts had been expressed with regard to article U, which was not completely parallel to the corresponding provision on succession in respect of treaties.

9. Under article U, the consent of the creditor State could result, *inter alia*, from "conduct engaged in by the third State", but that provision could give rise to problems in practice. For instance, if the successor State offered payment to the third State of part of a debt originally assumed by the predecessor State, the third State would, in his opinion, be well advised to accept that payment, subject only to the proviso that it did not thereby consent to the transfer of the debt. What interpretation should be placed on its conduct in such a case?

10. On the other hand, recognition that the relationship between the predecessor and the successor States also covered State debts vis-à-vis non-State creditors, including private persons, did not of itself bring the relationship between a State and a private person wholly or partly under the rules of public international law. Indeed, there were several questions relating to the legal impact of the predecessor State/successor State relationship on the State/creditor relationship with which the Commission was certainly not going to deal in its draft. They included the question of a possible impact on the currency in which the debt was expressed; the question of which municipal law would govern the debt after succession; and questions relating to the diplomatic protection which might be afforded to a private creditor by the State of which he was a national.

11. In those circumstances, he wondered whether the draft should not be limited solely to the relationship between the predecessor and successor States, leaving aside all questions of the possible legal impact of that relationship or the relationship of either of those States with the creditor. That would imply re-drafting article R so as to remove the mention of the extinction and arising of obligations, since those obligations were, of course, towards the creditor. It might also be advisable to leave out articles S, T and U, which dealt with the impact of the predecessor State/successor State relationship on the

relationship of those States with others. If that suggestion were adopted, it would, of course, be necessary to state that the Commission was leaving out of the study the impact of the predecessor State/successor State relationship on all the other points he had mentioned.

12. Mr. TSURUOKA said that, both in the literature and in practice, there were differing views regarding the passing of State debts, as the Special Rapporteur had rightly pointed out. On the other hand, as Mr. Schwebel had noted,⁸ transactions relating to debts were, nowadays, a developing field of international co-operation that was beneficial to creditors and debtors alike and to the world as a whole. The Commission's task, therefore, was to prepare a legal instrument that would meet contemporary needs. However, since such transactions were not yet governed by clearly established rules of international law, the Commission would have to go beyond codification proper and venture into the field of progressive development. It would have to elaborate flexible rules, easy to apply and to interpret, which would be acceptable to the majority of States. Practical value and flexibility were the essential considerations that the Commission must bear in mind in preparing the rules on succession of States in respect of State debts.

13. The Special Rapporteur had justified the title given to the draft articles proposed in his ninth report by presenting succession to State debts as the second aspect of the question of State succession, and drawing a parallel between State property and State debts, which he had defined as financial obligations. Like Mr. Ushakov, however, he (Mr. Tsuruoka) considered that "debt" and "financial obligation" were not necessarily synonymous and that, in the view of some, a debt existed only when a financial obligation had not been met. In his opinion, the draft must not deal solely with debts but with financial obligations in the broadest sense. The Drafting Committee might therefore consider replacing the word "debts" in the title of the draft articles by the words "financial obligations".

14. Mr. Dadzie had proposed, for the purpose of simplifying the draft, that there should be no reference to the consent of the third State.⁹ He himself did not share that view. The primary concern of every creditor, whether a State, an international institution or a private company, was the stability and security of his investment, and the best means of ensuring the repayment of his investment was through an understanding with the debtor.

15. As regards articles R, S, T and U, he would confine himself to a few remarks of a drafting nature. The words "without the consent of the latter" should be inserted at the end of article S to make the meaning of the article clearer. In article T the words "vis-à-vis the creditor State" should be inserted after the words "debts of the successor State". Lastly, in article U, in order to take account of Mr. Riphagen's comments, at the end of the first paragraph, the phrase "can result from ... or tacit act by that State" should be replaced by the words "shall be expressed in a formal act by that State".

⁸ 1423rd meeting, para. 10.

⁹ See para. 3, above.

16. What was needed was a legal instrument that would have practical value. It should therefore be specified that the draft articles did not affect the relationships between private creditors and the predecessor or successor State, even when the draft articles dealt solely with State debts in the narrow sense of those of the predecessor State.

17. Mr. YANKOV said that the definition of "State debt" proposed by the Special Rapporteur might require further study. The reason was that, even though it might be appropriate for the moment to limit the concept to financial obligations, there would remain the problem of succession in respect of matters other than treaties, property and financial obligations. Perhaps the section of the draft devoted to "General provisions" relating to State debt should be supplemented by further articles on the main constituent elements of the concept of State debt, the parties concerned, the law applying to the origin of the debt, and the main legal implications following therefrom. He would be grateful if the Special Rapporteur would comment on that point.

18. On the question of the personality of the creditor, he agreed with the Special Rapporteur that the Commission should try to stay within the realm of public international law, and that the rule which it was elaborating should therefore apply only to subjects of international law. Perhaps that limitation should be made clear in article O. The interests of creditors who were natural or juridical persons would be adequately catered for by the rules governing diplomatic protection in the event of a denial of justice. Provision should, however, be made in the draft articles for the situation in which a loan granted by a natural or juridical person was guaranteed by a State, for such a case clearly involved a subject of international law.

19. With regard to the suggestion that the study would become too complicated if consideration were given to the triangular relationship between the predecessor and successor States and the creditor third State, and that it should therefore be limited to the relationship between the predecessor and successor States, he was inclined to agree with the view expressed by the Special Rapporteur in paragraph 96 of his report (A/CN.4/301 and Add.1) that it was "the status of the third State as a creditor of the predecessor State that makes the territorial change relevant to it". The novation occurred only in the relationship between the predecessor and successor States, and then only under certain conditions, as the Special Rapporteur had pointed out in paragraph 106.

20. Some speakers had questioned the attribution to the creditor third State of the right to select its own debtor, and he wondered whether the Special Rapporteur had been correct in making the right of choice a discretionary right only of the creditor. Mr. Njenga had made some very pertinent remarks concerning the possible "power of veto" which that right conferred on the creditor third State,¹⁰ and he hoped that the Special Rapporteur would be able to resolve that problem.

21. The problem of a unilateral declaration by the successor State also required further study. The Special

Rapporteur had argued, in paragraph 111 of his report, that the creditor third State had a subjective right to accept or refuse the legal effect of such a declaration in relation to the original obligation of the successor State, and that its consent was therefore required for the change of debtor to take place. That was a very logical view, which was entirely in line with the Special Rapporteur's basic premises and one which he could accept. He therefore supported the requirement of consent as expressed in article U. That article would, however, have to be deleted if the Commission adopted the approach favoured by Mr. Dadzie.¹¹

22. He could support article R as proposed by the Special Rapporteur, but felt that it should be placed earlier in the draft, before the section dealing with the problem of the third State, since it made no mention of the third party to the debt. He had no problems in accepting article S, which made an obvious statement.

23. Mr. TABIBI said that the draft articles to be proposed by the Commission in connexion with State debt must attach equal importance to the three parties involved, namely, the predecessor State, the successor State and the creditor third State or party. The interests of the predecessor State must be protected because that State had incurred a financial obligation for the benefit of the territory for which it had been responsible. Consequently, once the territory became a successor State, the predecessor State should no longer be involved in any problem of payment of the debt to the creditor. But if the predecessor State had not used the loan or credit for the benefit of the territory that later became the successor State, the latter should not be under an obligation to pay off the debt. The criterion of validity was applicable not only in the case of succession in respect of treaties but also in the case of succession in respect of matters other than treaties.

24. Again, it was plain that creditor third parties which had contributed to the welfare of the territory were entitled to repayment of their loans. It should not be assumed that a successor State was entitled to decide not to repay a debt. Newly independent States were experiencing very serious economic difficulties and needed assistance from every source, whether States, international organizations, corporations or individuals. The Commission should, therefore, in its draft articles, prepare the ground for a smooth flow of financial assistance to the developing world. Creditor third States or parties played a vital role in such assistance and it was essential to avoid establishing a régime that would discourage creditors.

25. A devolution agreement or a unilateral declaration by the successor State of its assumption of debts of the predecessor State should not jeopardize the interests of the creditor third party. At the same time, in the case of devolution, the predecessor State should not create a situation in which the successor State suffered as a result of the arrangements made with regard to the debts incurred by the predecessor State. Moreover, in the case of a unilateral declaration, the successor State must not decide simply to accept the benefits that it had gained

¹⁰ 1423rd meeting, para. 13.

¹¹ See paras. 3-4 above.

and to disregard the obligations of the predecessor State. Regardless of what decisions were reached by the predecessor State and the successor State, the consent of the creditor third party was vital. He disagreed with the view that such consent represented a power of veto on the part of the creditor third party, which, after all, had extended the credit or loan and was entitled to have its rights safeguarded. The number of articles might well be reduced, but the Drafting Committee should bear in mind that the interests of each of the three parties involved should be equally protected.

26. The CHAIRMAN, speaking as a member of the Commission, said that one of the great services rendered by the Special Rapporteur in a penetrating report that was rich in material and, in some respects, in humour, had been to call attention to the difficulty and the complexity of the subject of State debts. The lesson to be drawn from, for example, paragraphs 68-72 of the report, was that the Commission should adopt an approach in which caution was the essence of wisdom. Otherwise, it might, if carried away by enthusiasm for the codification and progressive development of international law, tend to enunciate concepts that were not yet ready to be crystallized. In articles R, S, T and U, the Special Rapporteur had, in fact, shown a measure of caution. In the modern world, international finance was of great importance to all States. The Commission's work should not check the flow of international finance and he would be inclined to proceed from the principle that, so far as possible, creditors, by which he meant creditors in general, should not suffer loss as a result of a succession of States.

27. As to the scope of the articles, he believed that both theoretical and practical considerations would have to be borne in mind. While the draft articles could, theoretically, be confined exclusively to State creditors, it could be asserted that, for practical reasons, such a course would not be reasonable and that the interests of non-State creditors must be protected as much as those of State creditors. Nowadays, it was sometimes difficult to say whether the agency which actually provided the finance was a State agency or not, and whether the debt was due to the agency as such or as an agency of the State. Thought should be given to the possibility of making provision not only for State creditors but also for other creditors that were subjects of international law. In that regard, the Commission need not be bound by the Vienna Convention¹² or the draft articles on succession of States in respect of treaties, for it was at liberty to extend the boundary between the two concepts, where it was appropriate to do so in the context. Whether it was feasible to make provision for creditors who were natural or juridical persons was perhaps a more controversial matter, but if the draft was to be confined to State creditors or creditors which were subjects of public international law, it should be made clear that it was not intended to prejudice the interests of creditors who were natural or juridical persons.

28. While he could agree that the draft should deal with State debts, he was somewhat troubled about the definition of State debt—a difficulty that arose because

of differences between the concepts employed in civil law systems and common law systems. Broadly speaking, the common law system in the United Kingdom did not employ the concept of a financial obligation; rather, it drew a distinction between liquidated debts and non-liquidated claims. For example, a claim resulting from a motor-car accident would be regarded as a non-liquidated claim. On the other hand, if it was pursued in court and judgment for a particular sum was given against the defendant, it could be considered as a liquidated debt which had become a financial obligation within the meaning of the draft articles. In the field of property transactions, the distinction between a liquidated debt and a non-liquidated claim became less obvious. It was certainly not his intention to suggest that use should be made of the qualification "liquidated" or "non-liquidated", but he wondered whether the term "financial obligation" would suffice without some further explanation of what it was taken to mean.

29. In addition, it was not necessarily true that a financial obligation could be isolated as something that had an existence of its own. What might be termed the "bare" financial obligation could well be accompanied by various terms and conditions. For instance, the creditor might enjoy a currency option. If one of the conditions was a foreign exchange guarantee, a successor State which assumed responsibility for a debt might consider that its responsibility could be discharged in the currency of the successor State, but that would not be in keeping with the conditions attaching to the obligation. Other more complex terms and conditions were conceivable, for example, a debt that was conditional upon maintenance of, or free transit over, a highway. Obviously, the Commission need not legislate for such matters, but it must not adopt a course that would prejudice questions relating to the terms and conditions of a debt.

30. In the subject under consideration, there was a very subtle relationship between public international law and internal law. It could be affirmed that matters which might have been regarded 50 years ago as falling under private law had now entered an area in which they were protected by public international law and, in principle, he saw no reason why that should not apply in the case of State debts towards private creditors. Treaties and conventions on human rights clearly imposed obligations upon States, yet the beneficiaries were individuals, and no one would argue that those treaties and conventions did not operate as a part of public international law. Consequently, he was not convinced that State debts due to private corporations, for example, were a matter that lay outside public international law. Lastly, if the draft articles were confined to inter-State debts, they would tend to overlap with the draft articles on succession of States in respect of treaties. The Special Rapporteur was right to deal with debts on their own merits, but care must be taken to ensure that there would be no conflict between the two sets of draft articles.

31. Mr. BEDJAoui (Special Rapporteur) said that many of the suggestions made during the discussion would certainly be helpful to the Drafting Committee. In order to save time, he would not comment on observations with which he agreed; he would reply only

¹² See 1417th meeting, foot-note 4.

to questions, criticisms and doubts to which chapter II of his report had given rise.

32. He would concentrate on one basic problem, namely, the scope to be given to the draft articles which the Commission was preparing for the international community. Nearly all the members of the Commission had referred to that problem, which could be summarized under three main heads: first, the definition of State debt; second, the legal nature of the relationship established by the transfer of the debt, which some considered to be a relationship between the predecessor State and the successor State while others considered it to be a triangular relationship between the predecessor State, the successor State and the creditor third State; and, third, the status of the creditor—must the creditor be a State or might it also be another subject of international law or a natural or juridical person in private law?

33. Members of the Commission had expressed different views on that last point. Some thought that, for reasons of principle or methodology, the relationship should be limited to subjects of international law, whether States, international organizations or unions of States. He shared that view, but, since he had realized that different opinions might be expressed in that regard, he had planned the draft in such a way that, without changing its structure entirely, its scope might be extended to cover private creditors. Members of the Commission had displayed great powers of imagination in their efforts to find a solution to that problem, but most of them had stressed the basic relationship which linked the predecessor State and the successor State. It was Mr. Dadzie who had perhaps gone farthest by stating that the triangular relationship should not be retained and that the requirement of the consent of the third State should be eliminated. Mr. Riphagen had been of the opinion that the triangular relationship was established only when the relationship between the predecessor State and the successor State was projected on to the creditor third State. He (the Special Rapporteur) accepted that view, but believed that the situation was actually more complicated than that.

34. The discussion of the articles proposed in chapter II of the report and of the basic questions of the definition of debt and the nature of the relations established for the transfer of the debt could be summarized in the following way. Some members of the Commission thought that article R alone should be retained and that its wording should be amended. They had said that the other articles which had been proposed were helpful, but not really necessary because they dealt with procedural matters. Other members of the Commission had expressed the view that articles R, S, T and U were necessary and adequate although their wording might need to be improved; they had also said that those articles might be further clarified and, possibly, combined. Still other members of the Commission had been of the opinion that those articles were necessary but inadequate, and that they should be rearranged and supplemented so that it would, for example, be clear that they applied to creditors in private law.

Appointment of a drafting committee

35. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to appoint a drafting committee consisting of the following twelve members: Mr. Tsuruoka as Chairman, Mr. Ago, Mr. Calle y Calle, Mr. Díaz González, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Tabibi, Mr. Ushakov, Mr. Verosta and, *ex officio*, Mr. Bedjaoui, the Commission's Rapporteur. It was, of course, understood that a special rapporteur was always entitled to attend meetings of the Drafting Committee when the latter was considering the topic for which he was responsible.

It was so agreed.

Appointment of a committee for the Gilberto Amado Memorial Lecture

36. The CHAIRMAN said, that if there was no objection, he would take it that the Commission agreed that the Committee for the Gilberto Amado Memorial Lecture should consist of Mr. Ago, Mr. Castañeda, Mr. El-Erian, Mr. Sette Câmara, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat and Mr. Yankov.

It was so agreed.

The meeting rose at 1 p.m.

1425th MEETING

Monday, 23 May 1977, at 3.05 p.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/301 and Add.1)

[Item 3 of the agenda]

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

ARTICLE R (Obligations of the successor State in respect of State debts passing to it),

ARTICLE S (Effects of the transfer of debts with regard to a creditor third State),

ARTICLE T (Effects, with regard to a creditor third State, of a unilateral declaration by the successor State that it assumes debts of the predecessor State) *and*

ARTICLE U (Expression and effects of the consent of the creditor third State)¹ (*concluded*)

1. Mr. BEDJAOUI (Special Rapporteur) said that three trends had emerged from the discussion of chapter II of his ninth report (A/CN.4/301 and Add.1).

2. Some members of the Commission, including Mr. Ushakov, thought that only article R should be retained. That view raised the problem of the comparison between State property and State debts. Mr. Ushakov had said that, in the final analysis, the role played by the third State was the same, whether what was involved was a succession to State property or a succession to State debts; the third State would be bound by a transfer of property from the predecessor State to the successor State, and it would similarly be bound by a transfer of debt between those two States. That view, in turn, raised the problem of the legal nature of debt, a question which lay in the realm of the general theory of law. As a rule, the transfer of debts was prohibited in legal systems; there could thus be no subrogation in the matter of debts. If State A was the depository of funds of State B and State B requested State A to transfer those funds to State C, whose economic development it wished to promote, State A would probably have no objection to doing so. If, however, State A was a creditor of State B and, as a result of a succession of States, the debt passed to a State with which State A did not maintain diplomatic relations, or to an enemy State, it was quite reasonable that State A should have to give its consent. That was why, in all internal law systems, the transfer of a debt was possible only with the express consent of the creditor.

3. Both Mr. Ushakov² and Mr. Šahović³ had suggested that article R should be modelled on article 6⁴ on the rights of the successor State to State property passing to it. Although he was not against that suggestion, which the Drafting Committee might consider, it would have the effect of considerably reducing the value of article R. As it stood, article R offered the advantage of establishing a legal relationship between the successor State and the predecessor State, which continued to be subject to the consent of the third State. As Mr. Castañeda had said,⁵ it was a complex legal act, a legal norm in a state of suspension; the consent of the third State was required for that norm to become applicable to it. It was only the conjunction of the various elements composing that complex legal act that produced the expected results with regard to the third State. Article R would not reflect that complex situation if it were modelled on article 6. The role played by the third State in the cases covered by article R and article 6 was not the same.

4. Mr. Ushakov had also suggested the deletion of articles S, T and U, which he found useful, but pre-

mature,⁶ on the ground that the rules they contained were rules of procedure designed to implement the principle stated in article R. He (the Special Rapporteur) was of the opinion that articles S, T and U contained substantive rules without which the complex legal act of transfer of the debt could not take full effect, at least as concerned the third State.

5. Most of the members of the Commission had said that they were in favour of retaining articles R, S, T and U, but many of them had requested further clarifications. They had made general comments on the articles. Mr. Tabibi,⁷ Mr. Njenga⁸ and Mr. Castañeda⁹ had said that they would like those articles to be considered as a whole. Mr. Šahović and Mr. Riphagen¹⁰ had agreed with him on methodology, but would like the Drafting Committee to try to combine those articles and word them positively. He would see that their suggestions were taken into account by the Drafting Committee.

6. Some members of the Commission had again raised the question of the legal nature of the triangular relationship established in the articles. The views on that problem, with which he had already dealt orally, had been described by Mr. Jagota¹¹ in the following way: Mr. Ushakov had said that consent was a procedural matter; Mr. Njenga had said that it was a power of veto, and his (the Special Rapporteur's) view lay somewhere in between. Mr. Jagota had then asked what happened when the predecessor State ceased to exist, as in the case of South Viet Nam referred to by Mr. Sucharitkul, and had suggested that provision should be made for such a possibility, which would constitute an exception to articles R, S, T and U. He (the Special Rapporteur) was of the opinion that, in such a case, the creditor State would be quite wrong to refuse its consent because the exercise of its "power of veto" would be suicidal. Indeed, it was not necessary to limit the third State's power of veto as Mr. Njenga had suggested for obviously, in its own interest, the third State would never exercise that power if it jeopardized the existence of its debt-claim. Moreover, if the rule of succession unquestionably specified that the successor State was the new debtor, as in the case of localized State debts for instance, it was obvious that the third State would not exercise its power of veto since it would be aware that there was no legal basis for its claim. On the contrary, it would hasten to give its consent.

7. Mr. Sette Câmara,¹² Mr. Njenga,¹³ Mr. Yankov and Mr. Tabibi¹⁴ had recognized that it would be dangerous to say that unilateral declarations and devolution agreements gave rise to obligations for the successor State. To reinforce that point, Mr. Sette Câmara¹⁵

¹ For texts, see 1421st meeting, para. 32.

² 1422nd meeting, para. 43.

³ 1423rd meeting, para. 24.

⁴ See 1416th meeting, foot-note 2.

⁵ 1422nd meeting, para. 10.

⁶ *Ibid.*, para. 42.

⁷ 1424th meeting.

⁸ 1423rd meeting.

⁹ 1422nd meeting.

¹⁰ 1423rd meeting, para. 26.

¹¹ *Ibid.*, paras. 19-20.

¹² 1422nd meeting.

¹³ 1423rd meeting.

¹⁴ 1424th meeting.

¹⁵ 1422nd meeting, para. 25.

had referred to article 35 of the Vienna Convention,¹⁶ which related to the notification by which a third State expressly accepted an obligation arising from a treaty. Emphasis had also been placed on the fact that the will of the successor State was not always freely expressed, and some members of the Commission had said that it might be better to delete article S in order to avoid serious complications. Their view was not to be disregarded, but he would come back to it later when mentioning other important aspects of that provision.

8. Many members of the Commission had said that the scope of the articles under consideration should be extended to cover subjects of international law other than States. Such an extension would not pose any problems in view of the flexibility he had provided for in the structure of the draft. Mr. Quentin-Baxter¹⁷ had again referred to the question of the definition of State debt, in which he thought not only financial debts, but also fiscal, economic or monetary obligations, should be included. He (the Special Rapporteur) had no objection, provided the definition was not extended to include real obligations, which established boundary régimes or territorial régimes, and had already been examined in connexion with succession in respect of treaties. It was in the commentary to the articles that it should be explained that the Commission had in mind not only money debts, but also all financial obligations or obligations with financial implications. Mr. Yankov¹⁸ had said it should be made clear that the topic of State succession, which was, for the time being, limited to treaties, property and debts, did not stop at financial obligations. An explanation on that point might also be included in the commentary.

9. Several members of the Commission, particularly Mr. Quentin-Baxter, had emphasized the importance of maintaining a parallel between the articles relating to property and those relating to debts. In addition, Mr. Quentin-Baxter had contrasted succession to treaties, in which there was a triangular relationship, with succession to debts and to property. In his opinion, there should be a *renvoi* to internal law in respect of property and debts, but not in respect of treaties. That was why he had stressed the importance of the bilateral relationship between the predecessor State and the successor State, but had also drawn attention to the need to safeguard the rights and interests of the creditor third State. The fate of the debt should first be considered in terms of the bilateral relationship between the predecessor State and the successor State in order to decide how far the articles relating to State property could serve as a model for the articles on State debt. It seemed to him (the Special Rapporteur) difficult, *a priori*, to justify considering from the point of view of two partners only something which directly affected a third party. A triangular relationship undeniably existed. The articles under consideration were preliminary provisions which described the limits within which the predecessor and successor States could act, while the articles which

followed and which related to each type of succession dealt exclusively with the bilateral relationship between the predecessor State and the successor State and were, as far as possible, based on the provisions relating to State property. Thus, when he had suggested that it should be considered that localized State debts passed to the successor State, it was because the territory to which the succession related had generally benefited from such debts in the form of property. Moreover, Mr. Quentin-Baxter had never suggested that there was an automatic equation between succession to property and succession to debts. It might be possible to take account of his comments in the articles relating to the various types of succession by stipulating that, in the case of the transfer of a part of territory from one State to another, the State which took over the property took over the debt in the same proportion, due regard being paid at the same time to considerations of equity.

10. Comments had also been made on each separate article under consideration and some members of the Commission had asked how they were interrelated. It had been noted that there should be a close relationship between article R and article U, and Mr. Castañeda had drawn a parallel between article R and the second paragraph of article U.¹⁹ If it was true that the extinction of the debt depended on the consent of the creditor, that should be made clear in article R. However, he would point out that he had made a bridge between articles R and U by including in article R the words "in accordance with the provisions of the present articles", in other words, in accordance with article U. Also in connexion with article U, Mr. Tsuruoka had suggested that it should be stated that consent "shall be expressed in a formal act by that State".²⁰ It would be for the Drafting Committee to consider all those problems.

11. Mr. Thiam²¹ seemed to have had the impression that the debts of the predecessor State were transferred to the successor State by some sort of sleight-of-hand, and had asked whether or not a drafting problem was involved. That was the result of the complexity of the triangular legal operation. In practice, the predecessor State might have private creditors if it had, for instance, issued treasury bonds. If a succession of States occurred, it would continue to honour such bonds for a certain time, even if it had been decided that the debts of the predecessor State should pass to the successor State. Taking the example even further, the creditor third State might refuse to consent to a transfer of debts agreed upon by the predecessor State and the successor State, and the predecessor State might then continue to repay the debt, and be reimbursed by the successor State. Although such situations were rare, they had occurred during the period of uncertainty immediately following successions of States and had then been remedied by the payment of compensation. He had given that explanation in order to reply to Mr. Šahović,²² who had said that the triangular relationship had been raised to such a level that it was

¹⁶ See 1417th meeting, foot-note 4.

¹⁷ 1422nd meeting, para. 29.

¹⁸ 1424th meeting, para. 17.

¹⁹ 1422nd meeting, para. 10.

²⁰ 1424th meeting, para. 15.

²¹ 1422nd meeting, para. 17.

²² 1423rd meeting, para. 24.

difficult to see what the predecessor and successor States were doing. Those States were, in fact, doing what they could: if the third State did not give its consent, it could not be bound to accept an assignment of debt. In paragraph 58 of his report, he had made it clear that he was limiting his study to the debts of the predecessor State, without, for all that, neglecting the problem of the creditor third State.

12. Many members of the Commission had said that the articles under consideration should be supplemented by provisions relating to private creditors. Others had shared his view that the scope of the articles should be limited to creditor third States. He had not avoided that problem in his report, but he had refrained from taking a final decision on it until he had heard the opinion of other members of the Commission. He had made the draft articles sufficiently flexible to apply, with minor changes, to the debt-claims of subjects of international law other than States, or even to the debt-claims of natural or juridical persons in private law. In his definition of State debt, he had made it clear that the debtor was a State, but he had not said that the creditor must necessarily also be a State. In any event, the important thing was to start from the assumption that the creditor was a State, on the understanding that provisions on the debt-claims of other subjects of international law or of juridical or natural persons in private law could be added subsequently. In such a case care would have to be taken not to bring into play the consent of the third State of which a private creditor was a national, because then account would have to be taken of the problems of the treatment of aliens and diplomatic protection, which came under the heading of State responsibility. Serious difficulties might also be encountered because of the existence of the Calvo clause and the Declaration on the Establishment of a New International Economic Order, adopted by the General Assembly on 1 May 1974 (resolution 3201 (S-VI)), and which provided, *inter alia*, that aliens were subject to national jurisdictions on the same footing as nationals.

13. Replying to the comments of Mr. Francis,²³ he said it would be possible to extend the scope of the draft articles to cover private creditors without any change in the definition of State debt, or in the chapter on the creditor third State, or the structure of the draft or the articles relating to each type of succession. Those articles referred to general or localized State debts, but did not specify to whom such debts had been contracted; they could therefore be made to apply to debts contracted to private creditors.

14. The wording proposed by Mr. Tsuruoka²⁴ to safeguard the interests of private creditors was simple and elegant. It would also meet the concern expressed by Sir Francis Vallat.²⁵

15. The question raised by Mr. Schwebel²⁶ was irrelevant to the topic under consideration. If it were to be

assumed that all private creditors, whether nationals of the predecessor State or aliens, were to be treated equally, then any idea of the consent of the third State of which the private creditors were nationals must be ruled out, because the triangular relationship would cease to exist, while the bilateral relationship between the predecessor State and the successor State would take full effect. It should be made clear that the consent of the third State was not required for the passing of the debt if there was a rule providing for the transfer of private debts. Such a rule of transfer should not, as Mr. Schwebel thought, be sought in the successor State's obligation to take account of the internal laws of the predecessor State, because that would mean entering into an entirely different subject, namely, that of succession to the laws and the internal legal order of the predecessor State. Moreover, the interests of private creditors which preoccupied Mr. Schwebel would not be served in that way because, as a sovereign State, the successor State could not be required to submit to foreign laws. In such a case, reference should be made to the draft articles on different types of succession. It was also important not to require the prior consent of the third State of which the creditors involved were nationals. If the third State was to become involved, that would not be before the occurrence of the bilateral legal novation bringing about the change of debtor, but at a later stage, for instance, if the successor State or the predecessor State failed to respect the principle of equality of treatment of national and alien private creditors.

16. In that connexion, it was desirable to leave aside the question whether a measure which discriminated between national and alien creditors and took the form either of an act by the successor State or an agreement between the predecessor and successor States for the transfer of debts engaged the responsibility of a State and, if so, which State. That question related not only to the question of State responsibility, which came into play after succession, but also to that of the diplomatic protection of nationals abroad. The Commission should not try to seek solutions to problems which were not related to the topic it was studying, such as the problem of the exhaustion of local remedies referred to by Mr. Njenga.²⁷

17. The reasons given for extending the scope of the draft articles to private creditors were not equally valid. It had been noted that, to a large extent, State debt consisted of domestic loans contracted with private national creditors or loans contracted abroad with private banking consortia. That reason was certainly valid. Mr. Ago had,²⁸ however, given a less valid reason when he had claimed that, by limiting the study to inter-State debts, which were usually governed by treaties, the Commission would be returning to the question of succession of States in respect of treaties. Mr. Ushakov²⁹ had, however, rightly pointed out that a treaty could be declared invalid or unlawful and that there could not be

²³ 1422nd meeting, para. 37.

²⁴ 1424th meeting, para. 13.

²⁵ *Ibid.*, para. 26.

²⁶ 1423rd meeting, paras. 6 *et seq.*

²⁷ *Ibid.*, para. 14.

²⁸ 1422nd meeting, para. 19.

²⁹ *Ibid.*, para. 38.

any succession to such a treaty even if the debt existed, and that, moreover, inter-State debts did not all come into being as a result of treaties. That brought the Commission back to the problem of the source of the debt. Some members had pointed out that there were other sources of debt than treaty sources. For example, Mr. Verosta³⁰ had mentioned the case of a debt incurred for non-payment by the predecessor State of its contribution to an international organization. A debt could also have its source in the pecuniary reparation payable by the predecessor State as a result of an internationally wrongful act. The draft on succession of States in respect of treaties³¹ governed the fate of treaties as a subject-matter of succession; it did not govern the fate of the debts for which such treaties might provide.

18. In order to take account of the comment by Sir Francis Vallat, who had said at the 1424th meeting that a debt either passed with its conditions or not at all, it would be necessary to include a provision in the draft to explain that debts could not be considered in isolation from the circumstances in which they had come into being, and the conditions to which they were subject.

19. In conclusion, he said that, on the basis of the many opinions expressed, the Drafting Committee would be able to examine the four articles as a whole and, if it deemed it appropriate, combine them into one, two or three. It could consider the wording which Mr. Tsuruoka had proposed in order to safeguard the interests of private creditors, or, if it wished to go further, draft an article stating that national or alien private creditors were to be treated equally in a bilateral relationship between successor and predecessor States when a debt passed from one to the other.

20. Mr. DÍAZ-GONZÁLEZ said that if the Commission accepted article O in its present form or decided to incorporate the changes suggested by Mr. Castañeda,³² with which he could agree, articles R, S, T and U were simply a logical outcome of article O. The comments by previous speakers and the Special Rapporteur's summing up had confirmed his opinion in that regard. The articles now under consideration contained all the necessary elements for acceptance, and could even meet Mr. Ushakov's view³³ that article R should be drafted in such a way as to allow more room for the triangular relationship between the predecessor State, the successor State and the creditor third State. The Drafting Committee therefore had an ample basis for the preparation of a number of appropriate articles to propose to the Commission.

21. Mr. VEROSTA said that, at the beginning of the discussion on chapter II, he had proposed³⁴ that the Commission should formulate rules relating not only to debts contracted by States to other States, but also to debts contracted to other subjects of international law. He had not mentioned debts contracted to juridical persons which were not subjects of international law,

or to private creditors. If the Commission decided to limit the draft articles to debts contracted to States or to other subjects of international law, it would have to draft a safeguarding clause similar to the one contained in article X, relating to third State property.

22. Mr. AGO said that he had the impression that, in examining the question of private debts, several members of the Commission had strayed from the real problem of State succession, a problem which was governed exclusively by public international law. Like the Special Rapporteur, he considered that it was not necessary to deal with the protection of the interests of private creditors, because that question belonged elsewhere. It was not even necessary to deal with the possibility that a third State might intervene to protect a private creditor whose interests might have been jeopardized during a succession of States. In such a case, the third State would not become involved as a matter of succession, but as a matter of the treatment of aliens and diplomatic protection. The Commission should deal only with the subject of State succession.

23. Since he did not think that his views had always been clearly understood, he wished to stress that, in his opinion, the problem of State succession was, above all, a problem of the bilateral relationship between the predecessor State and the successor State. It was only in certain cases that the problem was complicated by the involvement of a third subject of international law and the question of its consent to the settlement of a succession. If a State floated a loan on its domestic market and then split into several States, it was between the predecessor State and the new States that questions of succession would have to be settled. Questions involving a creditor third State would arise only incidentally and in exceptional cases. He had therefore been surprised at the amount of importance given to such questions, particularly in view of the definition of State debt contained in article O.³⁵

24. Cases of succession involving trilateral relationships did not, in his opinion, necessarily come under succession of States in respect of treaties. Questions of succession frequently formed the subject of treaties and the subject-matter under consideration was perhaps less important than it seemed. That was why he did not think it was possible to concentrate attention on the problem of the succession of one State to another in respect of debts contracted to a third State or to another subject of international law, and devote only a short safeguarding clause to the case which he considered to be the normal case. It should be explained that the Commission would deal subsequently with the normal case, which involved a bilateral relationship having nothing to do with a third State.

25. Mr. BEDJAOUÏ (Special Rapporteur) said that he shared Mr. Ago's view. He would, however, point out that, when he had submitted the first articles relating to State property, he had dealt only with the bilateral relationship between the predecessor State and the successor State. He had then immediately been requested to draft an article X designed to safeguard the interests

³⁰ *Ibid.*, para. 13.

³¹ See 1416th meeting, foot-note 1.

³² 1417th meeting, para. 36.

³³ 1422nd meeting, para. 43.

³⁴ *Ibid.*, paras. 11 *et seq.*

³⁵ 1416th meeting, para. 1.

of third States. He had therefore thought it advisable to follow a similar procedure for debts. After having defined State debt, he had shown how the involvement of a third State created a triangular relationship. He had then gone on to the articles on the various types of succession, which again only concerned bilateral relationships.

26. The CHAIRMAN said it appeared to be the wish of the Commission that the Drafting Committee should discuss, in particular, the scope of the subject matter, and also the status of the draft articles in question, on which a final decision would not be taken until the Commission had considered other articles dealing with specific cases.

27. If there was no objection, he would take it that the Commission agreed, on that understanding, to refer articles R, S, T and U to the Drafting Committee.

*It was so agreed.*³⁶

ARTICLE C (Definition of odious debts) *and*

ARTICLE D (Non-transferability of odious debts)

28. The CHAIRMAN invited the Special Rapporteur to introduce chapter III of his ninth report (A/CN.4/301, p. 53), and in particular articles C and D, which read as follows:

Article C. Definition of odious debts

For the purposes of the present articles, "odious debts" means:

(a) all debts contracted by the predecessor State with a view to attaining objectives contrary to the major interests of the successor State or of the transferred territory;

(b) all debts contracted by the predecessor State with an aim and for a purpose not in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

Article D. Non-transferability of odious debts (Except in the case of uniting of States), odious debts contracted by the predecessor State are not transferable to the successor State.

29. Mr. BEDJAOUÏ (Special Rapporteur) said that, in article 6 of its draft on succession of States in respect of treaties,³⁷ the Commission had been careful to point out that it applied only to the effects of a regular and valid succession of States, "occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations". It had also deemed it advisable to specify, in article 13 of the draft, that "Nothing in the present articles shall be considered as prejudicing in any respect any question relating to the validity of a treaty".

30. In the present draft, the Commission had adopted article 2,³⁸ which corresponded to article 6 of the draft on succession of States in respect of treaties, but it could not adopt an article corresponding to article 13 of that

draft because, in the case of succession of States in matters other than treaties, the problem was not that of the validity of the source of the obligation. Even if the treaty by which the debt had been created was not valid, the debt could have come into being, the money could have been paid to the predecessor State and the latter could even have begun to service the debt by paying interest and annual instalments. On the other hand, even if the treaty was regular, in other words, even if the legal source of the debt was valid, there was another element which might be irregular, invalid or odious, namely, the application or use of the debt, and it was with that problem that the Commission was concerned.

31. Both the literature and practice favoured the "clean slate" principle with regard to "odious" debts, that was to say, they viewed such debts of the predecessor State as not transferable to the successor State. It was important therefore, to define "odious" debts and to determine their legal régime in the context of State succession.

32. There was no valid definition of odious debts either in the literature or in State practice, both of which appeared to confuse "odious" debts, "régime" debts, "war" debts and "subjugation" debts. The classification of such debts in relation to one another was uncertain. What was certain, however, was that all were excluded from any succession of States, essentially on the basis of moral principles; the successor State objected to assuming such debts either on grounds of public policy or because they were contrary to the major interests of the successor State or of the territory transferred.

33. He proposed to include all such debts under the expression "odious debts", which seemed to cover them all, and to avoid the expression "régime debts", which could cause confusion. The two expressions meant roughly the same thing and the only difference between them appeared, *prima facie*, to be one of approach—debts were odious when viewed from the standpoint of the successor State, and régime debts when viewed from the standpoint of the predecessor State. However, he preferred to speak of "odious debts", since the expression "régime debts" could give rise to two misunderstandings.

34. First, some writers, like Gaston Jèze, considered that "régime debts" were not State debts,³⁹ whereas, as Mr. Ushakov had rightly pointed out,⁴⁰ the debt of a régime or a Government was a State debt, since it related to the finances or patrimony of the State. Second, the expression "régime debts" gave the impression that they were debts linked to a particular political régime or a particular form of government in terms of internal constitutional law—a monarchy, a fascist régime, a bourgeois régime, and so on. The expression might therefore be employed in the context of a succession of internal law régimes, in other words, of a succession of Governments, for it seemed to imply, in the eyes of some writers, the continuity and identity of the State. It was better, therefore, in the context of State succession, to speak of "odious debts" so as to avoid any risk of confusion.

³⁶ For the consideration of the texts proposed by the Drafting Committee, see 1447th meeting, paras. 3, 8, 9 and 27 *et seq.*, and 1450th meeting, paras. 7-47.

³⁷ See 1416th meeting, foot-note 1.

³⁸ *Ibid.*, foot-note 2.

³⁹ See A/CN.4/301 and Add.1, para. 122.

⁴⁰ 1417th meeting, para. 7.

35. Although odious debts and régime debts overlapped to a large extent, there was nevertheless some difference between them, since the scope of régime debts appeared in some respects to be wider than that of odious debts. All odious debts were régime debts because they could be charged to a particular régime, but not all régime debts were necessarily odious. Some régime debts were linked to a given policy, either internal or external. The successor State, without necessarily disavowing that policy, might disapprove of it and as a consequence be unwilling to assume the debts in question.

36. Moreover, in the imaginary case he had suggested in paragraph 127 of his report, if State A contracted a war debt for the purposes of a conflict with State B and then united with State C, State C, against which the war had not been directed and which had affinities with State A, since it had agreed to unite with it, might consider that the war debt—the régime debt—of State A was not an odious debt, especially if it felt that State A had been engaged in a war of self-defence.

37. He therefore preferred to confine non-transferability to cases of odious debts, so as to avoid any errors of interpretation. Such debts could, in his opinion, be defined from two angles: the standpoint of the successor State, the main party concerned, since it was the State that might become the new debtor, and the standpoint of the international community, which would also have something to say if the debt had been contracted for a purpose that was not in conformity with international law.

38. From the standpoint of the successor State, an odious debt was a State debt assumed by the predecessor State in furtherance of purposes contrary to the major interests of the successor State or of the territory transferred to it. The interests must be "major", for any political, economic or social action by a State, such as an increase in customs tariffs or in the price of raw materials, was capable, ultimately, of impairing the interests of another State, whether a neighbour or not. Obviously, in such a case, the debts were not odious debts for the successor State that had been injured in some degree; otherwise, any debt of the predecessor State might be deemed odious by the successor State and cause it to reject practically all debts of the predecessor State. Thus, "odious" debts must be confined to debts which seriously impaired the major interests of the successor State.

39. If, through its political, economic or social system—which, like any other State, it had the right to choose freely—the predecessor State gravely impaired the major interests of another State, the latter could probably do nothing to remedy the situation, since the acts in question were lawful; but if, following a succession of States, it acquired the status of a successor State, it could not be compelled to succeed to a debt which had entailed harmful effects for itself. It might be, however, that, once it had become a successor State, it benefited from the action of the predecessor State about which it had previously complained. The debt must, therefore, constitute a serious impairment of the major interests of the successor State *at the moment of the succession of States*.

40. From the point of view of the international community, odious debts were debts contracted for purposes recognized as wrongful in international law. In the case, for example, of a debt contracted by the predecessor State with a view to violating obligations incumbent on it under a multilateral or even a bilateral treaty, the identity of the victim was of no consequence: even if there was no direct impairment of its major interests, the successor State would have to consider the debt as odious, since it had helped the predecessor State to breach obligations imposed upon it by a treaty. The successor State must refuse to lend support to a wrongful act, and it would be all the more inclined to take that course since by so doing it would rid itself of a debt.

41. There was also the case of debts which enabled the predecessor State to breach obligations in respect of human rights or the right of self-determination. For example, if the predecessor State contracted a debt in order to purchase arms which were used to infringe human rights, commit genocide or institute *apartheid*, the successor State would have to consider that debt as odious, even if it had not been a direct victim of the wrongful acts in question, since it must not lend support to the breach of international law. The same was true of debts contracted for the purposes of subjugation or colonization. In the same way, debts contracted by the predecessor State in order to wage a war of aggression were not transferable, irrespective of whether or not the war had been directed against the successor State.

42. That meant that account must be taken both of the interests of the successor State and of those of the international community, which did not always coincide, and that was what he had done in the definition of odious debts which he proposed in article C.

43. Once odious debts had been defined, their fate seemed clear. War debts were, in principle, rejected by State practice, as he had shown in his report.⁴¹ Under the terms of the Treaty of Versailles, for example, Denmark, which had succeeded to Schleswig after the separation of that territory from Germany, had been exempted from the war debts of the German Empire, although it had remained neutral during the 1914-1918 war.⁴² That showed that the war debt was considered odious by the successor State, even though the latter had not been a victim of the war waged by the predecessor State.

44. The peace treaties after the First World War had extended the notion of "war debt" to cover all debts contracted during the war. Thus, a loan concluded by Germany in 1917 for the construction for non-military purposes of a bridge in Upper Silesia had been treated as a war debt—and thus as non-transferable—by the German Reparations Commission, simply because of the date of its conclusion.⁴³

45. But as he had pointed out,⁴⁴ there were also instances in State practice of the assumption of war debts, apparently on the basis of considerations of political expediency.

⁴¹ See A/CN.4/301 and Add.1, paras. 142-152.

⁴² *Ibid.*, para. 146.

⁴³ *Ibid.*, para. 150.

⁴⁴ *Ibid.*, paras. 153-156.

46. Subjugation debts—debts contracted by a State in order to repress, in a territory which it dominated or sought to dominate, an insurrectionary movement or a war of liberation, or to strengthen its economic colonization of the territory—were also non-transferable, for, as Chicherin, the People's Commissar for Foreign Affairs of Soviet Russia, had stated in 1921, "No people is obliged to pay the cost of the chains it has borne for centuries".⁴⁵

47. Thus, in the Cuban debt controversy after the Spanish-American war that ended with the Treaty of Paris (1898)⁴⁶ the United States had repudiated the debts which Spain had contracted to keep Cuba under its domination and in particular to oppose the insurrectionary movements of 1868 and 1895. The United States had maintained, on the one hand, that the financial burdens resulting from Spanish war loans had been imposed upon Cuba without the consent of the Cuban people and, on the other hand, that the loans had served to finance operations contrary to the island's interests. Spain, for its part, had in the end renounced its claim for the assumption of the loans contracted by it in order to combat the Cuban insurrectionary movements, but it had asked that the latter should assume debts which had been used for the economic development of the island.

48. In the case of the loans contracted by Germany in order to Germanize part of Poland by establishing German nationals in Polish territory (the Posen settlers case), the Treaty of Versailles had excused Poland from assuming the debt.⁴⁷ Similarly, at the Round Table Conference held at The Hague in 1949, Indonesia had refused to assume the Netherlands debts resulting from its military operations against the Indonesian national liberation movement.⁴⁸ Algeria had likewise refused to assume debts which had served to finance French military operations in its territory.⁴⁹

49. The practice showed, therefore, that successor States had, in the majority of cases, rejected the odious debts of the predecessor State.

50. It was important to distinguish between the problem of odious debts and that of the validity of the succession of States, which had already been settled in article 2. The two matters were independent of each other, for the existence of odious debts did not preclude the occurrence of a perfectly regular succession of States. A distinction must also be made between the problem of odious debts and that of the validity of the legal source of the debt, which were also separate.

51. It was sufficient therefore to state, as he had done in article D, that odious debts contracted by the predecessor State were as a general rule not transferable to the successor State. But consideration must also be given to the question of the fate of such debts in the event of the disappearance of the predecessor State. Since the Commission had agreed to deal only with valid instances of

the succession of States, the case of the annexation of the predecessor State could be left aside; there remained the case of the disappearance of the predecessor State as a result of the uniting or separation of States. When the predecessor State disappeared, did the debt also disappear, or should it be assumed by the successor State or States? He had not felt competent to answer that question. For that reason, he had placed the phrase "except in the case of the uniting of States", which appeared at the beginning of article D, within square brackets.

Proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (para. 4 of General Assembly resolution 31/76) (A/CN.4/300)

[Item 5 of the agenda]

52. The CHAIRMAN said that the Commission had decided⁵⁰ to establish a working group to study the proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, in accordance with paragraph 4 of General Assembly resolution 31/76. He proposed that the group, the formation of which would be without prejudice to the possible appointment of a special rapporteur, should have as its members: Mr. El-Erian (Chairman), Mr. Calle y Calle, Mr. Dadzie, Mr. Francis, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Ushakov and Mr. Yankov.

53. If there was no objection, he would take it that the Commission agreed to that proposal.

It was so agreed.

The meeting rose at 6 p.m.

⁵⁰ 1415th meeting, para. 4.

1426th MEETING

Tuesday, 24 May 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Bedjaoui, Mr. Calle y Calle, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Succession of States in respect of matters other than treaties (continued) (A/CN.4/301 and Add.1)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR (continued)

ARTICLE C (Definition of odious debts) and

⁴⁵ *Ibid.*, para. 157.

⁴⁶ *Ibid.*, paras. 159-167.

⁴⁷ *Ibid.*, para. 168.

⁴⁸ *Ibid.*, para. 169.

⁴⁹ *Ibid.*, para. 334.

ARTICLE D (Non-transferability of odious debts)¹
(continued)

1. Mr CALLE y CALLE said that articles C and D concerned debts which could be repudiated because, quite apart from any considerations of the validity of the manner in which they had been contracted or of their source, they were intrinsically contrary to international morality. As to the terminology of the articles, although imprecise, the phrase “major interests” contained in article C, paragraph (a), was intelligible, for all members of the Commission were familiar with concepts such as that of *force majeure*, the notion of “serious breach” to which Mr. Ago had alluded in respect of certain international crimes, and the fundamental rights of States, such as survival or independence, to which reference had also been made. It was obvious that debts which had been employed for purposes contrary to the right to survival or independence of a State were by their very nature to be considered odious and would therefore not be transferable.

2. It would be preferable to divide article D into two paragraphs, the first of which would simply state the rule that “odious debts contracted by the predecessor State are not transferable to the successor State”. The exception to that rule, at present placed within square brackets, could then be stated in the second paragraph, which might read “The odious nature of a debt may not be invoked as a ground for its non-transferability in the event of a uniting of States”. In suggesting that change, he had in mind the provisions of article W (A/CN.4/301 and Add.1, para. 456).

3. Mr. USHAKOV said that the Commission was dealing not with debts as such but with the effects of State succession in respect of debts, and was considering only the case of lawful debts. From the legal standpoint, lawful debts could not be odious, since odious debts were necessarily unlawful debts. However, from the political standpoint or from the standpoint of international morality, even a legally valid debt could be odious, although it might be difficult to specify by which moral or political criterion it was to be assessed.

4. The Commission was dealing with succession of States, a term which, according to the definition given in article 3, paragraph (a),² meant “the replacement of one State by another in the responsibility for the international relations of territory”, and not with succession of Governments, meaning the replacement of one political régime by another, which was an altogether different matter. “Régime debts” should not, therefore, be taken into consideration in the draft articles.

5. With regard to the definition of odious debts, it should be noted in connexion with the criterion set forth in article C, paragraph (a), that the successor State did not exist at the time when the debt was contracted and that, consequently, the predecessor State would not have been able to foresee what would be the “major interests” of the successor State. On the other hand, he could tentatively endorse the criterion set forth in paragraph (b).

6. With regard to the non-transferability of odious debts, in the case of a debt contracted by the predecessor

State for the purposes of committing aggression, article D would mean that the aggressor State, if it united with another State, would be relieved of its debt, since an odious debt was not transferable to the successor State, despite the fact that it included the aggressor State. The aggressor predecessor State would also be relieved of its debt if it split into several States. Again, if part of the territory of the aggressor predecessor State separated from that State, the newly independent territory, despite the fact that it had formed part of the aggressor State, would then, as a successor State, be relieved of the debt. Lastly, if the aggressor predecessor State transferred part of its territory to another State, the territory transferred would also be relieved of odious debt. Such were the consequences of article D, when considered in conjunction with the definition given in article C, paragraph (b).

7. Article D was not acceptable, therefore, and for the time being it would be better to give up the attempt to formulate a general rule concerning odious debts. From the point of view of methodology, it would be preferable to begin by working out specific rules before going on to formulate general rules. It would be better to consider first succession to State debts in the different cases of State succession—transfer of territory, uniting or separation of States, and so forth—envisaged by the Special Rapporteur in his typology of succession.

8. Mr. TSURUOKA said he agreed with Mr. Ushakov's views concerning the methodology to be followed in elaborating the draft articles, but only in part, since everything depended on the way in which the general provisions proposed by the Special Rapporteur were interpreted. Mr. Ushakov would be justified if the Commission were being called upon to proceed forthwith to formulate precise and definitive general rules. If, however, those general rules were regarded merely as a pointer to indicate the direction to be followed in elaborating specific rules, the methodology adopted by the Special Rapporteur was acceptable.

9. With regard to “odious” debts, while subscribing to the principle expressed by the Special Rapporteur, he considered it difficult to lay down that principle in the form of a legal rule and to express that rule sufficiently precisely to ensure that it was applied objectively in all cases, and to overcome the practical difficulties to which its interpretation was likely to give rise.

10. With regard to the placing of the provisions contained in articles C and D, since they constituted an exception to the normal rule concerning succession to State debts, they should appear after those rules instead of before them.

11. With regard to the definition of odious debts, he was of the opinion that the criterion set forth in article C, paragraph (a) introduced two subjective elements: first, the judgment of the successor State, which was left to decide whether the debt contracted by the predecessor State was contrary to its major interests; and, secondly, the intention of the predecessor State, which might maintain that the debt had not been intended to impair the interests of the successor State. Again, as Mr. Ushakov had rightly observed, the predecessor State could argue that, at the time when it had contracted the debt, it had

¹ For texts, see 1425th meeting, para. 28.

² See 1416th meeting, foot-note 2.

been unaware that a successor State would subsequently emerge as a result of a succession of States. The expression "major interests" was vague and ambiguous and lent itself to arbitrary interpretations, for it was difficult to determine to what extent a debt "seriously impaired the major interests of the successor State", as the Special Rapporteur had put it in his introductory statement.³

12. With regard to the criterion set forth in article C, paragraph (b), he wondered whether a distinction should not be made between the various rules of international law, since some rules were more important than others. The Special Rapporteur had referred particularly to "the principles of international law embodied in the Charter of the United Nations"; it might be appropriate to indicate what those principles were. Without going so far as to reproduce the list contained in the sixth preambular paragraph of the Vienna Convention,⁴ which referred to "the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all", it should nevertheless be specified what was meant by "not in conformity with international law", so that cases which could be said to involve "odious debts" could be distinguished from cases which could not. He noted that article C, paragraph (b) raised only the question of the lawfulness of debts and not that of the lawfulness of the succession of States, a matter which, as the Special Rapporteur had observed, had already been dealt with in article 2.

13. With regard to article D, the exception which the Special Rapporteur had made to the rule of the non-transferability of odious debts in the case of the uniting of States did not seem very clear. Since article D constituted only a preliminary general provision designed to indicate the path which the Commission should follow in elaborating other provisions, he proposed that the expression between brackets be replaced by the words "subject to the present articles".

14. In conclusion, he endorsed the idea that in most cases odious debts were non-transferable but that idea was extremely difficult to translate into legal language and to apply objectively in practice; it could well raise more difficulties than it would resolve.

15. Mr. ŠAHOVIĆ said he was willing to follow the Special Rapporteur's lead in his efforts to formulate, as part of the general provisions, a clause which would fix the limits of succession in respect of State debts. The idea formulated by the Special Rapporteur in articles C and D should be the subject of a thorough discussion which would enable the members of the Commission to reach agreement on the definition of a special category of State debts known as "odious debts".

16. The fact that the Special Rapporteur had placed the expression "odious debts" within inverted commas seemed to show that he himself was not sure that such

debts constituted an entirely separate category. In fact, odious debts were more in the nature of a theoretical concept deriving from doctrine which the Special Rapporteur was proposing to make into a juridical concept by according it a separate place in international law.

17. The State practice which the Special Rapporteur had cited in his report showed that he had been right to lay down, in article D, the principle of the non-transferability of odious debts. However, the question was whether odious debts could be made into a special category of State debts and whether they should be made an exception to the general rules concerning succession in respect of State debts.

18. He agreed with Mr. Ushakov that it would be better to begin by formulating specific rules for particular cases before going on to work out general rules. It would therefore be preferable to consider the question of odious debts by reference to the different types of State succession and to see at a later stage whether a general rule could be formulated to cover them. It would be premature to start by laying down a definitive general rule, but the rule proposed by the Special Rapporteur in article D might perhaps be accepted on a preliminary basis.

19. With regard to article C, he wondered whether it was really necessary to define odious debts and what was the relationship between article C, paragraph (b), and article 2. He also wondered whether it was necessary to make a distinction between the criteria set forth in paragraph (a) and those in paragraph (b), since if the situation covered by paragraph (a) could not be accepted as lawful, it fell under the provisions of paragraph (b). There was therefore no reason to lay down two separate criteria for odious debts.

20. Mr. NJENGA said he approved, in principle, the approach adopted by the Special Rapporteur in articles C and D. It would, indeed, be contradictory for the Commission to say that the criterion for rejecting the transferability of odious debts was their moral reprehensibility and then to go on to say that such debts should none the less pass to the successor State. With regard to régime debts, the Commission could not say that a people which replaced an oppressive régime should be made to pay the debts which that régime had contracted for the purpose of maintaining its oppression. If the Commission accepted that any debts of the type mentioned in article C, paragraph (b), should pass to the successor, it would be saying in effect that action contrary to international law would not give rise to any consequences for the predecessor State. Their sanctionary power with regard to States which contravened the principles of international law was an aspect of the draft articles which some speakers had minimized, but which must on no account be overlooked.

21. Care must also be taken to ensure that the interests of creditors who had knowingly contributed to loans contracted for illegal purposes were not secured. States such as the western countries which had helped to finance the construction of the Cabora Bassa dam in Mozambique even though they had known that the purpose of the project was to enable Portugal to settle large numbers of its own nationals in that country and thereby oppress

³ 1425th meeting, para. 38.

⁴ See 1417th meeting, foot-note 4.

the local population, should not be allowed to claim, after an occurrence of succession, that they had been ignorant of the proposed use of the loan and were therefore entitled to repayment. With that consideration in mind, and in order to ensure that the new State did not find itself under an obligation to repay such loans simply because it was the only entity left to do so, he favoured the deletion from article D of the words which appeared in square brackets. With a provision such as article D, the sanctionary aspect was particularly important.

22. With regard to article C, paragraph (a), he considered it preferable to replace the words "with a view to attaining objectives contrary to" by the words "with a view to injuring".

23. Mr. SUCHARITKUL said he shared the view expressed by the Special Rapporteur, but also subscribed to the general observations of Mr. Ushakov and the drafting comments of Mr. Tsuruoka.

24. With regard to the definition of odious debts, he agreed with the criterion expressed in article C, paragraph (a). With regard to the criterion expressed in paragraph (b), however, debts "not in conformity with international law" were unlawful and consequently invalid *ab initio* and thus fell within the definition of odious debts given by Mr. Ushakov.

25. In article D the Special Rapporteur had laid too much emphasis on the protection of the interests of the successor State without taking sufficiently into account the interests of the creditor State. It might be asked what would become of the odious debts if the predecessor State were to disappear: would the debts disappear also?

26. State practice varied in the matter of the transfer of such debts as régime debts and war debts, which made him fear that a rule as absolute as that laid down in article D would be very difficult to accept. In the case of the war debt contracted by Japan vis-à-vis Thailand during the Second World War, by mutual agreement Japan and Thailand recognized the validity of that debt and its transferability from the Japanese Empire to the new Japanese State.

27. Mr. EL-ERIAN said that chapter III of the report and the wording of articles C and D bore out what the Special Rapporteur had said in his report with regard to the conflict between the requirements of a sound international legal order and those of equity (A/CN.4/301 and Add.1, para. 92). The Special Rapporteur had been very courageous in tackling so complex a subject as that of odious debts.

28. The fact that, in his presentation, the Special Rapporteur had had no difficulty in quoting examples from writers, practice, treaties and jurisprudence showed that the concept of odious debts existed. However, very difficult problems arose when an attempt was made to give a clear definition of that concept. Perhaps the Commission might consider, at the present stage, adopting a similar approach to the one it had followed in the case of the concept of *jus cogens*, by formally recognizing the existence of the concept, giving examples in the commentary of cases in which it would apply, but avoiding giving a categorical definition.

29. One of the problems was that, with regard to régime debts in particular, the Commission found itself on the borderline between succession of States and a question it had decided to leave aside, succession of Governments. The difficulties of determining where that borderline lay were illustrated by the example given by Mr. Njenga of a change in régime so radical that it could be held to represent more than a mere change of Government. With a view to illustrating the difficulties involved, he might mention similar problems of international law, such as that of determining where responsibility lay when a State had both an established and a *de facto* Government at the same time, or when one of them was confirmed as the sole authority. In the same vein, there was the question whether responsibility for the acts of rebels who assumed the status of belligerents should be attributable to the rebels or to the Government of the State concerned; the answer to that question would be different for those who recognized belligerency and those who did not.

30. Mr. Ushakov and Mr. Sucharitkul had raised questions as to the possibility that a debt might be invalid *ab initio*. Other questions to be taken into account were the recognition, as in the judgment by the French Conseil d'Etat in 1916 in the Bordeaux Gas case,⁵ that in some instances performance of an obligation, while still possible, could be so burdensome that considerations of justice warranted special treatment for the debtor; the difficulty of formulating considerations of justice into rules; and the existence, in article 46, paragraph 1, of the Vienna Convention of clear provisions concerning conditions under which a treaty could be considered as an odious burden and therefore not binding.

31. The exception which the Special Rapporteur was suggesting might be included in article D was presented within square brackets, but was, in his view, so sweeping that it would automatically entail the transfer to the new State, born of a uniting of States, even of obligations which were clearly and indisputably odious.

32. Mr. FRANCIS said that, in general, he agreed with the approach adopted by the Special Rapporteur in dealing with the question of odious debts. The report cited a number of cases of great moral turpitude on the part of the debtor State. He had no objection to designating such cases as cases of odious debt and it was quite clear that they had to be considered by the Commission.

33. In article C (a), Mr. Ushakov had rightly pointed out that the successor State might in fact be the actual territory transferred. If the successor State existed at the time the debt was contracted, it could be said that the intention of the debtor State had been to injure the major interests of an existing State. Where, however, the successor State consisted exclusively of the territory transferred, the question of intent hardly arose. Consequently, the loan ought perhaps to be viewed in terms of consequences rather than intent. In other words, where the transferred territory itself became the successor State,

⁵ *Compagnie générale d'éclairage de Bordeaux v. ville de Bordeaux*. See M. Dalloz, *Recueil périodique et critique de jurisprudence, de législation et de doctrine* (Paris, Jurisprudence générale Dalloz, year 1916), part three, pp. 25 et seq.

it was possible to discern not the intent but the consequences of the loan. On the other hand, if the successor State already existed, for instance if State A, the successor State, took over a portion of State B's territory, it was then possible to discern ill intent against the successor State. Thus, article C (a) dealt with both intent and consequence, since two different situations were conceivable: one in which the successor State already existed, and the other in which a State came into being as a result of territory transferred from the debtor State.

34. Article C (b), however, plainly dealt with deliberate ill intent, for it covered "all debts contracted by the predecessor State with an aim and for a purpose not in conformity with international law". Accordingly, the provisions contained in the two subparagraphs of article C were disjunctive and not necessarily cumulative.

35. With regard to article D, he shared Mr. Njenga's view that, as a general principle, odious debts should not in any way be transferable to the successor State, although certain exceptions could of course be envisaged—for example, instances in which the borrowing State might have used the loan for purposes entirely different from those explained to the creditor State. Nevertheless, generally speaking, odious debts should not be transferable to the successor State.

36. Mr. RIPHAGEN said that, in discussing so-called odious debts, the Commission was dealing with a very special aspect of the relationship between the predecessor State and the successor State. At the same time, the subject raised the question of the extent to which a debt, as such, was tainted by the use made of the money received—something that was by no means self-evident.

37. He had some difficulty in understanding the relationship between odious debts and the justification, so to speak, for the transfer of debts in cases of State succession. Viewed as a whole, the draft articles based the justification for the transfer of debts on three objective facts: first, the contributory capacity of the territory transferred, which, obviously, did not relate to the nature of the debt; secondly, the fact that State property, which might be the economic counterpart of a debt, passed from the predecessor State to the successor State; and thirdly, the benefit to the transferred territory itself, which played a role in determining whether debts passed to the successor State. One could imagine a case in which the predecessor State used a loan or loans to establish a military infrastructure in a part of territory which was later transferred to another neighbouring State. That infrastructure, which would normally pass to the successor State, would be of benefit to the successor State and perhaps to the territory involved. In that instance, the purpose for which the military infrastructure was originally established might well be irrelevant. The example was perhaps a special one and he had no wish to assert that odious debts did not exist. He doubted very much, however, whether typically odious debts would fall into the category of debts to be passed to the successor State under the special rules that the Commission would be discussing later.

38. He agreed with Mr. Šahović that the best course would be first to consider the rules on the transfer of debts and then to determine the need to provide for

exceptions. At the present stage, he considered that allowance for exceptions would not prove necessary, for the Commission regarded non-transferable debts as debts which should not fall into any of the categories of debts that passed to the successor State.

39. Mr. QUENTIN-BAXTER said that, obviously, the Commission must recognize the existence of the problem involved in the question of odious debts, but he tended to share the view of those members who thought that it would be better to consider individual kinds of State succession before attempting to reach any final conclusions on the matter.

40. The two subparagraphs of article C covered two quite different cases. Admittedly, a loan could be extended without any particular stipulations regarding its purpose, but the Commission had to accept the hypothesis that a debt could be contracted for an illegal purpose. The draft articles should not in any way imply that international law would recognize the existence of such a debt or of the obligation to repay it. Nevertheless, he was of the opinion that the debts mentioned in article C (b) lay outside the confines of the law of State succession.

41. Article C (a), however, did fall within the Commission's subject, for it was acknowledged that, even in instances of succession of Governments, in which no change of international personality occurred, there were none the less limits to the basic rule of continuity of obligations, a principle which, *a fortiori*, must apply to cases of true succession of international persons. In the case of subparagraph (b), what was illegal was also certainly immoral, but subparagraph (a) dealt with situations in which the outcome had to be known before the debt could be stigmatized as odious. Events such as the separation of States had particular consequences and, as with the precedents relating to succession of Governments, the decisive factor was the outcome, rather than the intrinsic immorality, of the transaction.

42. In the literature on succession of States in respect of treaties, many learned authors were ready to recognize that the extent to which rights and obligations were transferred depended on the circumstances which gave rise to the new international person. In the present draft, allowance had to be made for the special case of a new State which came into being in circumstances of bitter enmity towards the predecessor State and would, presumably, be unwilling to assume any burden of debt that might be regarded as continuing a situation against which it had successfully rebelled. Obviously, the law itself should take account of situations of that kind.

43. The CHAIRMAN, speaking as a member of the Commission, said it was clear that consideration must be given to the significant question of odious debts. Nevertheless, he experienced great difficulties in accepting articles C and D, at least in their present form. There appeared to be a tendency to move away from the realm of law into that of morality and away from the realm of the law of the effects of a succession of States into that of the law affecting the validity of a debt or, at any rate, its legal incidence. The Commission should be cautious about extending the boundaries too far but it ought to bring the matter to the attention of the General Assembly, which would make its views known in due course.

44. When it affirmed that particular debts were not transferable, the Commission was expressing an opinion on the validity or the legal effects of those debts and thus dealing with the internal law of contracts. For example, how was the illegal purpose or objective to be determined? A minority Government might contract a loan in order to purchase supplies of wheat, although its true objective was to release other sources of finance in order to buy weapons to suppress the majority of the people of the country concerned. Was a debt incurred in that way to be deemed odious and how could such situations be differentiated by means of a general rule? If the Commission attempted to deal with the concept of odious debts for the purpose of codification, it would be embarking on a task which was, if not impossible, at least extremely difficult. Perhaps it would be better to state, in effect, that the topic, although important, was not yet ripe for codification or for the establishment of positive rules.

45. Again, in most systems of private law, a relevant factor would be the creditor's knowledge of the illegal purpose of the loan. If the creditor was not considered guilty, it could be assumed that the debt would not be tainted by the secret wrongful intent of the debtor. He questioned whether the knowledge of the creditor could be taken into account in the draft articles; it would certainly be a very difficult element to include in the definition in article C.

46. Article 1 spoke of "the effects of a succession of States" and a number of the other articles already adopted spoke of the "passing" of State property. Article D, however, stated that odious debts were "not transferable", which implied that in the case of debts that did pass to the successor State, there was an act of transfer. Obviously, article D should speak of the passing, and not the transfer, of debts; otherwise, it would seem to be establishing an imperative rule and, moreover, one that could not apply in the cases covered by article C (a). For instance, if a successor State expressed its readiness to assume a debt, it could then reverse its position and claim that the debt was contrary to its major interests. Transferability was not a pertinent question in the context of State succession; rather, it was necessary to consider the question of the effects of a succession of States. It would be preferable to think in terms of some kind of saving clause instead of attempting to establish positive rules.

47. He noted in that connexion that article 6 of the draft articles on succession of States in respect of treaties⁶ and article 2 and article C of the draft articles now under consideration contained a provision which employed virtually the same form of language. However, in the case of article C, the concept involved had been converted from a limitation on the scope of the draft articles into a positive rule relating to particular classes of debts, a change that was of very great significance. In the one case, the terms were being employed in a limitative fashion, and in the other they were being used for the purpose of positive legislation. He failed to see the justification for such a course. If a saving clause were used, it might be possible to raise the matter for future consideration,

without going beyond the terms of reference of the subject matter.

Organization of work

48. Mr. BEDJAOUI (Special Rapporteur) said that he would answer the next day the questions raised by the debate on the non-transferability of odious debts, but for the moment would confine himself to a few proposals regarding the next stage of the session's work.

49. Since the Commission had only three meetings left in which to study the articles relating to each type of succession, and since a large number of articles had been proposed for the first type of succession—the transfer of part of territory of a State—it might find itself in the position of being unable to submit to the General Assembly a substantial number of articles on the typology of succession. Instead of considering one by one the articles relating to the transfer of part of territory of a State in the order in which they appeared in the report (A/CN.4/301 and Add.1, chap. IV, sect. F), the Commission would be well advised to concentrate on a single recapitulatory article on the understanding that it could come back to the various provisions later. Starting the next day, the Commission could consider an article recapitulating the solution proposed by the Special Rapporteur in article YZ for the general debt of the predecessor State and in article B for the special debts of the predecessor State, the text of which would be distributed to members of the Commission. If the Commission accepted that text without difficulty, it would still have time to study other provisions.

50. Mr. USHAKOV supported the Special Rapporteur's proposal but was sure that the Commission could make still more rapid progress if a few extra meetings could be held the following week and devoted to the Special Rapporteur's subject.

51. The CHAIRMAN said that the Commission had adopted a time-table according to which, as from the following week, it was to concentrate on the subject for which Mr. Reuter had been appointed Special Rapporteur. It could not change its time-table in Mr. Reuter's absence. Furthermore, the Special Rapporteur for the present topic would be unable to be present the next week. He would therefore consult Mr. Reuter to see if it would be possible to devote a few meetings later on to the topic of succession in respect of matters other than treaties.

52. Mr. TSURUOKA said he agreed with the Chairman, but would also suggest that the Commission hold afternoon meetings so as to make more progress.

53. Mr. BEDJAOUI (Special Rapporteur) said that two or three extra meetings on succession of States in respect of matters other than treaties would be useful. However, as for urgent reasons he would be obliged to be absent for some time, and in order to allow Mr. Reuter to make some headway in the presentation of his draft articles, it would be better to wait until mid-June before devoting the extra meetings to succession of States in respect of matters other than treaties.

⁶ See 1416th meeting, foot-note 1.

54. The CHAIRMAN said that it would therefore be advisable to proceed as he had already indicated. As regards afternoon meetings, he felt that apart from the meetings for the adoption of the report, which was practically automatic, it would be preferable to hold only morning meetings since, in the interests of the discussion, members of the Commission needed time for thought and reflection.

The meeting rose at 1 p.m.

1427th MEETING

Wednesday, 25 May 1977, at 10.10 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/301 and Add.1)

[Item 3 of the agenda]

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

ARTICLE C (Definition of odious debts) *and*

ARTICLE D (Non-transferability of odious debts)¹ (*concluded*)

1. Mr. BEDJAOUI (Special Rapporteur) said that, in summarizing the discussion of chapter III of his ninth report, he would first go through the general comments of members and then deal with the specific comments on article C and article D, respectively. The general comments could be grouped under three heads: Why should odious debts be dealt with at all? In which part of the draft should they be dealt with? How should they be dealt with?

2. To take the first question, some members had alleged that, in dealing with odious debts, the Commission was moving away from the realm of law into that of morality. Sir Francis Vallat² had said that, although consideration of odious debts should perhaps not be ruled out altogether, it would certainly prove to be difficult. Other members, such as Mr. Quentin-Baxter,³ had said that merely by referring to the possibility that a debt might be contracted for an illegal purpose, the Commission was moving outside the confines of the subject with which it

was supposed to be dealing. Other members had asked why the subject of odious debts should be studied since such debts concerned a very special aspect of the relationship between the predecessor State and the successor State. Mr. Riphagen had said⁴ that that special aspect would not come up again in connexion with the articles on the different types of succession and that he had some doubts about the need to study odious debts since it was far from clear that the purpose for which the debt was intended was the criterion by which it should be categorized. Still other members, particularly Mr. Ushakov⁵ and Mr. El-Erian,⁶ had said that they did not think odious debts should be studied at all, since consideration of such debts raised the problem of régime debts and it was not certain whether they came under succession of Governments or succession of States. Finally, some other members had asked why it was necessary to discuss odious debts at all since that subject was, to a large extent, covered by draft article 2⁷ concerning the validity of a succession of States.

3. He (the Special Rapporteur) was of the opinion that odious debts had to be considered, simply because they existed. Both State practice, as analysed in his ninth report, and diplomatic history and jurisprudence, bore witness to the fact that odious debts existed. The question of odious debts should not however, be confused with the question dealt with in article 2, namely, the validity of a succession of States. Mr. Calle y Calle⁸ had rightly claimed that, quite apart from any consideration of the validity of their source, odious debts were intrinsically immoral, and had referred to the "clean hands" theory. Mr. El-Erian⁹ had referred to *jus cogens*, the principle of self-determination, and the unlawfulness of recourse to war. He (the Special Rapporteur) thought that the problems of the source of the obligation and the source of the succession were irrelevant because, even if a treaty was invalid, it could still have been the source of a debt, and the amount of the corresponding loan might already have been paid to the predecessor State. Conversely, even if the treaty was valid, the purpose for which the debt was intended could be unlawful. He had already had occasion to stress that a distinction should be made between the problem of the unlawfulness of the succession and the problem of odious debts. In a lawful succession, even some valid debts could be classified as odious debts because of the purpose for which they had been intended. Similarly, a distinction should be made between the problem of odious debts and that of the validity of the legal source of odious debts. He mentioned that distinction in order to answer those members who had referred to the concept of invalidity *ab initio*.

4. He would point out that he himself had recommended that it would be better for the Commission to avoid a discussion of régime debts on the ground that they could

¹ For texts, see 1425th meeting, para. 28.

² 1426th meeting, paras. 43 and 44.

³ *Ibid.*, para. 40.

⁴ *Ibid.*, para. 37.

⁵ *Ibid.*, para. 4.

⁶ *Ibid.*, para. 29.

⁷ See 1416th meeting, foot-note 2.

⁸ 1426th meeting, para. 1.

⁹ *Ibid.*, para. 28.

be considered as coming under either succession of States or succession of Governments, or both.

5. The question of where in the draft the question of odious debts should be dealt with had been raised by several members. Some had been of the opinion that the Commission should consider the substantive rules relating to each type of succession before dealing with odious debts; others had said that the rule of the non-transferability of odious debts, as enunciated in article D, constituted an exception to the principle of succession to debts, and that it would therefore be better to consider it at the beginning of the draft. In his (the Special Rapporteur's) view, the entire question was one of method. There would, of course, be advantages in beginning with special rules, but, on that basis, it would also be possible to leave until later the definition of State debt and the problem of the third State. In any event, he was sure that if he had gone straight into the problem of the different types of succession—in other words, the special rules—many members of the Commission would then have asked why he had not dealt first with the definition of State debt, the problem of the third State and odious debts. Consequently, he endorsed Mr. Tsuruoka's view that the Commission could, for the time being, adopt a general provision like the article on odious debts, even though Mr. Riphagen's view¹⁰ was that it concerned a very special aspect of the relationship between the predecessor State and the successor State.

6. The question of how odious debts should be dealt with had given rise to various suggestions. Some members, such as Sir Francis Vallat,¹¹ had said that the Commission should formulate a general saving clause in order to reserve the case of odious debts. Others, such as Mr. El-Erian,¹² had said that odious debts should be dealt with in a dispositive article which would not be preceded by a definitions article. In that way, the Commission would not be bound by a definition and would be able to explain its concept of odious debts in the commentary. Most members of the Commission had, however, been of the opinion that articles C and D should be included in the draft but that they should be improved. He personally could accept any of those suggestions but thought that it was for the Drafting Committee to take a decision.

7. With regard to the comments on article C, which defined odious debts, he noted that Mr. Tsuruoka had said¹³ that the words "the major interests of the successor State" were too vague and that it was difficult to see where serious impairment of the interests of the successor State began and normality ended. Mr. Calle y Calle¹⁴ had rightly pointed out that while the notion of serious harm was extremely vague the Commission had already used it in other draft articles, such as those on State responsibility, and that it was quite possible to speak of serious harm to the fundamental rights of the successor State, its right to survival, its independence or its integrity.

¹⁰ *Ibid.*, para. 36.

¹¹ *Ibid.*, para. 46.

¹² *Ibid.*, para. 28.

¹³ *Ibid.*, para. 11.

¹⁴ *Ibid.*, para. 1.

8. Some members had expressed the view that the substance of article C (b) was covered by article 2, which was worded in practically identical terms. But article 2 dealt with the succession of States, which *a priori* was taken to be lawful, while article C (b) related to the debt as such. There were thus three possibilities, depending on whether it was the succession, the legal source of the debt or the debt itself, which was invalid.

9. In his subtle analysis of article C, Mr. Francis¹⁵ had said that subparagraphs (a) and (b) related both to the debtor's intent and to the consequences of his act—and, sometimes, to both of those aspects of the problem at the same time. Mr. Quentin-Baxter¹⁶ had endorsed that point of view in stating that, in the case of subparagraph (b), what was illegal was also certainly immoral, but that subparagraph (a) dealt with situations in which the outcome had to be known before the debt could be stigmatized as odious. Sir Francis Vallat¹⁷ had been of the opinion that it was difficult to apply the criterion of the illegality of the purpose sought by the predecessor State in contracting a debt, that such a criterion might lead to all kinds of subtle distinctions, and that it would have to be decided whether account should be taken of the stated purpose of the predecessor State—which might be different from its real purpose, of the creditor State's knowledge of the real purpose—and whether or not it had encouraged the act of the predecessor State, and of the use of which the funds were put. Those questions clearly showed the difficulties involved in the subject of odious debts. Although he (the Special Rapporteur) had never tried to conceal those difficulties, he did not think that the Commission could use them as an excuse for passing over the problem of such debts in silence.

10. Mr. Ushakov¹⁸ had criticized the loose wording of article C, which spoke of "debts contracted by the predecessor State", although at the time when the debts had been contracted, there had been no predecessor State and no successor State which they could have injured. The case he (the Special Rapporteur) had had in mind was nevertheless clear enough: it was the case where a State contracted a war debt for the purpose of starting hostilities, or a subjugation debt for the purpose of suppressing a liberation movement or colonizing a territory, and which then, by a succession of States, became a predecessor State in relation to a successor State which had been its victim or, though not having been its victim, refused to assume the odious debt in order not to lend support to an operation that was reprehensible on both moral and legal grounds.

11. With regard to the comments on article D, he would first like to draw attention to the conflicting conclusions reached by some members of the Commission, who had, nevertheless, all started from the same premise, namely, that the aggressor State must assume alone its debt of aggression. Whatever the conclusion they reached, all were agreed that the aggressor State ought to pay: some believed that it should pay twice rather than once,

¹⁵ *Ibid.*, paras. 33-34.

¹⁶ *Ibid.*, para. 41.

¹⁷ *Ibid.*, paras. 44-45.

¹⁸ *Ibid.*, para. 5.

if that were possible, even if it ceased to exist; others thought that some sanctionary element required that it repay its debt. But, while supporters of the first view had concluded that the successor State or States were obliged to pay, supporters of the second view concluded that the successor State was not obliged to pay. That difference of conclusions was explained by the fact that some members had in mind the case of a predecessor State which ceased to exist and was replaced by several States which had taken part in the act of aggression and could not be cleared of responsibility for it; Mr. Ushakov even considered that, in the case of the separation of a province of an aggressor State, that province, in other words, the successor State, ought to pay. The other members had had in mind the case of a newly independent State, even if it emerged by separation of a province and union with a neighbouring State. In that case, it was the predecessor State which should pay.

12. Some members of the Commission pointed out that State practice was inconsistent. For example, quoting the case of Japan and Thailand, Mr. Sucharitkul¹⁹ had noted that war debts sometimes passed to the successor State. In his report, he (the Special Rapporteur) had himself indicated that some treaties, such as the peace treaties concluded after the First and Second World Wars, had been based on political considerations. Such cases should doubtless be taken into account, even though the vast majority of precedents showed that odious debts did not pass to the successor State. Mr. Sucharitkul²⁰ had also said that the interests of creditors should not be overlooked, but he (the Special Rapporteur) did not fully share Mr. Sucharitkul's opinion on that point. He preferred the view of Mr. Njenga²¹ that States which might be tempted to contravene the purposes of the Charter of the United Nations, such as those which granted loans to South Africa, should be discouraged. Of course, if the predecessor State continued to exist, Mr. Sucharitkul's comment would have to be taken into consideration, but in that case it would be a matter of the relations between the creditor and the debtor predecessor State and not of a succession of States. It had been in the same vein that Mr. Quentin-Baxter²² had referred to certain factors which were decisive in determining the odious nature of a debt. If a succession of States occurred, for example, following hostilities or a breakdown of relations between the predecessor State and the successor State, it was unlikely that the successor State would be willing to assume war debts which had been forced upon it or colonial debts incurred for the purpose of suppressing the national liberation movement which had led it to independence.

13. Lastly, there had been two comments of a drafting nature. Sir Francis Vallat had expressed doubts about the appropriateness of the words, "not transferable",²³ while Mr. Calle y Calle²⁴ had suggested that article D be divided into two paragraphs, the first stating the rule

and the second the exception, and had expressed the hope that the Drafting Committee would collate article D and article W.

14. The very full discussion to which articles C and D had given rise, as well as the indications which he had just provided, should enable the Commission to refer those two articles to the Drafting Committee.

15. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer articles C and D to the Drafting Committee.

*It was so agreed.*²⁵

ARTICLE Z/B (Transfer of part of the territory of a State)

16. The CHAIRMAN recalled that it had been agreed provisionally at the previous meeting that, with a view to accelerating its work, the Commission should now proceed to consider the question of transfer of part of the territory of a State. For that purpose, the Special Rapporteur had circulated informally among the members the text of a single article, article Z/B, with the following wording:

Article Z/B. 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 the debt of the predecessor State to the successor State is to be settled by agreement between the predecessor and successor States.

2. In the absence of an agreement, an equitable proportion of the debt of the predecessor State shall pass to the successor State, corresponding to the property, rights and interests which pass to the successor State.

[Alternative for paragraph 2]

2. In the absence of an agreement, an equitable proportion of the debt of the predecessor State shall pass to the successor State, taking into account the relationship between the State debt concerned and the property, rights and interests which pass to the successor State.]

17. He invited the Special Rapporteur to introduce the article.

18. Mr. BEDJAOUI (Special Rapporteur) said that the Commission was now beginning its consideration of the articles relating to the different types of succession, starting with the transfer of part of the territory of a State. He had proposed a number of articles for that type of succession. Like all the other articles in his ninth report (A/CN.4/301 and Add.1), those being considered now had not been numbered but had been identified by letters which were not in alphabetical order, that allowed him to introduce any given article rather than another. In view of the short time the Commission had left to continue its study of the draft articles, he had combined articles YZ and B in a single article, article Z/B. He did not need to point out that the commentary contained in chapter IV of his report applied in substance to article Z/B. For the time being, the Commission should confine itself to that article, on the understanding that it could come back later to any of the other articles in the report, relating to transfer of part of a territory.

²⁴ *Ibid.*, para. 2.

²⁵ For the recommendation of the Drafting Committee, see 1447th meeting, paras. 4-5.

¹⁹ *Ibid.*, para. 26.

²⁰ *Ibid.*, para. 25.

²¹ *Ibid.*, para. 21.

²² *Ibid.*, para. 41.

²³ *Ibid.*, para. 46.

19. In chapter I of his report he had described the whole range of possible debts, including general debts contracted by the predecessor State to meet the general needs of the transferred territory or of other parts of its own territory, special or localized debts contracted to meet the exclusive needs of the transferred territory, local debts guaranteed by the predecessor State and local debts proper. The latter type of debt did not come within the subject being considered. A guarantee given by the predecessor State for a local debt might be examined later if it were decided that that problem did come within the subject. Consequently, only general State debts and localized State debts had been taken into consideration in article Z/B, although they were not specifically mentioned in it.

20. With regard to general debts of the predecessor State, the problem was to determine whether the successor State must assume part of such debts and, if so, how its share should be calculated. In his report, he had first defined general State debt, then described the uncertainties in the literature and presented the theories favourable to or opposed to transfer of part of the general debt, then gone on to the judicial precedents, which were generally against transfer of part of the general debt, and concluded with State practice, which varied considerably. In article YZ, he had referred first to the agreement which could be concluded by the predecessor State and the successor State, but had then gone on to suggest that, in the absence of an agreement, the successor State should be made to assume a part of the general debt which would be proportionate to the contribution of the transferred territory to the financial resources of the predecessor State. That was, in fact, the criterion most frequently adopted by the writers.

21. In dealing with specialized State debts, he had found more solid ground. A specialized debt was a debt which had served the interests of the territory exclusively, or nearly exclusively, whatever the nature of the property it had been used to create, which had passed to the successor State. The literature was generally in favour of the passing of such debts, which, like property, followed the territory. The practice of States in that respect was also more homogeneous and had allowed him to draft article B, which set out the rule that, in the absence of an agreement between the parties, the special debts of the predecessor State relating to the transferred territory were assumed by the successor State.

22. On reflection, however, he had realized that, if no distinction were made between general debt and localized State debt, and thus if no definition were given of those two types of debt, it would be possible to replace articles YZ and B by a single article. Better criteria were thus available for determining which debts passed to the successor State. In article YZ, he had taken the contributory capacity of the territory as the criterion for determining how much of the general debt the territory should assume. According to the practice of States and the literature, that criterion was based on population figures, the size of the territory and the share of taxes it paid. Since the territory's contributory capacity was calculated on the basis of its economic potential, natural resources, property and assets, which all passed to the successor State, it was only fair that a part of the general debt corresponding

to the economic potential it had inherited should also pass to it. He had not provided any criterion for the assumption of localized State debts, since such debts all passed to the successor State. As the criteria provided in articles YZ and B might seem either too broad or too restrictive, he had relied on the concept of equity when he had combined those two articles in the new article Z/B and had used the expression "equitable proportion", which had already been employed in the articles relating to State property. In so doing, he had taken account of the comments of those members of the Commission who had said that emphasis should be placed on the parallelism between the articles relating to State property and the articles relating to State debts.

23. The principle of equity had already been discussed by the Commission in 1976 during its consideration of the articles relating to State property.²⁶ The position taken by the International Court of Justice on the subject of the principle of equity in the *North Sea Continental Shelf* cases was described in the part of the Commission's report relating to that discussion.

24. Article Z/B was based on article 12, relating to the fate of State property in the case of the transfer of part of the territory of a State. Like article Z/B, paragraph 1, article 12, paragraph 1, related to the case of settlement by agreement. Under article 12, paragraph 2, in the absence of an agreement, the immovable property of the predecessor State situated in the territory to which the succession of States related passed to the successor State; the same was true of the movable property of the predecessor State connected with its activity in respect of the transferred territory. Under article Z/B, paragraph 2, the debt of the predecessor State passed to the successor State in an equitable proportion corresponding to the property, rights and interests which passed to the successor State. That wording might seem vague, but it allowed the fullest scope for the principle of equity. It could happen that there was no localized State debt in a ceded territory and that all the property which passed to the successor State had been created from part of the general State debt. The wording of paragraph 2 thus made it possible to ensure that a part of that general debt corresponding to the ceded property was assumed by the successor State in accordance with the principle of equity.

25. The equity criterion was also applied in the alternative for paragraph 2, but on the basis of a direct relationship between the property and the debt which had created it. The debt passed only if it was attached to such property. That provision related in particular to localized State debts specially contracted by the predecessor State for the exclusive needs of the territory.

26. Mr. USHAKOV said that he fully supported the principle enunciated in the new article Z/B proposed by the Special Rapporteur, which reflected the principle stated in article 12 concerning the passing of State property in the case of the transfer of part of the territory of a State. It was indeed only fair to provide that, in

²⁶ *Yearbook ... 1976*, vol. II (Part Two), pp. 132-133, document A/31/10, chap. IV, sect. B, paras. (16)-(24) of the introductory commentary to section 2 of part I of the draft.

general, the passing of debts, like the passing of property, must be settled by agreement between the predecessor State and the successor State (para. 1), and that, in the absence of an agreement, the settlement must be equitable (para. 2).

27. When it was the predecessor State which took the initiative of ceding part of its territory to another State, the passing of the debt was, as a rule, settled by an agreement between the predecessor State and the successor State, in accordance with paragraph 1. If, however, it was part of the territory of the predecessor State which took the initiative of separating from that State in order to unite with another State, there might not be an agreement between the predecessor State and the successor State and, in that case, the passing of the debt would be settled in accordance with paragraph 2.

28. Since article Z/B dealt with State debt, he suggested that the word "State" be added before the word "debt".

29. Mr. RIPHAGEN said the Special Rapporteur had rightly emphasized that an important factor was the contributory capacity of the territory which passed to the successor State. He wondered whether that capacity was covered by the phrase "the property, rights and interests which pass to the successor State", which was used in both versions of paragraph 2 of the article. The phrase "property, rights and interests" seemed to envisage the successor State as a subject of internal law. It gave the impression of referring solely to the property, rights and interests mentioned in the earlier parts of the draft and not to the contributory capacity and the jurisdiction that passed to the successor State.

30. Mr. BEDJAOUI (Special Rapporteur) said that, according to the literature, contributory capacity could be considered either from the point of view of the number of inhabitants or the geographical size of the transferred territory, or as a purely fiscal criterion. Mr. Riphagen had asked whether, in referring to property, rights and interests, the Commission was not taking the point of view of the successor State and whether such property, rights and interests were not being considered in terms of its internal law. He (the Special Rapporteur) did not think that that was the case because such property, rights and interests were being considered from the point of view of the internal law of the predecessor State, not from the point of view of the internal law of the successor State, and corresponded roughly to the contributory capacity of the transferred territory. From that point of view, the first version of paragraph 2 which he was proposing seemed the more appropriate because it took account of such contributory capacity and did not establish a direct link between the problem of the property which passed to the successor State and the problem of the debt which had created such property.

31. Mr. AGO said that, in principle, he agreed with the Special Rapporteur about the new article Z/B. As had been done in article 12 relating to succession to State property, it was very useful for the Commission to draw attention, in paragraph 1, to the advisability of a settlement by an agreement between the parties in respect of the passing of State debts, because the problems involved varied so much from one case to another that it was wise

for States to take such a precaution. Thus, the rule enunciated in paragraph 2 was only a residual rule based essentially on the only possible criterion, namely, that of equity, though it was obvious that the criterion of equity would pose serious problems, particularly that of deciding by whom it was to be applied.

32. He would therefore confine himself to a few comments of a drafting nature for the benefit of the Drafting Committee. First, he had some doubts as to whether the words "the passing of the debt" should be used in paragraph 1. He understood that those words had been used by analogy with the words "the passing of State property" in article 12. In article Z/B, however, the passing was not exactly the same, because it could either be total—in the case of a localized debt—or partial—in the case of a general debt. Thus, instead of taking it for granted that the debt passed—for it could happen that it did not pass at all—it would be better to say "the succession of the successor State to the debt of the predecessor State", which was more neutral and safer.

33. He fully endorsed the criterion of "equitable" proportion used in paragraph 2, but found the criterion of the proportion "corresponding to the property, rights and interests which pass to the successor State" more difficult to accept because it was not at all certain that the proportion of the debt which was to pass really corresponded to the proportion of the property which passed from the predecessor State to the successor State. For example, if a province separated from a State and 20 per cent of the property, rights and interests of the predecessor State passed to the successor State, the proportion of the debt which would pass to the successor State would not necessarily be the same: it would be a higher proportion if there were localized debts which the predecessor State had contracted exclusively in the interests of the province, and a lower proportion if there were other debts which had exclusively benefited other regions.

34. He therefore wondered whether the criterion which was most likely to safeguard the concept of equity was not, rather, the benefit which the part of the transferred territory had derived from the use to which the debt had been put.

35. Mr. NJENGA said that, by and large, he found the consolidated article produced by the Special Rapporteur acceptable.

36. He had no difficulty at all with the first paragraph; it was better to require settlement by "agreement" than by the more complicated formula of a treaty, and the requirement that the matter be settled by the predecessor and successor States should be the general rule. With regard to the second paragraph, however, he thought it would be very difficult for parties which had tried and failed to reach an "agreement" to come to a conclusion as to what constituted an "equitable proportion" of the debt of the predecessor State. In addition, it would be preferable to treat separately the questions of the passing of general and special, or localized, State debt; it was general State debt of which an "equitable proportion" should pass to the successor State. In the case of special State debt, what was required was an additional paragraph on the lines of the original article B (A/CN.4/301

and Add.1, para. 238), for, if the benefits of such a debt had gone to the territory which had become the successor State, it was to that territory that the burden of the debt should go. A clear statement of that rule would have the effect of minimizing possible areas of conflict between the predecessor and successor States in a situation in which they had tried, and failed, to reach agreement on the fate of localized State debt.

37. If his suggestion for the inclusion of an additional paragraph was not accepted, he would prefer to see the Commission adopt the second of the Special Rapporteur's proposals for paragraph 2, since it went at least some way towards meeting his point.

38. Mr. SUCHARITKUL said that, in principle, he endorsed the general tenor of article Z/B submitted by the Special Rapporteur. The article was well-balanced because it took account of the interests of the three parties and, in particular, of the interests of the successor State, which must consent to the passing of the debt. He also thought that the legal effects of the total or partial passing of debts had been viewed from the right angle.

39. The considerations which induced the successor State to accept the debts of the predecessor State were often political, as was clear from the practice of States, but the most decisive were perhaps economic considerations as in the case of the debt contracted by Japan to Thailand, whose acceptance had, in part, been motivated by a desire not to upset the two countries' trade relations. Acceptance of a debt often gave the successor State long-term advantages by, for example, enabling it to participate in international monetary or banking organizations.

40. He was in favour of the flexibility which the Special Rapporteur had imparted to the criterion of equitable distribution of the debt between the predecessor State and the successor State. The interests of the creditor third State had also been protected because, in the absence of an agreement, the passing of the debt was practically automatic.

41. Mr. VEROSTA said that he fully endorsed the idea underlying the new article Z/B submitted by the Special Rapporteur. In paragraph 1, however, it should be made clear that the passing of the debt from the predecessor State to the successor State was settled by an agreement for "the total or partial transfer of the State debt from the predecessor State to the successor State".

42. Like Mr. Ago, he thought that the idea of benefit should be introduced in paragraph 2, or in the alternative proposed for that paragraph, in order to make the criterion of equitable proportion fully objective.

43. Mr. FRANCIS, referring to the first paragraph of the proposed article Z/B, said that he would have preferred the question of general debt to be covered by a general provision like article Y (A/CN.4/301 and Add.1, para. 214). That was because the first paragraph of article Z/B presupposed that part of the general debt would be transferred to the successor State, whereas that was not always the case.

44. With regard to the second paragraph, on balance, the Special Rapporteur had been right to bring in the concept of equity, for the successor State might have

been formed from a very depressed region of the original State and, notwithstanding its presumed liability for a portion of the general debt of that State, be unable to assume the full burden thereof.

45. With regard to the first version of paragraph 2, he interpreted the "proportion" of the general debt of the predecessor State which would pass to the successor State as being equal to the fraction which the property, rights and interests of the successor State represented of the property, rights and interests of the predecessor State. Like Mr. Njenga, he preferred the alternative version of the paragraph, but believed that it could have two meanings: the first was that an equitable proportion of the general debt of the predecessor State would pass to the successor State, with that proportion being expressed as he had just mentioned; the second was that, if it had been formed from a very depressed area of the predecessor State and had already borne the legitimate localized debts attributable to it, the successor State would not, under normal circumstances, be expected to bear that portion of the general debt of the predecessor State which would otherwise be attributable to it.

46. Mr. REUTER said that he agreed with the comments of Mr. Ago and Mr. Verosta on article Z/B, paragraph 1. Paragraph 2 raised the question whether all or part of the debt passed to the successor State, but the word "proportion" seemed to rule out the possibility that the successor State had to assume the entire debt.

47. When referring to equity, what was usually meant was equitable principles, for equity was an extremely complex notion based on a number of principles which it was hardly possible to enumerate. It would be better, therefore, to refer to "equitable principles".

48. He would also like to see all the specific cases mentioned. Whatever the benefits a territory might have derived from a debt, it could happen that all the localized investments in the territory were destroyed by some external event, thereby depriving it of all further benefit. In the case, for example, of the settlement of the debts of the Austro-Hungarian monarchy to the successor States, account had been taken, during the negotiations after 1945, of the fact that, as a result of external events, part of the investments financed through a certain loan of the Austro-Hungarian monarchy had been destroyed in countries such as Yugoslavia. Some mention might therefore be made of capacity to pay, a concept which was recognized in many international arbitrations.

49. In the alternative he had proposed for paragraph 2, the Special Rapporteur seemed to have wanted to establish a symmetry between the passing of debts and the passing of property, rights and interests. If, however, a distinction was to be made between what was general and what was local in the case of debts, the same distinction had to be made in respect of property, rights and interests. That in his opinion, was what was meant by equity. Such symmetry could be expressed in economic terms, for instance, by introducing the idea of benefit, as Mr. Ago had suggested. He had no objection to the introduction of an economic concept, but would like to see the Commission take a broader—and perhaps more judicial, because more abstract—view based on the idea

of symmetry. In the negotiations to decide the passing of debts, there would have to be some symmetry between the factors of enrichment and the factors of impoverishment.

50. Mr. DADZIE said that he had no difficulty in accepting the first paragraph of the consolidated article, but both the versions of the second paragraph caused him some problems. For example, each contained the phrase "equitable proportion": quite apart from the question of the complexity of equitable considerations, to which Mr. Reuter had drawn attention, there was the question who, in a situation in which the predecessor and successor States were in disagreement, would decide what was equitable. Similarly, who would decide what, as the first version of the paragraph required, corresponded to the property, rights and interests which passed to the successor State? The second version of the paragraph contained the phrase "taking into account the relationship between the State debt concerned and the property, rights and interests which passed to the successor State", thereby indicating that the question at issue was the passing of localized debt. If that were so, the question of equity would not arise, for the localized debt would relate to property, rights and interests situated in the transferred territory and, as the Special Rapporteur had already pointed out in paragraph 14 of his report, would therefore pass to that territory in accordance with the maxim *res transit cum suo onere*.

51. Mr. CALLE Y CALLE said that, in introducing article Z/B, the Special Rapporteur had indicated that the basis for it was to be found in chapter IV of his report, which would to a large extent constitute the commentary to the article to be submitted to the General Assembly. The Special Rapporteur had stated in his report that "the refusal of the successor State to assume part of the general debt of the predecessor State seems to prevail in writings on the subject and in judicial and State practice".²⁷ He had advanced theories in support of transfer of part of the general debt, but had said that they were inadequate, and had quoted weighty arguments against such transfer from authorities like Hall and Borel.²⁸ He had, however, been unable to find any clear rule governing the fate of general State debt, but had concluded from his treatment, in section C of chapter IV, of special State debts of benefit only to the ceded territory, that such debts passed to the successor State. Notwithstanding that situation, the article the Special Rapporteur was now proposing looked to the future in that it seemed designed to establish an embryonic rule to the effect that both general and special State debt could pass to the successor State.

52. If that was a correct interpretation of the article, it would, as Mr. Ago had already said, be better if the first paragraph referred to the "total or partial" passing of the debt of the predecessor State to the successor State, for passage would be partial in the case of general State debt and total in the case of localized State debt.

53. It would also be better to adopt the alternative version of paragraph 2, but in a modified form. Since equity

would be an important factor in the apportionment of the general State debt, but less so in relation to the passage of localized State debt, the paragraph might be re-worded to read:

"2. In the absence of an agreement, an equitable proportion of the debt of the predecessor State shall pass to the successor State, taking into account both the relationship of the debt to the transferred territory and the property, rights and interests passing to the successor State."

The meeting rose at 1 p.m.

1428th MEETING

Thursday, 26 May 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/301 and Add.1)

[Item 3 of the agenda]

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

ARTICLE Z/B (Transfer of part of the territory of a State)¹ (*concluded*)

1. Mr. YANKOV said that, in general, he agreed with the approach and conclusions adopted by the Special Rapporteur in the commentary and articles he proposed in chapter IV of his report, which covered a complex subject for which there were no generally accepted rules of international law. While the consolidated article Z/B in some ways represented an improvement over the original proposals, it also gave rise to some problems.

2. For example, while he did not wish to challenge the Special Rapporteur's change in the first paragraph of article Z/B of the phrase "the contribution of the successor State to the general debt of the predecessor State shall be settled by treaty", which had appeared in the first paragraph of article Z (A/CN.4/301 and Add.1, para. 214), he wondered what was the reasoning behind the change. The new version seemed to lay greater emphasis on the operational aspect of the question, namely, the passing of the State debt of the predecessor State to

²⁷ A/CN.4/301 and Add.1, para. 209.

²⁸ *Ibid.*, paras. 194-195.

¹ For text, see 1427th meeting, para. 16.

the successor State, whereas it seemed to him equally—and perhaps more—important to put forward a rule of law setting out the rights and obligations of the predecessor State and the successor State in the event of the transfer of part of the former's territory. Such a rule would be particularly necessary in cases where the parties had been unable to reach agreement on the question. It would, therefore, be desirable to consider to what extent the requirements of equity and the relevant elements of substantive law could be incorporated in the article.

3. Mr. Reuter had referred² to the principle of symmetry between the modalities for the passing of State debt and those for the passing of the related property, rights and interests to the successor State. He agreed that the Commission should try to elaborate a general rule of conduct to which would be attached certain legal rights and obligations, while at the same time taking into consideration the requirements of equity, common sense and reality.

4. Again, he wondered why the Special Rapporteur had decided not to reproduce in either of the versions of paragraph 2 the phrase “proportionate to the contributory capacity of the transferred territory”, which had appeared in the second paragraph of article Z. To what extent did the words now proposed in place of that phrase bring the Commission closer to the statement of a general rule of law which could apply in the event of a transfer of part of the territory of a State?

5. It seemed to him that the essence of the problem of the codification and progressive development of international law in the field with which the Commission was now dealing lay in the elaboration of a rule which would state the basic legal principles involved and indicate the main modalities of identifying the bases for determining what was, as the Special Rapporteur now put it, an “equitable proportion” of the debt of the predecessor State corresponding to the benefits, property rights and interests which passed to the successor State. The existence of such a rule might encourage the predecessor and successor States to reach agreement amongst themselves, if only because they believed that sometimes the worst amicable agreement was better than the best judicial decision, and it would, of course, facilitate adjudication and third party procedures.

6. Mr. ŠAHOVIĆ asked why the Special Rapporteur had thought it better to use the words “property, rights and interests”, in paragraph 2 of article Z/B, rather than speak simply of “State property”. According to the definition in article 5,³ “State property” meant property, rights and interests.

7. The CHAIRMAN, speaking as a member of the Commission, said that the questions he had wished to raise in connexion with article Z/B had, in general, been the same as those which had been put by other speakers. He did, however, wish to draw particular attention to a point similar to that which had been raised by Mr. Šahović. Whereas article O⁴ spoke specifically of “State debt” as being a “financial obligation”, article Z/B re-

ferred in more general terms to the passing of a “proportion of the debt of the predecessor State”, a phrase which gave rise in his mind to two questions. Firstly, if the phrase in question meant “passing of a proportion of the financial obligations” of the predecessor State, how could arrangements be made for the passing of specific financial obligations? Secondly, did the term “debt” mean “State debt” as defined in article O, or all the financial obligations of the predecessor State?

8. Mr. BEDJAQUI (Special Rapporteur) said that members of the Commission who had participated in the discussion on article Z/B had, generally speaking, approved of his proposed text and had shown a preference for the alternative version of paragraph 2. He would not linger over matters of form, which would be considered by the Drafting Committee, but would deal mainly with the comments on the substance.

9. Some members of the Commission had pointed out, in connexion with paragraph 1, that the debt could pass either completely or partially, and had suggested various formulations to take that aspect into account. Some had noted that the term “agreement” was broader than the term “treaty” and had emphasized the value of clarifying the notion of agreement by including a reference, even in paragraph 1, to equitable principles.

10. His reply to the question by Mr. Šahović concerning the use of the expression “property, rights and interests” instead of “State property” was that if the principle of equity was to be applied, account must be taken of the content of State property, as defined in article 5, for it included not only physical property but also rights and interests. The formula “State property” would not be sufficiently comprehensive and would not encompass all the elements that had to be taken into consideration in applying the principle of equity.

11. Members of the Commission had clearly seen that the rule stated in paragraph 2 was a residuary rule, for the passing of the debt should be settled in most cases by agreement between the parties, and the majority had preferred the alternative, which established an equitable relationship between debts and property and applied primarily to localized State debts. However, a relationship between debts and property did not mean an absolute, automatic and complete link between the two. Any passing of property and debts had to be governed by equitable principles. The “equitable proportion” had to be sought not only in relation to the passing of property but in the light of all the circumstances. Thus, the problem of the passing of debts should be viewed first and foremost in relation to the principles of equity and their context.

12. Mr. Ago had proposed⁵ the criterion of the benefit derived by the territory from the utilization of the debt. That was a possible operational criterion. He (the Special Rapporteur) had already used it once and he used it again in chapter V of his report, concerning succession to debts in the case of newly independent States. The criterion of benefit had been invoked in doctrine in the case of the transfer of part of a territory and in the case of newly independent States. But at what

² 1427th meeting, para. 49.

³ See 1416th meeting, foot-note 2.

⁴ *Ibid.*, para. 1.

⁵ 1427th meeting, para. 34.

point in time was the benefit to be assessed? Was it when the utilization of the debt had created property or satisfied a need, or was it later, at the time when the succession of States occurred? The benefit could have disappeared by then, for the property created by the utilization of the debt might have been destroyed in a war between two States that had led to the transfer of part of the territory of one State to the other, or in a war of national liberation that had led to the birth of a newly independent State. The notion of benefit had many facets and could be viewed from different angles.

13. As for decolonization, the case of the Cabora Bassa dam in Mozambique, mentioned by Mr. Njenga,⁶ was a borderline case; although the dam had been built for the purposes of Portuguese colonization, it could now be considered as useful to Mozambique. However, there were instances of property which had been of benefit only to part of the population of the colonial territory—for example, in Algeria, where wine growing had been a colonizers' activity specifically designed to meet the needs of the metropolitan State. Following Algeria's independence, the vines had had to be uprooted in order to reconvert Algerian agriculture, because wine production had exceeded the capacity of the national market and it had been difficult to find outlets abroad.

14. Again, port or highway infrastructures, military installations and so on might have been built during the period of colonization for the benefit of the colonizers. An industrial or agricultural complex might have been created, in the colonial context, in order to tie the colony's economy to that of the metropolitan State, since colonial development was then conceived in terms of ties to make the colonial economy dependent on the metropolitan economy. As a consequence, some economic developments, both industrial and agricultural, had proved very difficult to convert after the territory's accession to independence and had become a burden rather than a benefit. Again, highly sophisticated military bases installed by the metropolitan State in a dependent territory might be totally useless to the newly independent State. The notion of benefit was therefore difficult to define, since the economic and political courses followed by the newly independent State might be different from those which had been imposed on it by the former metropolitan State.

15. Consequently, if the aim was to apply the principles of equity, the benefits gained by the colonizers over many years or even centuries of colonization had to be taken into consideration. The case of the Cabora Bassa dam could itself be posed in such terms. Moreover, the various conferences of Heads of State or Government of the non-aligned countries, from that of Belgrade in 1961 to that of Colombo in 1976, had all talked about compensation for colonial exploitation.

16. What had to be emphasized first and foremost was the principle of equity and that meant taking into account the circumstances of each particular case, for equity did not mean equality or an automatic symmetry between the passing of property and the passing of debts. In its

judgment of 20 February 1969 in the *North Sea Continental Shelf* cases, the International Court of Justice had stated that

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 Court had added: "The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case".⁷

17. Mr. Yankov had rightly noted that the agreement between the parties should itself be equitable and, consequently, the notion of equity should also be introduced into paragraph 1. It might well be asked who was to apply the criterion of equity in the event of disagreement between the predecessor State and the successor State. In his opinion, that problem did not fall within the scope of the draft article, but was a matter for the procedure to be followed for the settlement of disputes, which would form the subject of later articles. The International Court of Justice had made a distinction between obligations of means and obligations of result. States could be required to engage in negotiations, which was an obligation of means, but they could not be required to reach an agreement, which was obligation of result.

18. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article Z/B to the Drafting Committee.

*It was so agreed.*⁸

19. The CHAIRMAN announced that there would be a meeting of the Enlarged Bureau after the closure of the present meeting.

The meeting rose at 11.05 a.m.

⁷ *Yearbook ... 1976*, vol. II (Part Two), p. 133, document A/31/10, chap. IV, sect. B, para. (23) of the introductory commentary to section 2 of part I of the draft.

⁸ For the consideration of the text proposed by the Drafting Committee, see 1447th meeting, paras. 3 and 10, and 1449th meeting, paras. 1-3.

1429th MEETING

Friday, 27 May 1977, at 11.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Dadzie, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tsuruoka, Mr. Ushakov, Mr. Yankov.

⁶ 1426th meeting, para. 21.

Question of treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/285,¹ A/CN.4/290 and Add.1,² A/CN.4/298)

[Item 4 of the agenda]

**DRAFT ARTICLES SUBMITTED BY
THE SPECIAL RAPPORTEUR**

ARTICLE 19 (Formulation of reservations in the case of treaties concluded between several international organizations) and

ARTICLE 20 (Acceptance of and objection to reservations in the case of treaties concluded between several international organizations)

1. The CHAIRMAN invited the Special Rapporteur to present the general introduction to part II, section 2, of his draft articles, as contained in his fifth report (A/CN.4/290 and Add.1) and articles 19 and 20 which read as follows:

Article 19. Formulation of reservations in the case of treaties concluded between several international organizations

In the case of a treaty between several international organizations, an international organization may, when signing, formally confirming, accepting, approving or acceding to the treaty, formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only certain specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 20. Acceptance of and objection to reservations in the case of treaties concluded between several international organizations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting international organizations unless the treaty so provides.

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

3. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance by another contracting international organization of a reservation constitutes the reserving organization a party to the treaty in relation to that other organization if or when the treaty is in force for those organizations;

(b) an objection by another contracting international organization to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving organizations unless a contrary intention is definitely expressed by the objecting organization;

(c) an act expressing the consent of an international organization to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting international organization has accepted the reservation.

4. For the purposes of paragraphs 2 and 3 and unless the treaty otherwise provides, a reservation is considered to have been accepted by an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

2. Mr. REUTER (Special Rapporteur) said that he proposed first to discuss some general problems and to recall certain matters for the benefit of the new members of the Commission.

3. At its 1974 and 1975 sessions, the Commission had adopted articles 1 to 4 and articles 6 to 18 of his draft on first reading; the text of those articles was reproduced in the Commission's report on the work of its twenty-seventh session.³ At that session, the Commission had also begun its consideration of the articles concerning reservations, more particularly articles 19 and 20. In the course of the discussion, it had emerged that those two provisions did not fully reflect the views of the Commission. For the 1976 session, therefore, in his fifth report (A/CN.4/290 and Add.1), which was now before the Commission, he had drafted a fresh introduction and proposals for articles 19 and 20. For the present session, he had prepared a sixth report (A/CN.4/298), dealing with articles 34 to 38. Once the Commission had considered articles 19 to 23, concerning reservations, contained in the fifth report it could proceed to examine articles 24 to 33 in his fourth report (A/CN.4/285) and perhaps then move on to articles 34 to 38 in his sixth report.

4. In its earlier work on the topic, the Commission had decided to keep as close as possible in its draft to the articles of the 1969 Vienna Convention on the Law of Treaties.⁴ Whenever there were two acceptable solutions, the Commission had worked on the principle that the one closer to the Vienna Convention was to be preferred.

5. There were two good reasons for a set of draft articles on the present topic. First, to have extended the Vienna Convention to cover treaties concluded by international organizations would have entailed serious drafting problems, as the United Nations Conference on the Law of Treaties had quickly realized. Second, while some articles posed no problem for the Commission, for example, those which differed little, if at all, from the corresponding provisions of the Vienna Convention, others were very difficult, for example, article 6, concerning the capacity of international organizations to conclude treaties.

6. As was clear from the title of the topic, the Commission had to deal both with treaties concluded between States and international organizations and with treaties concluded between two or more international organizations. For the sake of simplicity, it had sought to cover categories of treaties in one and the same provision, whenever such a course had been possible. However, for reasons either of form or of substance, the two categories sometimes had to be considered separately. The

³ *Yearbook ... 1975*, vol. II, pp. 171-183, document A/10010/Rev.1, chap. V, sect. B, subsect. 1.

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. 287. The Convention is hereafter referred to as the "Vienna Convention".

¹ *Yearbook ... 1975*, vol. II, p. 25.

² *Yearbook ... 1976*, vol. II (Part One), p. 137.

reasons of substance all related to the nature of international organizations. The Commission felt, as he did, that it would be a mistake to assimilate international organizations to States. In point of fact, it was not clear what exactly an international organization was. For the purposes of the articles that had already been adopted, the Commission had taken the definition given in the Vienna Convention, that an international organization was an intergovernmental organization. However, that definition was insufficient.

7. The Commission had decided not to consider a delicate problem that he had raised, which was that of treaties concluded by a subsidiary organ of an international organization. But although delicate, the problem did exist. For instance, the United Nations Council for Namibia, a subsidiary organ of the United Nations and the possible embryo of a future State, was participating in the United Nations Conference on the Law of the Sea and in the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. As it was not uncommon for the embryo of a State to be assimilated to a State, it might be asked whether United Nations responsibility would be involved if the Council for Namibia were to sign a treaty drawn up by one of those Conferences.

8. International organizations were different from States in another respect: while States were identical in the legal concept, international organizations were very different. For the purposes of the present draft, therefore, the only points that could be considered were those that they had in common. That was the thinking underlying article 6, which, in the matter of the capacity of international organizations to conclude treaties, referred to the relevant rules of each organization. Moreover, international organizations had a composite structure: they were composed of States which remained States. An international organization which was a party to a treaty might thus find that the other parties to the treaty included some, all, or none of its member States, a situation that could give rise to formidable problems. He personally had been inclined to disregard such distinctions for one simple factual reason: the agreements in question might be headquarters agreements concluded between a State and an international organization, co-operation treaties between international organizations, or treaties between one organization and several States. But the major concern of those who had wanted to have such treaties covered by the Vienna Convention had been how to define the status of agreements on nuclear matters, in which one State supplied something, another received it, while an international organization ensured observance of the rules of international law.

9. Assistance agreements under which one State rendered assistance to another State, with the participation of an international organization, fell into the same category. Such cases were fairly straightforward compared with that of a relatively open multilateral treaty. So far, States had not agreed that an international organization might become a party to a treaty of that kind, but the Commission had already had occasion to state that such an eventuality should be taken into consideration. That

explained his approach in the drafting of article 9, paragraph 2, a "futuristic" provision which he had submitted to cover the hypothetical case of a technical multilateral convention on customs nomenclature to which States agreed that a customs union should be admitted as a party. Meanwhile, yet another step forward had been taken. The participants in the United Nations Conference on the Law of the Sea were considering articles under which the future convention on the law of the sea would be open to one or more, or even all, international organizations. The Council for Namibia had asked to participate in that Conference and he wondered whether the United Nations could participate in a treaty as the representative of a territory. At his request, the Secretariat had prepared a study on that point,⁵ and both he and the Commission had decided to exclude the question of representation from their study.

10. Another question had arisen at the United Nations Conference on the Law of the Sea. EEC had embarked on negotiations on an exclusive fishing zone with a number of States, some of which did not fully recognize the concept of a fishing zone. If the Community concluded a treaty on the subject, its member States would not be in a position to sign without reservations a treaty on the law of the sea containing provisions that fell solely within the competence of an international organization. The Commission should therefore bear that problem in mind in considering the question of reservations. When both an international organization and some of its member States were parties to a treaty, both the organization and its member States could formulate, or object to, reservations.

11. At the outset of its work, the Commission had decided to draw up a set of draft articles that was independent of the Vienna Convention. It followed that the convention which might one day emerge could enter into force independently of the entry into force of the Vienna Convention. Again, for legal reasons and for the sake of clarity, the Commission did not wish simply to refer in its draft articles to provisions of the Vienna Convention, but that decision related purely to form and, naturally, did not mean that an article of that Convention could not be reproduced word for word.

12. The question of reservations, more particularly articles 19 and 20, had revealed yet a third consequence of the autonomy of the draft, which was, in fact, of general significance. Article 3 (c) of the Vienna Convention had followed from the Conference's decision to exclude from its work treaties concluded by international organizations. Since some delegations had feared that it might be concluded from that decision that none of the rules of the Convention being prepared by the Conference would apply to that category of treaties, particularly trilateral treaties on nuclear matters, the Conference's Drafting Committee had added a subparagraph to article 3, providing that the fact that the Convention did not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law did not affect the

⁵ *Yearbook...1974*, vol. II (Part Two), pp. 8-32, document A/CN.4/281.

application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law were also parties. The Conference had therefore recognized that, in a treaty between States and one or more international organizations, it was possible to isolate purely inter-State relations, which fell under the Vienna Convention, whereas the treaty itself was not subject to the Convention. That provision gave rise to problems in the case of "integral treaties". It could be regarded either as an expedient or as reflecting a new way of looking at the situation. In the latter case, the draft would have to contain provisions specifying that purely inter-State relations were governed by the Vienna Convention. If there was no major obstacle, therefore, he would have to isolate, for each article of the draft, the inter-State relations and reproduce the relevant applicable rule of the Vienna Convention. A more straightforward solution would be to draft a general reservation on the point, once all the articles of the draft had been considered. Since the Commission could adopt that approach only after it had considered each draft article, for the time being it would have to adopt complicated provisions in the hope of simplifying them later.

13. That led him to the problem of "intermittent treaties". He had in mind the case of a treaty that had been negotiated and signed by States and international organizations and so would come under the future convention. If the international organizations concerned then refused formally to confirm their will to become parties to the treaty, the latter would become a treaty concluded between States. In that event, would it thenceforth, after having been governed by the future convention, come under the Vienna Convention? And if one of the international organizations concerned then expressed its will to become a party to the treaty, would the treaty once again be governed by the future convention? The question had already been raised in the Commission, but it had not yet been discussed at sufficient length. In his opinion, a treaty of that kind would always be governed by the future convention. The fact that an international organization was given the opportunity to become party to a treaty to which States were themselves parties was so important and extraordinary that the entire structure of such a treaty rested upon that fact. However, that was not yet the official view of the Commission.

14. With regard to articles 19 and 20, he would not repeat what he had said in the commentary in his fourth report.⁶ Quite simply, for reasons both of drafting and of substance, he had thought it preferable to provide different régimes for treaties concluded between two or more international organizations, and for treaties concluded between States and international organizations. He had also taken the view that there was no reason not to apply the rules of the Vienna Convention to treaties concluded exclusively between international organizations. Thus, the Commission would have to take a decision on two points: whether to study separately agreements between States and international organizations on the one hand and agreements between international organizations on

the other hand, and whether to apply to the latter rules which followed very closely those of the Vienna Convention.

15. As he had indicated in his commentary to article 19 (A/CN.4/290 and Add.1), the proposed wording followed faithfully the text of article 19 of the Vienna Convention, the only change being to replace the word "ratifying" by the words "formally confirming", as an expression of the will of an international organization.

16. Mr. USHAKOV said he wondered whether it was not possible to make a distinction between different categories of multilateral treaties concluded between international organizations, just as, in the case of multilateral treaties concluded between States, it was possible to distinguish between multilateral treaties of a universal character, concluded for the benefit of the whole of the international community and open to all States, multilateral treaties of a regional character, as provided for in Chapter VIII of the Charter of the United Nations, and multilateral treaties with limited participation. It was a problem that had to be considered: did not multilateral treaties concluded between international organizations also include a category of universal treaties open to all international organizations, existing or future, and a category of regional treaties concluded between, for example, organizations of African or European States? The words "or acceding to", in article 19, seemed to indicate that some agreements among international organizations might be open to other international organizations.

17. The possibilities regarding multilateral treaties concluded between States and international organizations were endless. Article 3 (c) of the Vienna Convention envisaged the possibility of an agreement between States to which international organizations were also parties, but another possibility was an agreement between international organizations to which one or more States were also parties. The difference was important with regard to reservations because, in the case of an agreement concluded between States with the participation of one or more international organizations, what was essentially involved was reservations by States whereas, in the case of an agreement between international organizations with the participation of one or more States, what was essentially involved was reservations by international organizations.

18. In article 20, paragraph 2, the expression "negotiating international organizations" raised a problem since it might be asked whether it should be understood to mean the same thing as the expression "negotiating State", which was defined in article 2, paragraph 1 (e), of the Vienna Convention.

19. Mr. AGO said that the Special Rapporteur had been right to draw attention to the need to avoid following too closely the system of the Vienna Convention with regard to reservations to treaties concluded between international organizations. He questioned whether the concept of reservations applied in the same way in the case of agreements between States and in the case of agreements between international organizations. It was difficult to conceive of a treaty concluded exclusively

⁶ *Yearbook ... 1975*, vol. II, pp. 36-37, document A/CN.4/285, general commentary to section 2 of part II of the draft.

between international organizations to which some of them might enter reservations. The purpose of reservations was to protect particular interests of a State and it was not easy to picture a situation where the need of an international organization to protect a particular interest would lead it to formulate a reservation to a multilateral treaty concluded with other international organizations. Thus, so far as reservations to a multilateral treaty confined to international organizations were concerned, it would be artificial to assimilate the situation of an international organization almost entirely to that of a State. To establish such a strict parallel would mean pushing assimilation between the régime of treaties between States and the régime of treaties between international organizations too far.

The meeting rose at 12.55 p.m.

1430th MEETING

Tuesday, 31 May 1977, at 3.05 p.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz Gonzáles, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/285,¹ A/CN.4/290 and Add.1,² A/CN.4/298)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (continued)

ARTICLE 19 (Formulation of reservations in the case of treaties concluded between several international organizations) *and*

ARTICLE 20 (Acceptance of and objection to reservations in the case of treaties concluded between several international organizations) (continued)³

1. Mr. REUTER (Special Rapporteur) said that, after listening to the comments of Mr. Ago⁴ and Mr. Ushakov,⁵ he had realized that his commentary and oral introduction had not allayed all the concern expressed with regard both to basic principles and to drafting

problems. For example, Mr. Ago had said that he did not see what practical scope a reservation to a treaty concluded between international organizations would have, since relations between international organizations seemed to him to be very different from relations between States, while Mr. Ushakov had asked about the specific nature of the various types of multilateral treaties concluded between international organizations. He therefore intended first to review the types of treaties covered by articles 19 to 23 and then to consider the consequences of such different types of treaties, in the matter of reservations.

2. With regard to Mr. Ushakov's question concerning the different types of treaties, he said that, for the purposes of the draft articles, he had already made a distinction between treaties concluded between States and international organizations and treaties concluded between two or more international organizations. That distinction was, however, inadequate because, as was implied in articles 19 and 20 of the Vienna Convention,⁶ a distinction also had to be made between "open" treaties of universal character and "closed" treaties of restricted character.

3. Of the various types of possible treaties, however, some already existed but others did not. It was a question whether the latter types of treaties could be expected to exist either in the relatively near future or in the very distant future. The problem was thus to decide whether rules should be formulated only for types of treaties which already existed and of which examples could be given, or whether rules should be formulated for types of treaties which were merely possible, ruling out the types of treaties which were theoretically possible but could not be expected to exist in the sufficiently near future.

4. The position he had adopted on that question was that the Commission must not confine itself to existing types of treaties but must also consider other possible types of treaties, although it should rule out those which could not be expected to appear until the very distant future and would require the formulation of rules whose consequences could not yet be foreseen.

5. He had reached the conclusion that it was difficult to imagine an international organization whose members were States and one or more international organizations, or whose members were all international organizations. Indeed, such an extremely remote possibility would be contrary to the definition given in article 2, paragraph 1 (i),⁷ which stated that an "international organization" meant "an intergovernmental organization". He had therefore not proposed, in draft articles 20 and 20 *bis*, a provision corresponding to the one contained in article 20, paragraph 3, of the Vienna Convention.

6. The Commission should, however, look ahead and try to allay the concern of international organizations, which feared that the future convention might hamper their development. The draft articles should provide a framework for the accommodation of the international organizations rather than impose something on them.

¹ *Yearbook ... 1975*, vol. II, p. 25.

² *Yearbook ... 1976*, vol. II (Part One), p. 137.

³ For texts, see 1429th meeting, para. 1.

⁴ 1429th meeting, para. 19.

⁵ *Ibid.*, paras. 16-18.

⁶ *Ibid.*, foot-note 4.

⁷ *Ibid.*, foot-note 3.

7. According to the definition of the word "treaty" in article 2, paragraph 1 (a), of the Vienna Convention, there were many acts in economic, technical, financial and administrative life which could, in future, be covered by treaties and to which the future articles would apply. Regardless of their functions, all international organizations would be covered by the draft articles.

8. Now the functions of international organizations were extremely varied. The function of some was merely to inform, so they could conclude only secondary treaties, as of co-operation, among themselves. The function of others, such as the Commission itself, was to produce preparatory legislation; still others, such as the European Communities, had to produce final legislation, while some, such as the ILO and WHO, produced intermediate legislation. Still others played a supervisory role, that of ensuring that States fulfilled their obligations. Their role was therefore not the same as that of a State. There were also international organizations which had operational functions: some carried out financial activities (about a dozen were banks); others carried out consultative activities, while about ten others engaged in scientific research.

9. Some international organizations had production functions and thus were akin to enterprises; such was the case of the international entity to be set up by the United Nations Conference on the Law of the Sea for exploiting the sea-bed. Would that entity be an independent international organization or a subsidiary body of another international organization? Would it exploit the sea-bed itself or through concessionaires? What kind of agreements would it conclude and to what problems of responsibility would such agreements give rise? The machinery to be set up by the United Nations Conference on the Law of the Sea raised an extremely complex legal problem, which had not yet been solved and which the Commission would have to take into account in its draft articles. Whence the need to provide for a framework of accommodation.

10. Mr. Ushakov had asked whether treaties concluded solely between international organizations could be described as "universal treaties". He (the Special Rapporteur) felt that, in such a case, the expression "universal treaty" was not suitable because, although from the geographical point of view, any treaty to which the United Nations was a party could be said to be a universal treaty, from the legal point of view it was difficult to imagine a treaty to which all international organizations would be parties. Of course, it was possible that all international organizations might be interested in concluding an agreement between themselves on the standardization of publications or on questions relating to personnel, such as the salaries of international officials and standardization of working conditions, but those two possibilities did not justify the formulation of special provisions.

11. Mr. Ushakov had also asked whether there could be agreements between two or more international organizations which were open to other international organizations. Indeed, it could be asked whether it was possible for an international organization to accede to a

treaty which already linked other international organizations. In the case of treaties between States, it often happened that a group of States, such as large and powerful States or States interested in a specific question, concluded a treaty and then opened it to other States. There were thus some open treaties which had not been adopted by an international conference. Could there be similar treaties concluded between international organizations?

12. He was tempted to give an affirmative reply to that question because, in view of the increasingly large number of international entities which might conclude agreements, it was quite conceivable that a number of them might conclude an agreement to which the others could subsequently accede. For example, some of the international organizations which dealt with nuclear physics might conclude an open agreement in order to set up a data bank or to avoid duplication of research work. Having regard to the growing number of international organizations, it could well be imagined that, in areas such as scientific research, the environment and banking, some of the interested organizations might conclude rationalization agreements which would be open to other organizations.

13. In referring to treaties between States and international organizations, Mr. Ushakov had very rightly pointed out that a distinction could be made between treaties concluded between States, to which an international organization was a party, and treaties concluded between international organizations, to which a State was a party. For example, if the European Communities or the United Nations acting on behalf of the United Nations Council for Namibia became parties to the future convention on the law of the sea, that convention would still be a treaty between States, whereas, if a State requested international assistance, the agreement concluded would be an agreement between the international organizations which provided such assistance, such as the ILO, FAO and WHO, to which the State in question would be a party.

14. It might be asked whether, in a treaty concluded between one or more States and one or more international organizations, the participation of one or more international organizations was essential to the object and purpose of the treaty, a matter to which the Vienna Convention attached great importance. In some cases, such as an international assistance agreement, a headquarters agreement between an international organization and a State, or a nuclear agreement between two States and an international organization entrusted with the task of monitoring its implementation, it was obvious that the participation of one or more international organizations was essential to the object and purpose of the treaty. In other cases, however, such as the future convention on the law of the sea, it was obvious that the object and purpose of the treaty would be the same even if no international organization was a party to it.

15. With regard to the consequences of such types of treaties for the system of reservations, he must first point out that the rules relating to reservations were only residuary rules. Since each treaty would provide for its

own system of reservations, the residuary rules would apply only where the States parties had failed to make provision for reservations in the treaty they were concluding. Such cases were quite frequent because States did not like to touch the question of reservations. For example, the United Nations Conference on the Law of Treaties, which had devoted many articles to the question of reservations, had itself passed over in silence the question of reservations to the Convention it had adopted.

16. Again, with regard to reservations, the Commission had a choice between a liberal system and a restrictive system. On the whole, the United Nations Conference on the Law of Treaties had adopted a liberal system but, as an exception, it had formulated less liberal rules for certain special cases. The Commission would therefore have to decide which categories of treaties should be governed by a liberal system and which should be governed by a restrictive system.

17. With regard to treaties concluded between international organizations only, he had proposed that the Commission follow the system of the Vienna Convention, which, in principle, laid down a liberal rule, with an exception for limited agreements. The opposite rule could, however, also be laid down and then made less restrictive by means of an exception. The Commission would therefore have to choose between the two possibilities and decide whether it was wise to maintain a liberal rule for treaties concluded between international organizations, it being understood that they were not universal treaties.

18. If the Commission was in favour of a liberal rule, it would have to amend the text he had proposed, in which he had followed the Vienna Convention too closely, particularly when he had referred, in article 20, paragraph 2, to the "limited number of the negotiating international organizations" in order to justify an exception to the liberal rule enunciated in article 19, forgetting that a criterion which was valid for States was not necessarily valid for international organizations.

19. With regard to reservations to treaties concluded between States and international organizations, he had, in principle, laid down a restrictive rule because, in that type of agreement, freedom to enter reservations could not be permitted. He had, however, made an important exception to that general rule "in the case of a treaty concluded between States and international organizations, on the conclusion of an international conference", such as the United Nations Conference on the Law of the Sea. In such a case, it was the liberal system of the Vienna Convention which would apply.

20. Thus, for treaties between international organizations, he had formulated a liberal rule with a restriction attached whereas, for treaties between States and international organizations, he had formulated a restrictive rule with an exception to allow for more freedom.

21. It had been said that, in a treaty between States and international organizations, a distinction had to be made between relations between States, to which the rules of the Vienna Convention applied, and relations between States and international organizations, for which special rules had to be formulated. In draft articles 19 *bis* and 20 *bis*, he had not made any distinction between relations

between States and relations between States and international organizations and he suggested that that question be left aside for the time being.

22. With regard to treaties between States and international organizations, the Commission would thus be called upon to adopt a general principle and an exception to that principle. However, if it decided to apply the system of the Vienna Convention, at least in certain cases, a further problem would arise in the case where the States members of an international organization which was party to a treaty were also parties to the treaty. In that case, it would be necessary to provide that formulation and acceptance of reservations and objections to reservations were permitted only if they were expressed in the same terms and at the same time by the international organization and by the member States of the organization which were parties to the treaty. For example, if EEC became a party to the convention on the law of the sea at the same time as its member States, it was inconceivable that it should be permitted to make reservations which its member States did not make, to accept reservations which its member States did not accept, or to object to reservations to which its member States did not object, since in that event the other States parties to the treaty would no longer enjoy any legal security. Some homogeneity was therefore necessary in such a case.

23. What applied in the case of EEC, however, did not necessarily apply in the case of the United Nations. If, say, the United Nations became a party to the convention on the law of the sea on behalf of the United Nations Council for Namibia, it would have to be able to formulate reservations, accept reservations or object to reservations on behalf of the Council for Namibia, without all the States Members of the United Nations being obliged to adopt the same position. It was therefore necessary to make an exception to the homogeneity rule when an international organization acted on behalf of an entity which was separate from the organization itself.

24. Mr. ŠAHOVIĆ said that the Commission was bound by a number of decisions which it had already taken on questions of principle. It had, for example, decided that treaties concluded between States and international organizations or between two or more international organizations should be governed by a different instrument than the Vienna Convention. It might have been able to avoid many of the difficulties it was now facing if it had merely drafted an additional protocol to that Convention instead of preparing a separate draft. So far, the Commission had more than once succeeded in overcoming the obstacles to which the separate draft had given rise, including those concerning the capacity of international organizations to conclude treaties and the concept of the ratification of a treaty by an international organization. The question of reservations had, however, given rise to problems which were not concerned with terminology alone, and it had to be clearly stated whether or not international organizations could formulate reservations to treaties to which they were parties. The question was not just theoretical, it was a question of method. Personally he thought that the Commission should promote not only the codification of international

law on the basis of already existing agreements but also its progressive development on certain points.

25. International organizations should be permitted to formulate reservations to treaties concluded between several international organizations. Although he had no definite ideas about the rules to be formulated, he had a preference for a liberal solution. The Commission should agree on general principles and leave drafting problems till later.

26. Mr. AGO said he endorsed the Special Rapporteur's opinion that, in the matter of reservations, the Commission could not confine itself to the treaties which international organizations had so far concluded. It must show some imagination and envisage possibilities which might arise in future. In his thorough analysis of the functions of international organizations, the Special Rapporteur had rightly stressed their operational functions, such as providing external assistance to States, and taking direct action when, for instance, an organization acted on behalf of a State which had been prevented from carrying out some of its functions.

27. In replying to a question he had raised at the preceding meeting, the Special Rapporteur had given many examples of open treaties which might be concluded between international organizations. He was, however, still not sure whether treaties in that category were really similar to treaties concluded between States or whether, in fact, an increasingly sharp distinction was not appearing between them. Multilateral agreements concluded between States were very often designed to establish valid rules of international law for the international community. Agreements concluded between international organizations, such as the ones which the Special Rapporteur had in mind, might also be normative in character but in a technical rather than a general context, since, in the cases in question, international organizations were not attempting to lay down norms of international law. Consequently, it could be questioned whether the "liberal" rule of the Vienna Convention was as justified in the case of treaties concluded between international organizations as in the case of treaties concluded between States. He personally would be inclined to require stricter discipline in the matter of reservations when international organizations were the only parties to a multilateral treaty. Moreover, the Special Rapporteur himself had seemed to be moving in that direction when he had admitted that the wording of article 19 was based too closely on that of article 19 of the Vienna Convention.

28. At first sight, the main difference seemed to be between treaties concluded between international organizations and treaties concluded between States and international organizations. On reflexion, however, it could be seen that the difference was most apparent within the category of what might be termed treaties with mixed participation. If an international organization was allowed to become a party to a treaty concluded between States, the rules of the draft articles would be applicable to that organization; on the other hand, relations between States would continue to be governed by the Vienna Convention.

29. It was with regard to reservations that the situation became more complicated. He was inclined to share the

opinion which the Special Rapporteur had expressed when he said that an organization such as the Council for Namibia or even EEC was in a similar position to States from that point of view. He wondered, however, what would happen in the case of an organization of universal character. It was possible that the future convention on the law of the sea might entrust the United Nations or a specialized agency with the task of managing the resources of the sea-bed and the ocean floor. In view of the universal character of the United Nations and the specialized agencies, the position of the organization and that of its member States would be entirely different. The organization would have to manage the resources of the sea-bed, but it would have no rights or duties in respect, for example, of the territorial sea and the exclusive economic zone. It was hardly conceivable that the organization would be allowed to make reservations, or objections to reservations, with regard to those two matters. In the opposite case, where, for example, a number of international organizations concluded a treaty with a State, he thought that there was little likelihood of reservations being formulated by those organizations. That would be the case if the international organizations which had their headquarters in Geneva concluded an agreement with the Swiss Government concerning the privileges and immunities of their officials, or if several organizations concluded an agreement with a State for the purposes of joint technical assistance operations. If, in fact, all the organizations concerned were free to formulate reservations, the co-operation on which the treaty was based would be jeopardized. That was why he did not think that the draft articles should necessarily provide for a régime similar to that of the Vienna Convention. It was, rather, by making a distinction between the possible situations which might arise that the Commission would be able to find satisfactory solutions.

30. Mr. FRANCIS said that the word "several", which was used both in the title and in the first part of the English version of article 19, created the impression that the article departed from the subject-matter of the draft, namely, treaties concluded between States and international organizations or between two or more international organizations. It was misleading in that it seemed to exclude treaties between fewer than three international organizations. The Drafting Committee might consider the possibility of replacing the word "several" by the words "two or more".

31. International organizations derived their treaty-making capacity from their own special rules and, when they were negotiating treaties among themselves, they were on an equal footing. Consequently, in the matter of reservations, there was no reason to deprive them of the powers conferred on them by article 19, which appeared to elevate them to the rank of States. It should be remembered that the Vienna Convention also applied to treaties which international organizations concluded among themselves and, in treaty negotiations, they might well find it convenient to adapt to their own circumstances a rule concerning reservations that was followed by States.

32. In the case of treaties concluded between States and international organizations, if the Commission agreed

that international organizations were not to be regarded as States, for the reason advanced by Mr. Ago, allowance should be made for a situation in which they would have what might be termed a secondary status, and no discredit should be attached to States if, in the exercise of their sovereign rights, they reserved their positions on the same basis as did the international organizations with which they were negotiating. He therefore agreed with the structure of the draft articles submitted by the Special Rapporteur and failed to see how such a situation could be circumvented, unless, of course, the Commission contemplated the possibility of placing international organizations on the same footing as States with regard to the formulation of reservations.

33. He was reluctant to endorse the idea that the draft might incorporate a provision which would preclude the application of article 3 (c) of the Vienna Convention to States which were parties both to that Convention and to the future convention now in preparation. In fact, a very liberal attitude was adopted in the Vienna Convention towards the application of that Convention to international agreements that lay outside its scope. In view of the important nature of the present draft, it would be difficult, for practical reasons, for him to accept the incorporation of such a sweeping exception. Again, article 3 (c) of the Vienna Convention permitted the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law were also parties. The Commission might be on dangerous ground if it decided to preclude the application of the Vienna Convention simply by precluding the application of its article 3 (c). The Convention was more comprehensive than might be imagined at first sight and caution was needed in a situation where it was difficult to foresee all the consequences of the present draft articles.

34. He endorsed the approach of the Special Rapporteur to the question whether treaties concluded between two or more international organizations and treaties concluded between States and international organizations should be considered separately.

35. Mr. USHAKOV said that he was quite satisfied with the replies given by the Special Rapporteur to the many questions he had asked at the previous meeting, but he still wondered whether there could be a category of treaties of general character to which all the existing international organizations might be parties. It was mainly in connexion with treaties of universal character concluded between States that the question of reservations had arisen. The Vienna Convention contained a rule which was applicable to treaties of universal character and provided for exceptions for treaties of restricted character, but left aside all intermediate treaties. For treaties to which international organizations were parties, it did not seem enough to refer to the common interests of the organizations because, under the relevant rules (which, in accordance with article 6 of the draft, governed the capacity of international organizations to conclude treaties), an organization could be empowered to conclude treaties only in certain specific areas. Thus, international organizations did not, strictly speaking, have any common interests and it was difficult to see how

treaties of a general character could be concluded between international organizations in the near future. Thus, there remained for the moment only treaties of a restricted character and, in his opinion, the rule to be applied to them in the matter of reservations should be a restrictive rule. Consequently, it should be provided that a reservation could be formulated to a treaty concluded between several international organizations only if it was expressly allowed by the treaty or accepted by each of the contracting organizations. That would make it unnecessary to draw a distinction between treaties of general character and treaties of restricted character.

36. Treaties concluded between States and international organizations could be divided into two categories, namely, treaties concluded between States, to which a small number of international organizations were parties, and treaties concluded between international organizations, to which a small number of States were parties. Between those two categories, there was room for many other types of treaties, but the Commission did not have to consider them; all it had to do was to draft an article on each of the two main categories. For treaties in the first category, the liberal rule of the Vienna Convention, as stated in article 19 proposed by the Special Rapporteur, would be applicable to States but, for international organizations, it would be necessary to provide for a special rule stating that they could formulate reservations only if the treaty expressly authorized them to do so. For treaties in the second category, the restrictive rule set out in the second part of draft article 19 would be applicable both to States and to international organizations. States and international organizations would be allowed to formulate only the reservations specified in the treaty or those to which all the contracting parties consented. If the Commission endorsed his view, only drafting problems would remain to be solved.

37. The CHAIRMAN suggested that it would be helpful if the Commission considered only articles 19 and 19 *bis* for the time being and left articles 20 and 20 *bis* till later.

38. Mr. REUTER (Special Rapporteur) said that those members of the Commission who had spoken thus far had mainly raised matters of principle. His reply to Mr. Ushakov's comments was that, if there really were only two rules, the restrictive rule would apply in every case except that of reservations formulated by States to treaties concluded by States to which a limited number of international organizations were parties.

39. The Chairman's suggestion would no doubt enable the Commission to progress more rapidly by leaving secondary questions aside and concentrating on general principles. If the majority of members of the Commission shared Mr. Ushakov's view, articles 19 and 19 *bis* could be referred to the Drafting Committee.

Establishment of a Planning Group

40. The CHAIRMAN said that, if the possibility was contemplated of dividing the Commission's report into two parts, dealing respectively with draft articles and

administrative matters, decisions on such matters and on future work would need to be taken earlier. The Planning Group, which it was agreed in principle should be established again during the current session, should now be set up to consider the Commission's future programme and methods of work, and report to the Enlarged Bureau, by which any appropriate matters should be submitted to the Commission.

41. If there were no objections, he would take it that the Commission agreed to establish a Planning Group, with Mr. Sette Câmara as Chairman, and Mr. Ago, Mr. Dadzie, Mr. Schwebel, Mr. Tsuruoka and Mr. Ushakov as members.

It was so agreed.

Organization of work (continued)⁸

42. The CHAIRMAN said that a decision would be required shortly on the question of dividing the Commission's report into two parts, one relating to administrative matters and the other to the various sets of draft articles.

43. Mr. FRANCIS said it had been his impression that, although the report would be divided into two parts, one part would not necessarily be confined to administrative matters.

44. Mr. VEROSTA said that the Sixth Committee might be disappointed if the first part of the report, which could be prepared towards the end of June, did not include at least one of the substantive items on the Commission's agenda.

45. The CHAIRMAN said that it might prove convenient to Governments to consider the two parts as if they were separate reports: in that way, one government department would be concerned with the administrative aspects only of the Commission's work, while another department considered the draft articles. However, the matter still had to be considered by the Enlarged Bureau.

The meeting rose at 6 p.m.

⁸ See 1416th meeting, paras. 47 and 48.

1431st MEETING

Wednesday, 1 June 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/285,¹ A/CN.4/290 and Add.1,² A/CN.4/298)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (continued)

ARTICLE 19 (Formulation of reservations in the case of treaties concluded between several international organizations)³ (continued)

ARTICLE 19bis (Formulation of reservations in the case of treaties concluded between States and international organizations)

ARTICLE 20 (Acceptance of and objection to reservations in the case of treaties concluded between several international organizations)⁴ (continued)

ARTICLE 20bis (Acceptance of and objection to reservations in the case of treaties concluded between States and international organizations)

1. The CHAIRMAN, noting that there were questions of principle which were common to all four articles, invited the members of the Commission to comment not only on articles 19 and 20, which had already been formally introduced by the Special Rapporteur but also on articles 19bis and 20bis, which read:

Article 19bis Formulation of reservations in the case of treaties concluded between States and international organizations

1. In the case of a treaty between States and international organizations, a reservation may be formulated by a State, when signing, ratifying, accepting, approving or acceding to the treaty, or

an international organization, when signing, formally confirming, accepting, approving or acceding to the treaty,

only if the reservation is expressly authorized either by the treaty or in some other manner by all the contracting States and international organizations.

2. Notwithstanding the rule laid down in the preceding paragraph, in the case of a treaty concluded between States and international organizations on the conclusion of an international conference in the conditions provided for in article 9, paragraph 2, of these draft articles, in respect of which it does not appear either from the limited number of the negotiating States or from the object and purpose of the treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty,

a reservation may be formulated by

a State, when signing, ratifying, accepting, approving or acceding to the treaty, or

an international organization, when signing, formally confirming, accepting, approving or acceding to the treaty, unless:

(a) the reservation is prohibited by the treaty;

¹ Yearbook...1975, vol. II, p. 25.

² Yearbook...1976, vol. II (Part One), p. 137.

³ For text, see 1429th meeting, para. 1.

⁴ *Idem.*

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 20bis Acceptance of and objection to reservations in the case of treaties concluded between States and international organizations

1. A reservation expressly authorized either by a treaty or in some other manner by all the contracting States and international organizations does not require any subsequent acceptance by the other contracting States or international organizations unless the treaty so provides or it is otherwise agreed.

2. In the case falling under article 19bis, paragraph 2, and unless the treaty otherwise provides:

(a) acceptance by another contracting State or international organization of a reservation constitutes the reserving party a party to the treaty in relation to that other contracting party if or when the treaty is in force for those parties;

(b) an objection by another contracting State or international organization to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving contracting parties unless a contrary intention is definitely expressed by the objecting contracting party;

(c) an act expressing the consent of a State or international organization to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State or international organization has accepted the reservation.

3. For the purposes of paragraph 2 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after notification of the reservation was received or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

2. Mr. CALLE Y CALLE said that the very lucid explanations given by the Special Rapporteur and other speakers, especially Mr. Ago,⁵ had shed light on the extremely difficult and complex question of reservations and had set it in its proper perspective.

3. In his fourth report, the Special Rapporteur had said that the articles of the Vienna Convention⁶ which dealt with reservations were clearly one of the principal parts of that Convention on account of both their technical preciseness and the great flexibility which they had introduced into the régime of multilateral conventions. He had gone on to suggest, in a fairly categorical manner that there was no reason to put international organizations in a situation different from that of States in the matter of reservations, for it was the quality of being a "party" to a treaty which governed the whole system of reservations, and it therefore followed, from the definition of that term given in draft article 2, paragraph 1 (g),⁷ that an international organization which could be so described was placed on exactly the same footing as a State. He had added:

... it cannot be accepted without precautions that an organization should be party to a treaty at the same time as its own members; either a situation of this kind must be governed by special rules,

or else it must be ensured that the areas of competence of the organization and of its member States are clearly defined⁸

4. That was so because of the risks of conflict between the positions of States as sovereign entities and as members of the organization concerned, or between the positions which an individual would be expected to hold as a representative of his country on the one hand and as an official of the organization on the other. Such a risk of conflict was all the more likely as international organizations were established for specific purposes which, as Mr. Ago had pointed out, they were bound by their own rules to pursue. It was for those reasons that the Special Rapporteur now felt that, where international organizations were concerned, it would not be sufficient to reproduce the corresponding articles of the Vienna Convention, as he had done in his fourth report. Consequently, he now proposed in article 19 a text similar to that of the corresponding article of the Vienna Convention, and in article 19bis a separate and less liberal régime to cover the case of treaties concluded between States and international organizations. The second paragraph of article 19bis referred to article 9, paragraph 2, which laid down the conditions for the adoption of the text of a treaty between States and one or more international organizations. That being so, he (Mr. Calle y Calle) considered that article 19bis, paragraph 2, related not to the formulation of reservations, which was an operation which took place independently of and later than the adoption of a text, but to the conditions which would apply to the adoption of a text which permitted or prohibited reservations.

5. His own view was that the formulation of reservations by international organizations should be subject to a fairly liberal régime. Since international organizations had contractual capacity by reason of their functions, and were accountable for their use of that capacity to their member States, they should be allowed to establish limits to their obligations through the mechanism of reservations. He did not think that they would abuse such a freedom, since they were limited by their constituent instruments and were ultimately controlled by their member States.

6. The international organizations should be asked to express their opinions on the four articles the Special Rapporteur was now proposing, for they had already expressed concern at the elaboration of the draft articles as a whole and were likely to be even more concerned at the elaboration of provisions concerning reservations.

7. Mr. SETTE CÂMARA said that the Special Rapporteur's fifth report (A/CN.4/290 and Add.1) provided not only another example of the exceptional quality of his work but also an illustration of his openness to the views of other members of the Commission and of representatives in the Sixth Committee, for by comparison with the corresponding portion of his fourth report (A/CN.4/285), he had revised the entire section dealing with reservations.

⁵ 1429th meeting, para. 19; 1430th meeting, paras. 26-29.

⁶ See 1429th meeting, foot-note 4.

⁷ *Ibid.*, foot-note 3.

⁸ *Yearbook ... 1975*, vol. II, p. 37, document A/CN.4/285, second part of the draft articles, sect. 2, paras. 1, 2 and 4 of the general commentary.

8. In his fourth report, the Special Rapporteur had proposed for the problem of reservations very simple solutions which, in accordance with the agreed methodological approach, closely followed the corresponding articles of the Vienna Convention. Those solutions had been based on the premise that the participation of international organizations in multilateral treaties between States was still extremely rare, and that the problem of reservations was therefore of no immediate practical interest. However, even while advocating the extension to treaties involving international organizations of the liberal régime provided in respect of reservations by the Vienna Convention, the Special Rapporteur had not omitted to point out the very complicated problems which could arise when both States and an international organization of which they were members were parties to the same treaty. As he had said in his fifth report, the adoption by the Commission of draft article 9, paragraph 2 (which concerned the adoption of the text of a treaty by an international conference in which one or more international organizations participated) had prompted him to embark on the search for provisions to cover the real possibility that international organizations might be permitted to participate in multilateral treaties.⁹

9. It was clear from the fifth report that the liberal régime of the Vienna Convention, if widely applied to treaties between States and international organizations of which those States were members, could lead to a chaotic situation. That suggested that the solution was to accept the abandonment of the principle of freedom to formulate reservations, which the Special Rapporteur had proposed in paragraph 5 of that report and concerning which he had said that it was “designed not to abolish freedom to formulate reservations, but to oblige parties to consider [its] consequences... before adopting it in each particular case”. At the same time, the Special Rapporteur had recognized, in paragraph 16 of the same report, that the situation with regard to treaties between two or more international organizations was different, and had concluded that organizations which were parties to such agreements could therefore be given the same freedom with regard to reservations as was granted to States by the 1969 Vienna Convention.

10. It was on the basis of that reasoning that the Special Rapporteur proposed two sets of articles: articles 19 and 20, which were devoted to treaties concluded between two or more international organizations, and articles 19*bis* and 20*bis*, which were devoted to treaties concluded between States and international organizations. The Special Rapporteur had emphasized in paragraph 23 of his fifth report that he was “proposing a quite strict general reservations régime, with exceptions; but in his approach, liberalism and severity apply in the same manner to States and to international organizations”.

11. The Special Rapporteur had discussed at length in his fifth report the problems which had already been raised in previous discussions of the Commission concerning the applicability of article 3 (c) of the Vienna Convention and the relationship between that provision

and article 3 (c) of the present draft. He had concluded, in paragraph 24 of that report, that those problems could be solved if the present draft articles constituted a complete whole, or in other words, if they defined “a reservations régime applicable in relations between two States parties to a treaty between States and international organizations”. In the opinion of the Special Rapporteur, it was that régime, and not the provisions of the Vienna Convention, which would be applicable. The Special Rapporteur proposed that the situation should be made clear by the insertion in the draft articles of a provision precluding for States parties to the convention deriving from those articles and to the Vienna Convention the application of article 3 (c) of the latter instrument. However, the problem of the boundaries between the two conventions was one of great importance, which certainly went beyond the problem of reservations proper, and it was therefore one on which he himself preferred to reserve his position.

12. He had no disagreement with the substance of article 19 as proposed by the Special Rapporteur. However, the phrase “several international organizations”, which appeared in both the title and the text of the article, should be replaced by the phrase “two or more international organizations”, which were the words used in the title of the agenda item. He agreed that draft article 19 could be referred to the Drafting Committee.

13. Nor had he any disagreement with article 19*bis*, which limited to certain specific instances the faculty of international organizations to formulate reservations to treaties concluded between themselves and States. With regard to paragraph 2 of that article, the suggestion by Mr. Calle y Calle concerning the effect of the reference to article 9, paragraph 2, merited attention. The hypothesis advanced in paragraph 2 of article 19*bis* was very reasonable, as could be judged from the fact that the United Nations Council for Namibia had participated on a par with States, and at their invitation, in the recent United Nations Conference on Succession of States in respect of Treaties.

14. He supported the suggestion by Mr. Calle y Calle that efforts should be made to ascertain the views of international organizations concerning the Special Rapporteur's proposals with regard to their capacity to formulate reservations.

15. Mr. NJENGA said that, while he could accept generally the Special Rapporteur's approach to the problem of reservations, he did have some doubts for, however closely the role of international organizations might be approximated to that of States, it must never be forgotten that international organizations and States constituted two entirely different categories of subjects of international law. Consequently, the limitation which draft article 6 placed on the capacity of international organizations to conclude treaties did not apply to States, which, as sovereign entities, had full powers to enter into such agreements as they chose. He assumed that the Commission had already dealt with the problem of the situation where an international organization desirous of concluding a treaty did not have the “relevant rules” referred to in article 6; his own view was that an international organization should not be excluded from concluding treaties solely because it did not have written

⁹ A/CN.4/290 and Add.1, para. 9.

rules. There remained, however, the limitation on its treaty-making power which derived from the purpose of an international organization; he did not believe that such an organization should be considered competent, merely because it was a subject of international law, to conclude a treaty which had no connexion with its own function, let alone enter reservations to that treaty.

16. Perhaps, however, that problem did not arise with respect to articles 19 and 20, since treaties concluded between international organizations would presumably concern matters of relevance to their respective fields of competence. Moreover, such treaties would probably be restricted treaties and therefore of interest to all their parties, who should, logically, be given an equal right to formulate reservations. Given that articles 19 and 20 referred to restricted treaties, he agreed that they should speak not of "treaties concluded between several international organizations", but of "treaties concluded between two or more international organizations".

17. The list of restrictions placed on international organizations by article 19*bis* was acceptable, but perhaps not exhaustive. For example, it could be said that the United Nations Council for Namibia had been permitted to participate in the United Nations Conference on Succession of States in respect of Treaties because it was seen as the representative of a potential sovereign entity and that, as such, it should be treated no differently from fully-fledged States with respect to power to conclude treaties or formulate reservations. The Council would probably be treated in that way at the forthcoming session of the United Nations Conference on the Law of the Sea, but the situation of EEC, which it had already been proposed should be admitted as a party to the eventual convention on the same subject, was very different. The proposal concerning EEC had presumably been made essentially because the members of the Community had entrusted to it the handling of their common fishery policy. He doubted very much whether the Community should be permitted to enter reservations to the eventual treaty on any subject other than fisheries, for all other matters would fall outside its competence.

18. He would, therefore, like the Special Rapporteur to comment on the suggestion that the capacity of an international organization to enter reservations to a treaty should be limited not only by the existing provisions of article 19*bis* but also by the conditions that the reservation should relate to a matter pertinent to the object and purposes of the organization concerned.

19. Mr. SCHWEBEL said that he was sympathetic to the views expressed by both Mr. Njenga and Mr. Calle y Calle. In principle, he favoured the view of Mr. Calle y Calle that the status and potential of international organizations should be enhanced, and that their capacity to enter reservations to treaties to which they were parties should therefore be subject to a flexible régime. On the other hand, he had doubts about the practical impact of such an approach, especially in so far as international organizations continued to operate on the basis of equal votes for all their members. Furthermore, it was his impression that, generally speaking, the treaty-making power of international organizations was not at all well-defined, and that the constraints on that power

were equally obscure. Even in the case of the United Nations, the Charter gave no clear indication as to the Organization treaty-making power. Perhaps, however, the *Reparation* case¹⁰ could be seen as inferring that international organizations generally, and certainly the United Nations in particular, were authorized to conclude treaties. Mr. Calle y Calle had been right in saying that there were practical constraints on the use of that power, but it was hard to be sure just how small was the likelihood that international organizations would use their power to formulate reservations in a manner contrary to their members' interests. In all, he favoured the approach to the question of reservations adopted by the Special Rapporteur. He saw merit in the suggestion by Mr. Calle y Calle that the international organizations should be asked to state their views on the Special Rapporteur's proposals.

20. Mr. TABIBI said he fully agreed with the Special Rapporteur that, when considering the adoption of a reservations régime, the Commission should make a political choice rather than a choice based on international law, which would raise a host of difficult legal problems. As Mr. Schwebel had remarked, the treaty-making power of international organizations was not clearly defined. The question arose whether international organizations were equal to States in regard to the conclusion of treaties, a question which was particularly complex in the case of a treaty between a State and an international organization. Another difficulty, as the Special Rapporteur had observed, was raised by the case in which reservations to a treaty were formulated by a State member of an international organization which was itself a party to the treaty.

21. At a time when there were already more than 200 international organizations in existence and their membership was constantly increasing, it was necessary to devise rules which would facilitate the operation of such organizations and serve the needs of the community of nations. The activities and objectives of international organizations were for the benefit of mankind as a whole, and such organizations represented the collective voice of States, which should be respected. For that reason, he favoured the approach adopted by the Special Rapporteur and believed that the Commission had no choice but to accept the régime he proposed. He had no substantial disagreement with the wording of the provisions under consideration.

22. Mr. TSURUOKA said that he agreed with the Special Rapporteur that the Commission should take account of both existing treaties and treaties to which international organizations might be parties in future and that, in preparing the draft articles, it should take care not to hamper the natural development of the activities of international organizations. Indeed, in the matter of reservations, such development was particularly rapid.

23. He had no difficulty in accepting articles 19 and 19*bis*. The rules the Commission was formulating were residuary rules and the principle of the freedom of action

¹⁰ *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949, p. 174.*

of the parties was always safeguarded. The liberal approach on which article 19 was based was in keeping with the Vienna Convention and should not constitute an obstacle to the natural development of the activities of international organizations. He fully supported the restrictive rule which the Special Rapporteur had proposed in article 19*bis*. The liberal solution which the United Nations Conference on the Law of Treaties had eventually adopted for reservations had been the result of a difficult compromise between the supporters of a liberal approach, who had taken the view that a liberal régime would encourage States to accept certain treaties, whereas a restrictive régime would discourage them from doing so, and the supporters of a restrictive régime, whose view was that treaties of universal character were the result of compromises reached after lengthy negotiations and that any reservation could upset the balance thus achieved. The supporters of a restrictive régime had also said that it was not unusual for States pursuing short-sighted policies to formulate reservations for discreditable reasons. Article 19 which had emerged from those discussions required some sacrifice on the part of States, but it benefited the international legal order.

24. Article 19*bis* proposed by the Special Rapporteur stated a general restrictive rule, subject to an important exception. It was a well-balanced provision, which should not hamper the harmonious development of international organizations. It covered the case to which the Special Rapporteur had referred at the previous meeting, where one or two States concluded a treaty with an international organization and objected to the reservations which the organization wanted to formulate; if the treaty related to assistance to be provided by the international organization, its object and purpose would be defeated. A case of that kind was also, and especially, covered by article 19 (c) of the Vienna Convention, which provided that a reservation must not be incompatible with the object and purpose of the treaty.

25. With regard to the suggestion made at the previous meeting by Mr. Ushakov,¹¹ that, in the case of treaties concluded between States and international organizations, States should be subject to a liberal régime and organizations to a restrictive régime, he thought that such a solution offered practical advantages, even though it might seem strange to have two categories of parties to the same treaty.

26. Mr. USHAKOV said that, in his opinion, the question whether an international organization and its member States could, as parties to a treaty, formulate different reservations was not a real problem because, first, the capacity of international organizations to conclude treaties was always very limited and, second, the risk of an overlap of competence between an international organization and its member States was no concern of the Commission.

27. The Commission must, however, limit the capacity of international organizations to formulate reservations. For example, if the United Nations became a party to the future convention on the law of the sea, it was obvious that it would not be able to formulate reservations on

matters which did not concern it directly, such as the limits of the territorial sea, the exclusive economic zone or the right of passage through channels and straits. It was therefore necessary to know exactly to what rules international organizations could formulate reservations. The simplest solution would be to provide for a *renvoi* to the treaty. If the treaty was silent on the point, as was often the case, it was then the general rule which would apply. That rule should be that an international organization could formulate reservations to a treaty only if the treaty did not prohibit it from doing so. Thus, if EEC, which was competent to represent its member States for the purposes of concluding certain categories of treaties, such as economic treaties, became a party to the future convention on the law of the sea, it would not be competent to formulate reservations to all the clauses of that instrument. If it were, any conflict of competence between it and its member States would be an internal conflict which would not concern the Commission, since the Commission could not lay down rules governing the internal relationships between international organizations and their members. It was therefore important that international organizations should be subject to special rules and be able to formulate only the reservations expressly provided for in treaties.

28. Mr. EL-ERIAN said he agreed with the approach adopted by the Special Rapporteur in making a distinction between the reservations régime applicable to treaties between States and international organizations, and the reservations régime governing treaties between two or more international organizations. By and large, the formulation of the draft articles took into account the differences between those two situations.

29. With regard to the suggestion by Mr. Calle y Calle and Mr. Sette Câmara,¹² that the Special Rapporteur should seek the views of international organizations, it would certainly be worth making the attempt, even though the organizations might be reluctant to express an opinion on matters where the practice was almost non-existent. The Special Rapporteur had, in fact, already conducted certain consultations with international organizations, and he might perhaps enlighten the Commission as to whether he had followed the practice which had been adopted in connexion with the draft articles on the representation of States in their relations with international organizations, namely, to ascertain the views of such organizations on his reports and on the draft articles.

30. Mr. QUENTIN-BAXTER said that the subject under consideration raised the complex problem of the balance to be struck between codification and the progressive development of international law. Practice was clearly inchoate and incomplete, and in some cases also arcane. To adopt too timid an approach would be to impose a strait jacket on the future development of the law, while to follow too bold a course would mean building an edifice based on only a few known facts.

31. Perhaps the most fundamental consideration was what the members of the Commission thought the nature of an international organization to be. Clearly, the cha-

¹¹ 1430th meeting, para. 36.

¹² 1431st meeting paras. 6 and 14.

acter of such an organization was quite different from that of the States which created it. Although States themselves were to some degree an abstraction which, as could be seen from the Charter of the United Nations, existed for the benefit of their peoples, international organizations represented an even higher degree of abstraction. In a general context, therefore, such organizations were not to be compared with States. That did not, however, mean that, in a specific context, an international organization did not carry as much weight as, or even greater weight than, States. For instance, the relationship between international finance institutions and individual States members of those organizations which applied to them for supplementary financing was reminiscent of the relationship between banker and client. In such cases, organizations, responding to the collective will of their member States, were required by those member States to negotiate on terms of equality and even of superiority with individual States.

32. In the light of that basic consideration, certain questions came to his mind in connexion with article 19*bis*. First, was it right that, under the provisions of paragraph 1, States should be removed from the ambit of the reservations régime laid down by the Vienna Convention, merely because an international organization or organizations participated in a treaty concluded as a result of an international conference? Second, did the provisions of article 9, paragraph 2, under which the adoption of the text of a treaty between States and one or more international organizations at an international conference was subject to a two-thirds majority, provide sufficient relief from the rigour of the rule laid down in article 19*bis*, paragraph 1? Third, was it really necessary to provide for full equality of rights concerning the making of reservations as between States and international organizations, even when the latter were or might become parties to the same treaty?

33. He found it very difficult to envisage many circumstances in which the case covered by article 9, paragraph 2, would in fact occur. He could conceive of cases where the consideration of a treaty might involve the participation of one or more international organizations. The most obvious example was perhaps international finance agencies, but the United Nations might also play a role in relation, for instance, to the sea-bed, or any specialized agency in relation to a matter within its competence. In such a case, the community of States would conduct negotiations designed to lead to the conclusion of a treaty at an international conference in which international organizations having a competence basic to the purpose of the conference would play a very important and perhaps even a dominating role. He thought it unlikely, however, that such a conference would accord voting rights to the organization or organizations concerned, or that the latter would wish to have such rights. It was customary, in cases of that kind, for treaties to be adopted by a two-thirds majority of States participating in the conference. Moreover, it might be presumed that participating international organizations would not wish the outcome of the conference to turn on their votes.

34. The situation was much the same in the case of a regional conference involving, say, the participation of

WHO and the States of the South Pacific region, although it might be somewhat different in the case where an international organization in a sense represented member countries which had vested competence in it. It was possible, for instance, to conceive of circumstances in which EEC as such would participate in a conference, although even there it was difficult to envisage absolute equality in the matter of voting rights. In any event, it would be quite wrong to remove from the scope of the rules laid down in the Vienna Convention the States which furnished the vast majority of participants in an international conference convened to elaborate a new treaty instrument. Such States should surely be governed, at least among themselves, by the rules of that Convention. In regard to methodology, he subscribed to the approach adopted by the Special Rapporteur in reproducing, where necessary, the provisions of the Vienna Convention rather than merely making reference to that instrument.

35. He was not persuaded that it was necessary to provide for full equality of treatment in regard to the formulation of reservations as between States and international organizations, even when they were parties to the same treaty. The manner in which States and international organizations participated in a treaty was invariably different, and obligations fell on such organizations in different ways from what they did on States. He was inclined to think that, in article 19 as well as in article 19*bis*, it might be appropriate to adopt a rather stricter reservations régime than that laid down in the Vienna Convention. In the case of multilateral treaties concluded between States, it was customary for States to be able to formulate reservations regarding not the object and purpose of the treaty but lesser matters where an element of chance and arbitrariness might have been involved. He had in mind, in particular, the proceedings of large multilateral conferences at which, at some time or other, votes were taken on particular provisions of the draft treaty. It was quite proper that a State should be able to make incidental adjustments in cases of that kind by entering reservations. International organizations, on the other hand, were bound not only by the basic clauses of a treaty relating to its object and purpose but also by the limitations imposed by their own constituent instruments. While every effort should be made to make provision in a treaty for restrictions of that kind, it was not always possible to determine with precision what the relationship between the provisions of a treaty and those limitations would be. Although he held no hard-and-fast views on the subject, it did seem to him that that might be an argument in favour of adopting a rather stricter rule concerning reservations formulated by international organizations.

36. Mr. DADZIE said he wished to associate himself with the views expressed by Mr. Ushakov and Mr. Ago. In particular, he believed that account should be taken of two distinct situations: the case in which States were parties to a treaty to which a limited number of international organizations also subscribed, and the case in which international organizations were parties to a treaty to which a limited number of States also subscribed. In the former case, the reservations régime should be

based on the liberal rules laid down in the Vienna Convention, in the latter, provision should be made for the consent of States parties so as to safeguard their position vis-à-vis the international organizations which were parties to the same treaty. Although he could not imagine that, in the case of a treaty involving both States and international organizations, such organizations would formulate reservations on matters of no concern to them, it was better that provision should be made for such an eventuality. In any event, he agreed with Mr. Quentin-Baxter that international organizations should not be placed on the same footing as States in regard to the formulation of reservations.

37. In his introductory statement, the Special Rapporteur had referred to the case of a treaty between States and an international organization in which the organization failed formally to confirm the treaty, thus leaving only States as parties to it.¹³ In such a case, was it the provisions of the draft articles or those of the Vienna Convention which should apply? In his view, if it was envisaged that an international organization would at some later stage become a party to the treaty, the rules laid down in the draft articles should apply; if, on the other hand, no such possibility was envisaged, States should then be free to decide whether they would rather be governed by the rules of the Vienna Convention. In the latter case, it would not be fair to insist that States should not avail themselves of their rights under the Vienna Convention but should have to resort to a convention envisaging a situation involving States and international organizations.

38. Mr. ŠAHOVIĆ said that the Special Rapporteur's proposals concerning reservations were logical because they were in keeping with the basic principles already adopted by the Commission. Indeed, those proposals should be viewed in the context of the articles which had already been adopted, particularly article 6 relating to the capacity of international organizations to conclude treaties, and article 9, paragraph 2.

39. Article 6 met a number of the points raised by members of the Commission with regard to the action relating to reservations which international organizations might take under the agreements they concluded with States. The capacity of an international organization to conclude treaties (which, according to article 6, was governed by the relevant rules of the organization) involved not only the act of concluding treaties but also the whole process pertaining to that act. Account should therefore be taken of such capacity in the articles relating to reservations.

40. The solution to the problem of reservations to treaties concluded between States and international organizations which the Special Rapporteur had proposed in article 19*bis*, paragraph 2, was the direct consequence of the rule enunciated in article 9, paragraph 2, of the Vienna Convention.

41. His answer to the question whether, under article 3 (c) of the Vienna Convention, the system provided for in that Convention could be applied to agreements between

States and international organizations was that it could. The Special Rapporteur had explained the scope of that provision very clearly in his fifth report, which stated that "it was to be only a transitional measure designed partially to fill the gap created by the fact that the scope of the [Vienna] Convention is limited to written treaties between States". (A/CN.4/290 and Add.1, para. 24.)

42. With regard to the relationship between the Vienna Convention and the draft articles, the Commission had agreed that international organizations possessed capacity to conclude treaties with States. The problem was now whether, and how, such capacity should be limited. In his opinion, States must solve that problem within the various international organizations and the Commission should disregard it.

43. Mr. Ushakov's proposal to apply a more restrictive rule to international organizations¹⁴ was interesting, as was Mr. Tsuruoka's comment on the different régimes which applied to States and to international organizations. He nevertheless thought that, if the Commission agreed that two different régimes were applicable, it would be introducing an element of discrimination in the draft articles which might undermine their foundation. The draft articles must be based on a presumption of the full equality of the parties to treaties.

44. With regard to the method to be followed, the Commission should wait until the end of the discussion of all the articles relating to reservations before referring articles 19 and 19*bis* to the Drafting Committee and taking a final decision on them.

45. With regard to the proposal to consult international organizations about the problem of reservations, he thought they should be consulted not only about that problem but also about the draft articles as a whole, and that the Commission should wait until it had completed its work before embarking on such consultations.

46. The CHAIRMAN said that the question how far the Commission should go in its consideration of the draft articles before referring provisions to the Drafting Committee raised something of a problem. His own estimation was that the Commission needed to cover articles 20 and 20*bis* before referring any provisions to the Drafting Committee, since those articles were closely interrelated with articles 19 and 19*bis*. On the other hand, he would be reluctant to carry the debate further than the four articles in question, which raised points that the Drafting Committee could perfectly well consider.

47. Mr. REUTER (Special Rapporteur) said he thought that the Commission should continue the general debate on articles 19, 19*bis*, 20 and 20*bis*, but that, once the general debate had been completed, it should, as a first step, refer those articles to the Drafting Committee, which in any case would have to come back to them later. There would then be two possibilities open to the Commission: either it could consider the other articles relating to reservations, numbered 21, 22 and 23, which might be affected by the position adopted with regard to articles 19, 19*bis*, 20 and 20*bis*, or it could go on to the following articles, which were less difficult than the articles relating

¹³ 1429th meeting, para. 13.

¹⁴ 1430th meeting, para. 36.

to reservations, which it could refer to the Drafting Committee.

48. With regard to the possibility of consulting international organizations, which had been mentioned by Mr. Calle y Calle and other members of the Commission, he thought that, for the time being, there could be no question of holding formal consultations with international organizations on the subject of reservations. The Commission had already held general consultations on the draft articles as a whole and, as Mr. Šahović had very rightly pointed out, it was not possible formally to consult international organizations in connexion with each point. The Commission had made it very clear that only a small number of international organizations in the United Nations system would be consulted, even though such a decision would deprive it of some potentially very interesting observations by other international organizations. Finally, the consultations which had been held had been with officials of the secretariats of the organizations, who had been hard put to reply to some of the questions asked, whereas it was the principal organs of the organizations which would have been competent to express an opinion on questions with a significant political background. The replies to the questions asked by the Commission during the general consultations had shown that those questions had not always been fully understood by the international organizations and that some of them had had repercussions in their internal administrations. That seemed to prove that the organizations expected the Commission to give them more detailed information than they could give to it.

49. If two opposing trends emerged within the Commission concerning the system of reservations, it would be necessary to draft two different versions for each article and then submit them to the international organizations for their consideration.

The meeting rose at 1 p.m.

1432nd MEETING

Thursday, 2 June 1977, at 11.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/285,¹ A/CN.4/290 and Add.1,² A/CN.4/298)

[Item 4 of the agenda]

¹ *Yearbook...1975*, vol. II, p. 25.

² *Yearbook...1976*, vol. II (Part One), p. 137.

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (continued)

ARTICLE 19 (Formulation of reservations in the case of treaties concluded between several international organizations),³

ARTICLE 19bis (Formulation of reservations in the case of treaties concluded between States and international organizations),⁴

ARTICLE 20 (Acceptance of and objection to reservations in the case of treaties concluded between several international organizations)⁵ and

ARTICLE 20bis (Acceptance of and objection to reservations in the case of treaties concluded between States and international organizations)⁶ (continued)

1. Mr. VEROSTA said that, in his sixth report, the Special Rapporteur had himself emphasized that "certain secondary details in the articles of the Vienna Convention derive from the fact that the effects in question are to operate with respect to *sovereign* subjects of law, namely, States, whose sovereignty must be carefully respected, whereas in the draft articles consideration must also be given to the effects which are to operate with respect not to sovereign States but to subjects of law which are wholly subject to the service of a *function*, as internationally defined in relation to States". (A/CN.4/298, para. 25.) That passage was extremely important and should appear at the beginning of the commentary to the articles under consideration, because it showed the limits within which international organizations could be assimilated to States. States were sovereign subjects of international law, whereas international organizations were the creations of States, in other words, subjects of international law by derivation, which were, as the Special Rapporteur had stated, wholly subject "to the service of a function, as internationally defined in relation to States", a definition to which the words "and by States" might even be added.

2. During the 1920s, after the founding of the League of Nations, some international organizations had begun to be accorded a position of exaggerated importance. That tendency had been reinforced by Kelsen's theory and had developed, after the Second World War, with the proliferation of international organizations. But in his *Théorie et réalités en droit international public*,⁷ Charles de Visscher had demonstrated the fundamental role of States and the limited role of international organizations in international society.

3. International organizations could conclude treaties only within the narrow limits of their functions, as defined in the treaty concluded by the founder States, which was the constituent instrument of every international orga-

³ For text, see 1429th meeting, para. 1.

⁴ For text, see 1431st meeting, para. 1.

⁵ For text, see 1429th meeting, para. 1.

⁶ For text, see 1431st meeting, para. 1.

⁷ 4th ed. (Paris, Pédone, 1970).

nization. Thus, as Mr. Ago and Mr. Ushakov had noted, the World Bank could not conclude a treaty of friendship or a trade treaty either with a State or with another international organization. The treaty-making capacity of an international organization was limited by the function attributed to it by States in the treaty by which they had established it. That should be expressly stated in the draft, because it constituted a general principle of public international law which warranted codification.

4. The question to be answered was whether the limits imposed on the treaty-making capacity of international organizations by reason of the functions to which they were subject impaired in any way their capacity to formulate reservations to a multilateral treaty or to object to reservations by other parties to the treaty. In his fifth report (A/CN.4/290 and Add.1), the Special Rapporteur appeared to be of the opinion that they did not.

5. He (Mr. Verosta) would be prepared to accept, in principle, the rules laid down in articles 19, 19*bis*, 20 and 20*bis*, provided that it was made clear in the draft that the capacity of an international organization to conclude treaties was governed not only by the relevant rules of the organization, as already stated in article 6,⁸ but also, as the Special Rapporteur had quite rightly pointed out in his sixth report, by the function to which it was wholly subject.

6. Mr. RIPHAGEN said that the clear and original views expressed by the Special Rapporteur, both in his reports and in his oral statements, were a real contribution to legal thinking on the difficult subject under consideration.

7. He wished to address himself to two questions: the system of reservations itself, and the actual meaning and effect of the participation of an international organization in a treaty to which States were also parties. Under article 2, paragraph 1 (*d*), of the draft, which was based on the corresponding provision of the Vienna Convention,⁹ a reservation was defined as a unilateral statement purporting to exclude or to modify the legal effect of certain provisions of the treaty in their application to the entity making that statement. He would submit that, in considering the question to what extent an international organization should be permitted to make a reservation and to accept or object to a reservation made by another party, it was relevant to know the exact legal effect of the provisions of the treaty in their application to the organization concerned.

8. Turning first, however, to the reservations régime itself, as laid down in the Vienna Convention, it would seem an exaggeration to say that that system had been received with general enthusiasm by international lawyers. That régime was far from ideal, either with regard to substance because it operated on the rather vague basis of compatibility with the object and purpose of the treaty, or with regard to procedure because, through the individual acceptance or rejection of reservations by the other parties, it split up the multilateral regulation into a series of bilateral relationships. Ideally, an international con-

ference convened to draft and adopt a series of treaty provisions should itself determine, on a collective basis, which deviations from those provisions were acceptable within the framework of the treaty as a whole. In very many cases, however, international conferences were unable to devote the necessary time and attention to such matters. So-called residual rules on the substance and procedure of reservations were therefore necessary, but in fact tended to become general rules.

9. The Commission was now faced with the need for such rules with regard to the power of international organizations to make reservations, and to accept or reject reservations made by other international organizations or by States. Every international organization was different from every other international organization, and international organizations as a whole were quite different from States, a fact which, at the first blush, would seem to militate in favour of adopting an extremely flexible approach in the matter of reservations made by international organizations. Indeed, if a multilateral treaty contained general rules which did not distinguish between States and international organizations in the formulation of rights and duties, it would seem almost imperative for any international organization wishing to become a party to that treaty to specify "the legal effect of certain provisions of the treaty in their application... to that international organization", in other words, to make what was technically known as a reservation.

10. The case for admitting reservations by international organizations which became parties to a multilateral treaty was, however, based on two rather formidable assumptions. The first assumption related to the legal effect of the accession of an international organization to a multilateral treaty to which States were or became parties. Was that legal effect automatically limited to such rights and obligations under the treaty as the organization itself could have or could assume under its own "relevant rules", as referred to in article 6? If so, there would be no need for the organization concerned to make any unilateral declaration. On the other hand, if the Commission were eventually to adopt a provision along the lines of article 36*bis* (A/CN.4/298), according to which the fact that an international organization of the kind mentioned in that provision became a party to a multilateral treaty entailed direct rights and obligations for its member States, such an organization should clearly have the same right to formulate reservations as other parties to the treaty. The point he wished to emphasize was that it was extremely difficult to arrive at a final conclusion regarding the admissibility of reservations by international organizations until one had clearly established what the effect was of an international organization becoming a party to a multilateral treaty.

11. The second assumption was that there were or might be multilateral treaties which, on the one hand, did not distinguish in their provisions between States and international organizations as parties thereto and, on the other, admitted the possibility that a specific international organization, international organizations of a particular type, or any international organization might become a party thereto. Obviously, in a great many cases, a treaty would only provide for one or more

⁸ See 1429th meeting, foot-note 3.

⁹ *Ibid.*, foot-note 4.

international organizations becoming a party if it made specific provision for the rights and obligations of such organizations as distinguished from States parties to the treaty. Thus, in such a case, the legal effect of an international organization becoming a party to such a treaty was *a priori* limited to such provisions as specifically mentioned its rights and duties. While it could obviously be argued that the international organization concerned should be required to subscribe fully to the provisions of the treaty without having the option of making reservations to it, the Commission could not rule out a situation in which an international organization, which might not have had a real say in the drafting and adoption of a treaty, might be willing to accept only part of the obligations envisaged for it by the treaty, without thereby affecting the object and purpose of the treaty as a whole. Furthermore, the Commission could not altogether rule out a situation in which a treaty instrument adopted at an international conference accepted the possibility that a certain type of international organization might become a party to that treaty, without describing in detail what the legal consequences of such an action really were. The only way in which such detailed legal effects could be formally determined was through the formulation of a reservation by the international organization concerned and the acceptance of that reservation by the other parties to the treaty.

12. His tentative conclusion was that the Commission should not take any rigid decision concerning the admissibility of reservations to a multilateral treaty by an international organization. While any reservation which was incompatible with the object and purpose of the treaty would be excluded, the question arose who was to decide whether a particular reservation had that character of incompatibility. Unless the drafters of the treaty dealt with that matter collectively at the international conference itself, one was practically forced to admit the rather inadequate procedure of individual reactions, as envisaged in the Vienna Convention.

13. The further problem arose whether international organizations should have the power to accept or reject reservations made by other entities entitled to become parties to a particular treaty. There again, he found it extremely difficult to arrive at abstract conclusions which would be valid for every kind of treaty, international organization and reservation. In the case of a treaty which envisaged an obligation for an international organization to provide for the financing of projects in States parties to the treaty, and which further imposed certain obligations on such States, the fact that, by a reservation, one such State refused to accept the obligation in question must entitle the international organization concerned not to accept any financial obligation towards that State. It seemed equally clear that, in the case of a treaty dealing both with matters of concern to an international organization, and therefore envisaging the accession of that organization to the treaty, and with matters which fell outside the scope of the organization's activities, it did not make sense to allow the organization in question to reject a reservation by a State relating to a matter which fell outside the scope of the organization's competence and interests.

14. For the time being, he could find no formulation which would take account of the two cases he had mentioned. He did, however, consider that an international organization entitled to become a party to a treaty should not object to a State becoming, *vis-à-vis* itself, a party to that treaty for reasons unconnected with the role of that organization under the provisions of the treaty. On balance, it seemed to him that an objective rule in that matter was not easy to elaborate. An international organization should therefore be permitted not to accept its obligations under a treaty towards a State which itself was unwilling to accept certain obligations under that treaty, the acceptance of which the organization concerned considered relevant to its own contribution to the implementation of the treaty.

15. Sir Francis VALLAT, speaking as a member of the Commission, said that there was no doubt that draft articles 19, 19*bis*, 20 and 20*bis* contained elements of progressive development in the field of policy and legislation. The Commission would quite clearly be creating rules to govern future circumstances. There was, however, a second aspect to its task, namely, the codification of existing rules in the matter of reservations.

16. In that connexion, it was appropriate to recall article 15 of the Statute of the Commission, in which the expression "progressive development of international law" was defined as meaning the preparation of draft conventions on subjects which had not yet been regulated by international law, or in regard to which the law had not yet been sufficiently developed in the practice of States. In some respects, clearly, the Commission had virtually no practice of States or international organizations in regard to reservations on which to base itself. On the other hand, there were international legal standards which had been written down and codified in the Vienna Convention. Whatever one's personal views might be concerning the virtues or shortcomings of those rules, they could be regarded more or less as a statement of current international law in the field of reservations.

17. In the present context, therefore, the Commission's task was a limited one, namely, not so much to develop new law as to adapt to its present purposes the known rules as laid down in the Vienna Convention. Reference should also be made to the Commission's report on the work of its twenty-seventh session, which recorded the Commission's decision generally to follow as far as possible the articles of the Vienna Convention referring to treaties concluded between States, for treaties concluded between one or more States and one or more international organizations, and even for treaties concluded between two or more international organizations.¹⁰

18. That consideration constituted the essential point of departure. It was good legislative practice to build on precedent, although that should also be accompanied by a vision of the future and by caution and flexibility. The question arose what was meant by "caution" in the present context. To his mind, caution meant making adequate provision for the possibility of future development, and not creating artificial barriers and complexities.

¹⁰ *Yearbook...1975*, vol. II, p. 169, document A/10010/Rev.1 para. 124.

As the Commission had been reminded, there were already some 220 international organizations within the meaning of the definition provisionally adopted under article 2, together with some thousands of treaties to which international organizations were parties. Doubtless, most of those treaties were mainly or exclusively bilateral in character. However, the developments of the past 50 years would indicate that the number of multilateral treaties in which international organizations participated was bound to expand considerably in the relatively near future. It was not difficult to imagine areas in which States and international organizations might wish to participate in the same treaty: treaties relating to cultural matters, the exchange of information, industrial property and the outcome of research in particular fields were examples which immediately sprang to mind. The Commission should foresee that possibility and prepare the ground for the likely future developments in that area.

19. At the same time, however, the Commission should bear in mind the very limited nature of the particular subject under discussion, namely, reservations. Under article 2, paragraph 1 (*d*), a reservation was defined as "a unilateral statement... by an international organization... whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application... to that international organization". Consequently, the Commission was not concerned with the case of an international organization which might attempt, by means of a reservation, to alter the obligations of States parties to a treaty but rather with the right of an international organization to modify the legal effect of provisions in their application to itself. Thus, the real issue before the Commission was that of the competence of international organizations. The question whether the parties to the multilateral treaty other than the reserving party were States or international organizations was not strictly relevant, nor, as Mr. Ushakov had pointed out, was the question of overlapping.¹¹ If a State party to a treaty made a reservation different from a reservation made by an international organization of which that State was a member and, as a result, a question arose concerning the duties of that State within the organization, that was a matter for the internal regulation of the organization concerned.

20. To some extent, the fears which had been expressed concerning the formulation of reservations by international organizations appeared to be based on two factors. It was feared, first, that an international organization might attempt to make reservations which went beyond its competence. In that regard, Mr. Ushakov¹² had given the example of a case in which the United Nations might formulate a reservation concerning a treaty provision on the breadth of the territorial sea. But he doubted very much whether such a reservation could be made since a provision on that point could hardly be held to apply to the United Nations. If it were considered to be applicable, however, he saw no real reason why the United Nations should not be allowed to make a reservation in the same manner as any other party to the treaty concerned.

¹¹ 1431st meeting, para. 26.

¹² *Ibid.*, para. 27.

21. Misgivings had also been voiced in regard to objections to reservations, some members of the Commission being of the opinion that it would be unseemly to permit international organizations to object to reservations made by States. However, the provisions of article 20 of the Vienna Convention, and of articles 20 and 20*bis* of the draft under consideration brought out the bilateral character of acceptance of and objection to reservations. Under paragraph 4 (*a*) of article 20 of the Vienna Convention, acceptance by another contracting State of a reservation constituted the reserving State a party to the treaty in relation to that other State. Under paragraph 4 (*b*) of the same article, an objection by another contracting State to a reservation did not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention was definitely expressed by the objecting State. In both those cases, the effect achieved was essentially bilateral. In the case of international organizations, he did not find it unreasonable that an international organization should be allowed to express the intention not to regard a treaty as being in force between itself and a reserving State if it objected to the reservation formulated by that State. He could conceive of circumstances in which international organizations would need to exercise such a right. The bilateral effect of a reservation was further emphasized by article 21, paragraph 2, of the Vienna Convention, which stated that the reservation did not modify the provisions of the treaty for the other parties to the treaty *inter se*.

22. As he saw it, the capacity to formulate reservations formed an integral part of the treaty-making capacity. The capacity of international organizations to conclude treaties was generally recognized and had been acknowledged in draft article 6. However, that provision further stated that such capacity was governed by the relevant rules of the organization concerned. It was in the regulations, written and unwritten, of a particular organization that the key to the problem lay, and it was those rules that determined how far an international organization was entitled to formulate reservations. The Commission's report on the work of its twenty-seventh session stated:

Similarly, with regard to the exercise by international organizations of their competence in the process of concluding treaties, the Commission considered that it was necessary to bear in mind that such competence, unlike that of States, is never unlimited and that the terms used in the Vienna Convention concerning the competence of organizations should be adapted accordingly.¹³

23. Thus, the problem before the Commission was how far to adapt the provisions of the Vienna Convention concerning reservations so as to take account of the limited competence of international organizations, and he would submit that good legislation should be designed to meet the problem. The Commission should not deprive international organizations of their right to formulate reservations merely because their competence might be limited.

24. The *raison d'être* of article 19*bis*, paragraph 2, appeared to be a concession to that line of thinking; if an international organization could participate in an international conference on a par with States, then it should

¹³ *Yearbook...1975*, vol. II, p. 170, document A/10010/Rev.1, para. 127.

enjoy the same rights with regard to the formulation of reservations. He was not sure whether the inclusion in that article of a reference to article 9, paragraph 2, was the best way of achieving that end, but he approved of the general approach.

25. As the subject was still in an early stage of development, he felt it would be a great mistake to make too much of special cases. The United Nations Council for Namibia, for instance, was a novel entity, which did not fully fall within the ordinary framework of international organizations. The Commission should take a broad view looking to the future and, if anything, should open the door instead of shutting it. If States wished to exclude the possibility of reservations being made by international organizations in particular cases, that was easy to do. It was, however, far more difficult to make positive provision for reservations in particular cases.

26. With regard to the basis for the four draft articles under discussion, he agreed with the Special Rapporteur that there were only three categories of multilateral treaty to be taken into consideration: treaties to which only States were parties, which came within the ambit of the Vienna Convention; treaties to which only international organizations were parties, which were covered by article 19; and treaties to which both States and international organizations were parties. He had originally been strongly in favour of the distinction drawn in respect of such treaties in articles 19*bis* and 20*bis*, but he had been unable to find any solid reasons for the discrimination against international organizations which it implied. The more he had heard of the Commission's debate, the more he had become convinced that the distinction made in those two articles was based on the wrong criteria. He did not see why the Commission should wish to deprive States *inter se* of the right to formulate reservations to a treaty simply because international organizations were parties to it, or to deprive international organizations *inter se* of the same right merely because States were parties to the treaty. If the Commission did wish to make what would inevitably be an artificial distinction in the case of the third category of treaties he had mentioned, it must look to the real problem, namely, the question whether there should be a special régime for States and international organizations which were parties to the same treaty. He had very serious doubts as to whether there was any legal or political justification for a limitation of that nature.

27. Articles 20 and 20*bis* followed logically from articles 19 and 19*bis* as they now stood. He hoped, however, that the need for article 19*bis*, paragraph 2, would disappear. The phrase "in some other manner" which appeared in article 19*bis*, paragraph 1, and article 20*bis*, paragraph 1, was open to improvement by the Drafting Committee.

28. Mr. EL-ERIAN, recalling that the United Nations Conference on the Law of Treaties had recommended in a resolution that the General Assembly refer to the Commission the study of the present topic, "in consultation with the principal international organizations",¹⁴

asked whether other consultations would be held with such organizations than those the Special Rapporteur had mentioned at the previous meeting.¹⁵ He considered that, once the Commission had prepared a full set of draft articles, it should circulate them not only to Governments but also to international organizations in order to be able to take account of the comments of both groups in preparing its final proposals.

29. Mr. AGO, referring to the statement made by Sir Francis Vallat, said that he wished to dispel a number of misunderstandings. Sir Francis had been right to say that the Commission need not concern itself with questions such as the risk that international organizations might exceed their competence if they had full freedom to formulate reservations. However, he (Mr. Ago) had never linked that question with the subject under consideration. Sir Francis had further referred to the equal rights enjoyed by participants in an international conference and had stressed the need to avoid any discrimination. On that point, it should be noted that discrimination could exist only between comparable entities, such as States *inter se*, but not between States and international organizations.

30. He agreed with Sir Francis Vallat that it would be wrong to make too much of special cases, such as that of the United Nations Council for Namibia. That body, which had been established at the international level to represent a possible future State, might just conceivably be assimilated to a State. The case of EEC, which was characterized by a limited division of sovereignty between the Community and its member States, was also very different from that of organizations of a universal character. The latter, on the other hand, were really quite different from States, and their participation in an international conference was at another, and possibly higher, level. An international organization might be expected to promote the adoption of a convention or exercise a measure of supervision with regard to its application. In other words, the difference to which he had referred was evidenced by the fact that the rights and duties deriving from a convention were generally not the same for States as they were for international organizations.

31. Sir Francis' appeal to the Commission to look to the future and progressively develop international law was certainly praiseworthy. However, he wondered whether the Commission might not rather hamper the development of international law by giving international organizations too free a hand in the formulation of reservations. The system of reservations was necessary but at the same time regrettable, since it deprived treaties of their general character. He therefore doubted whether the confusion caused by State reservations should be aggravated by according international organizations excessive power to make reservations. Further complications might arise through allowing an international organization to object to the reservations of a State. It

tion, Sales No. E.70.V.5), p. 285, document A/CONF.39/26, annex, resolution relating to article 1 of the Vienna Convention on the Law of Treaties.

¹⁵ 1431st meeting, paras. 48 and 49.

¹⁴ Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference (United Nations publica-

would be extremely odd for an international organization to make an objection concerning rights or duties which the treaty did not confer upon it.

32. Mr. USHAKOV said he shared most of the misgivings expressed by Sir Francis Vallat, particularly with regard to the extent of the competence of an international organization to conclude a particular treaty and the need not to place international organizations and States on the same footing. Many difficulties would be resolved if the proposal he had made at a previous meeting was adopted.¹⁶ That proposal had been to grant international organizations the right to formulate only such reservations as were authorized by the treaty. Needless to say, it would be possible in practice to make an exception to that rule so as to give one or more organizations the right to make other reservations.

33. To revert to the suggestion which he had made in connexion with articles 19 and 19*bis*,¹⁷ he now suggested that article 20 (Acceptance of and objection to reservations in the case of treaties concluded between several international organizations) be supplemented by two articles: an article 20*bis* applicable to treaties concluded between States with limited participation by international organizations, and an article 20*ter* applicable to treaties concluded between international organizations with limited participation by States. In his view, the Commission should refrain from dealing with any intermediate cases.

34. Mr. REUTER (Special Rapporteur) said that, interesting as they were, he could not systematically review all the comments, questions, misgivings and criticisms to which the consideration of articles 19, 19*bis*, 20 and 20*bis* had given rise. With regard to the drafting, for instance, he would confine himself to acknowledging that, as a number of members of the Commission had suggested, the words "two or more" should be used in articles 19 and 20 instead of the word "several".

35. In general, it would appear that the members of the Commission were not far from reaching agreement so that the four articles could be referred to the Drafting Committee. Personally, he favoured a fairly open approach towards international organizations and a solution which, while meeting the concerns expressed during the debate, would be more generous than the solution proposed by Mr. Ushakov. The problem was to determine when and how to adopt that approach, and he would be submitting new proposals on that subject.

36. Before turning to the four articles, he wished to make two preliminary remarks. First, he noted that some members of the Commission had addressed themselves to general concepts, such as the concept of reservations. He himself wished to refer to a concept which was even more elementary but extremely important for the draft, namely, the status of party to a treaty. The question had already been settled by the Commission in draft article 2, paragraph 1 (g), which read:

"party" means a State or an international organization which has consented to be bound by the treaty and for which the treaty is in force.

37. That definition, which the Commission had adopted provisionally, was based on a definition which he had previously proposed but which the Commission had discarded, and which read:

"party" means a State which has consented to be bound by the treaty and for which the treaty is in force; in the same conditions it means an international organization when its position with regard to the treaty is identical to that of a State party,¹⁸

While the Commission had doubtless been right to discard the last part of that definition, it was precisely to that point that many of the comments made during the debate on the articles under consideration had been directed. The question was whether an international organization was to be regarded as never being on the same footing as a State, as always being on such a footing, or only sometimes so being. In the first case, Mr. Ushakov's proposal would be entirely acceptable; in the second, it would be a recipe for disaster. In his view, an international organization was sometimes on the same footing as a State; the question was when.

38. Still on the subject of the status of party to a treaty, he said that, in putting forward his own definition of the term "party", he had had in mind the many situations where a treaty accorded a special role to an international organization without making it a genuine party to the treaty or regarding it as a stranger to the treaty. That was the status of the United Nations in respect of the constituent instrument of ITU. The concepts of party to a treaty and of member did not necessarily coincide. For that reason, it should be made clear that the rules laid down in the draft were not applicable when an international organization was in a special situation vis-à-vis a treaty. The Commission could not go into details and should acknowledge that, when States subjected an international organization to a special régime in a treaty, they could equally well settle the question of reservations.

39. His second preliminary remark related to the legal foundation and extent of the right to deposit an instrument in the matter of reservations, in other words, to formulate, accept or object to a reservation. In the view of Sir Francis Vallat, that right was quite simply founded on the capacity to conclude treaties. To formulate a reservation was to limit one's commitment and one could not limit a commitment unless one was capable of entering into the commitment. To accept a reservation was also to limit one's commitment. On the other hand, objection to a reservation raised more difficult problems, which had been referred to by Mr. Riphagen and Mr. Ago, and to which he intended to revert at a later stage.

40. The real problem was not that of an international organization which exceeded its competence by objecting to a reservation, since in such a case the organization concerned would have no right to raise an objection. The question was rather whether States could confer a "quasi-judicial" power on the organization making an objection. That power was not judicial in the true sense of the word, since the organization was not a court, but it was judicial to the extent that it performed a function which distin-

¹⁶ 1430th meeting, para. 35.

¹⁷ *Ibid.*, para. 36.

¹⁸ *Yearbook...1975*, vol. II, p. 31, document A/CN.4/285, art. 2, para. 1 (g).

guished it from States. That would be the case if States concluded between themselves and an international organization a treaty relating to nuclear inspection. If a State made a reservation and the organization raised an objection, on the ground that the State concerned would no longer be bound by the obligations of the treaty, the organization would be taking a quasi-judicial decision. It might be that States wished to confer such a power on the organization concerned. Admittedly, that question was linked with the question of competence, but with competence in the broad sense, since not only the assumption of a commitment but also the supervision of the application of a treaty would be involved. Thus, the problem of objection to reservations had manifold implications which should form the subject of further consideration.

The meeting rose at 1 p.m.

1433rd MEETING

Friday, 3 June 1977, at 10 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Thirteenth 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 that the thirteenth session of the Seminar would be held from 6 to 24 June 1977 and would be called the "Edvard Hambro session" as a tribute to that eminent man who had always placed all his competence and energy at the disposal of the Seminar.

3. Desiring to secure the widest possible geographical distribution, the Selection Committee had chosen 22 candidates, some of whom were from distant countries, such as Papua New Guinea. Mr. Verosta, Mr. Reuter, Mr. El-Erian, Mr. Šahović, Mr. Dadzie, Mr. Ushakov and Sir Francis Vallat, as well as the Director of the Human Rights Division and Mr. Pilloud of the International Committee of the Red Cross, would give lectures at the Seminar. The programme of work would enable yet another member of the Commission to give a lecture during the third week of the Seminar.

4. With regard to the Seminar's finances, he wished to thank Mr. El-Erian, the Commission's previous Chairman for the efforts by which he had obtained a contribution

of \$2,000 from Kuwait. He also observed that the Netherlands and Norway had considerably increased their contributions, that of Norway being nearly doubled. The 1977 budget, which amounted to \$22,000 and to which Denmark, the Federal Republic of Germany, Finland, Kuwait, the Netherlands, Norway and Sweden had contributed, had made it possible to grant 13 fellowships. That was an encouraging result, but the interest of Governments should not be allowed to wane for the cost of living and travel expenses were continually increasing. It was only through the generosity of Governments that candidates from developing countries could be invited to participate in the Seminar.

5. The CHAIRMAN said he was glad to note that the contributions of several Governments had increased, and expressed the hope that every member of the Commission would draw the attention of his country's Government to the importance and value of the Seminar so that the level of contributions would not only be maintained but, if possible, increased.

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/285,¹ A/CN.4/290 and Add.1,² A/CN.4/298)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR
(continued)

ARTICLE 19 (Formulation of reservations in the case of treaties concluded between several international organizations),³

ARTICLE 19bis (Formulation of reservations in the case of treaties concluded between States and international organizations),⁴

ARTICLE 20 (Acceptance of and objection to reservations in the case of treaties concluded between several international organizations) ⁵ and

ARTICLE 20bis (Acceptance of and objection to reservations in the case of treaties concluded between States and international organizations) ⁶ (concluded)

6. Mr. REUTER (Special Rapporteur) said he would begin by answering Mr. El-Erian, who has asked at the previous meeting when and how international organizations should be consulted on the draft articles being prepared.⁷ Although it was not for him to settle the matter, he wished to intimate that he did not see how international organizations could be officially consulted if States were not consulted at the same time. It was

¹ Yearbook...1975, vol. II, p. 25.

² Yearbook...1976, vol. II (Part One), p. 137.

³ For text, see 1429th meeting, para. 1.

⁴ For text, see 1431st meeting, para. 1.

⁵ For text, see 1429th meeting, para. 1.

⁶ For text, see 1431st meeting, para. 1.

⁷ 1432nd meeting, para. 28.

true that it was the Commission's duty to request international organizations to submit observations, as was shown by the resolution of the United Nations Conference on the Law of Treaties, mentioned by Mr. El-Erian. However, the topic under study was of as much, if not more, concern to States. After all, international organizations were composed of States and there did not seem to be any other procedure than the usual one of consulting States. Moreover, in view of the rather slow pace at which the Commission was examining the lengthy draft of articles, it might perhaps be considered advisable to ask for comments before the draft was considered in its entirety. Personally, he strongly recommended that solution, which might be adopted once consideration of the sixth report (A/CN.4/298), which dealt with relations with non-party States or international organizations, had been completed.

7. Continuing the statement he had begun at the previous meeting on the debate on the articles under consideration, he said that the question of objections to reservations did not depend only on capacity to enter into international commitments. Some examples would make it easier to understand the problem. For instance, Mr. Ushakov⁸ and Sir Francis Vallat⁹ believed that, in the case of the European Communities, it was either the Communities or the member States that were competent; each could enter into commitments only in their own spheres of competence. That reasoning was theoretically correct. If the Commission accepted it, the European Communities would be able both to sign treaties within their spheres of competence and to formulate and accept reservations, or object to reservations. States would enjoy the same rights within the same limits. In the case of an organization of a universal character, such as the United Nations, the situation was more awkward, as Mr. Ago and Mr. Ushakov had appreciated. In fact, international organizations of a universal character were competent to deal with an almost unlimited number of subjects in the form of studies or recommendations, but they did not usually have any decision-making power. And it was difficult to conceive of an international commitment without decision-making power. To recognize that the United Nations could become a party to any treaty in the interests of the international community would seriously disturb the treaty-making process. In that case, the criterion proposed by Mr. Ushakov¹⁰ could not be applied.

8. It was also conceivable that organizations of a universal character might have particular interests of their own which did not correspond to those of all their member States. If such organizations possessed decision-making power in respect of those interests, there would be nothing to prevent them from entering into an international commitment. In that connexion, the example of the United Nations Council for Namibia was interesting. That subsidiary organ of the United Nations could be regarded mainly as a potential State. However, even if it was regarded only as an instrument, the United Nations was

acting in an entirely special capacity through the Council and it could both formulate and accept reservations and object to reservations. In so doing, it would not be defending the interests of the international community but those of a certain territory; its role would cease once the territory had legally become a State.

9. He, personally, would find it quite normal for the United Nations Council for Namibia to become a party to the future convention on the law of the sea, but not the United Nations, as the representative of the interests of all mankind. Moreover, it was not true, as some members of the Commission believed, that the United Nations would become a party to that convention if the future sea-bed authority was a United Nations body; it would be enough for the United Nations to accept or refuse, by a collateral instrument, the task entrusted to that body. That was how it had proceeded in accepting the annex to the Vienna Convention,¹¹ which provided for a system of settlement of disputes, for which the Secretary-General of the United Nations was to draw up a list of conciliators.

10. In his opinion, it would be a very serious matter to authorize an international organization of a universal character to become a party to a general convention. It was not enough to say, as Mr. Ushakov had done,¹² that, if the United Nations became a party to the future convention on the law of the sea, for example, it could neither formulate reservations nor object to a reservation relating to a matter not directly within its competence, such as the territorial sea or the exclusive economic zone, because, where the rights of the United Nations were involved, any reservation which a State might formulate on one of those matters would directly concern the interests of the United Nations. Moreover, ships had already flown the United Nations flag, in particular in the Korean Sea and at Suez, and it was quite possible that the future convention on the law of the sea might authorize the Security Council to operate vessels under the United Nations flag for peace-keeping purposes. The United Nations would then naturally wish to safeguard its rights under the future convention. Consequently, he thought it would be a serious political decision to open a general convention, such as the future conventions on the law of the sea and humanitarian law, to an international organization which considered itself qualified to protect the general interests of mankind. His regard for open treaties did not go that far.

11. If the Commission endorsed his view, it might perhaps be necessary to add, at the beginning of the articles on reservations, a provision on the following lines:

The capacity to formulate a reservation, to accept a reservation formulated by another party to a treaty, and to object to a reservation formulated by another party to a treaty is based on the capacity to enter into international commitments. In the case of international organizations, it is subject to the limits deriving from article 6.

He would submit a draft text to the Drafting Committee. Any provision of that kind would, of course, have to be accompanied by a detailed commentary.

⁸ 1431st meeting.

⁹ 1432nd meeting.

¹⁰ 1430th meeting, para. 35.

¹¹ See 1429th meeting, foot-note 4.

¹² 1431st meeting, para. 27.

12. The four articles under consideration would have to contain liberal rules and restrictive rules, but the members of the Commission had not yet reached agreement on the proportion of rules of each kind to be included. Mr. Riphagen¹³ had adopted a very cautious attitude, maintaining that as long as it had serious doubts, the Commission should not take a decision. Mr. Ushakov¹⁴ had proposed a simple and logical solution, but one which would place great restrictions on international organizations, since all their reservations would have to be authorized by the treaty, whatever its nature. Mr. Ago¹⁵ and Mr. Quentin-Baxter¹⁶ had taken a less categorical position than Mr. Ushakov, but were nevertheless inclined to favour restrictive rules. The other members of the Commission had expressed a number of doubts, but tended to be in favour of a liberal régime.

13. When applied to articles 19 and 20, relating to treaties concluded between several international organizations, Mr. Ushakov's solution would have unquestionable drafting advantages. So far, the discussion had centred on the idea that reservations related to treaties with a large number of parties and that agreements between international organizations, even if they were open agreements, had only a few parties and usually dealt with matters of minor importance. The conflict between Mr. Ushakov's view and that of the members who were in favour of a more liberal régime was thus perhaps more relevant to the future or even to theoretical considerations.

14. Viewing the problem from that angle, it might be asked whether the system of reservations provided for in the Vienna Convention was intended for treaties to which a large number of States were parties. He had not yet had occasion to state his views on that point, but some members of the Commission had recognized the advantages of the solutions provided by the Vienna Convention, whereas others had expressed indefinite regrets regarding them. Referring to article 20, paragraph 2, of that Convention, he pointed out that the criterion for determining the treaties to which a restrictive solution applied was not so much the limited number of the negotiating States as the object and purpose of the treaty and, principally, the fact that "the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty". In other words, the Vienna Convention allowed the liberal régime to be applied to a treaty to which few States were parties, if its application in its entirety between all the parties was not an essential condition of the consent of each one to be bound by the treaty. He himself had always considered that the solution adopted by the International Court of Justice in the *Reservations to the Genocide Convention* case¹⁷ was adequate, not only because it had made it possible to put an end to an

attempt to isolate and oppress a minority but also on grounds of principle. It was true that reservations presented some disadvantages, as Mr. Ago had observed, but a treaty accepted with reservations by several States was better than no treaty at all.

15. At the 1431st meeting, Mr. Calle y Calle had emphasized the fact that international organizations were intergovernmental organizations, each comprising a group of States, so that a treaty concluded between international organizations with only seven or eight member States each might well concern 20 or 30 States. Just as all legal systems recognized that there came a time when it was necessary to find out what was concealed behind legal persons, so it was necessary to see what happened during the negotiation of treaties. In many cases, negotiators did not receive precise instructions, so that Governments might later be confronted with texts which did not exactly correspond to their views. Consequently, the faculty to formulate reservations at the time of signing or ratifying treaties, even if few States were parties to them, was a matter of great interest to Governments. International organizations usually negotiated agreements through their secretariats, though their decision-making organs sometimes took part in the negotiations. But it should be borne in mind that the decision-making organ, which was composed of government representatives, might be faced with a treaty whose text it did not find satisfactory. It should not then be denied the right to formulate reservations. After all, it was States that were concerned, and international organizations would be all the more willing to sign agreements if organs composed of government representatives had the same faculty as States to formulate reservations. He therefore considered that the wording of draft article 20, paragraph 2, should be amended so as to refer, not to the limited number of the negotiating international organizations, but to the circumstances of the negotiation.

16. With regard to articles 19*bis* and 20*bis*, relating to treaties concluded between States and international organizations, he believed that, to deal with the many delicate and varied situations to which such treaties could give rise, the solution required was to subject international organizations to the restrictive rule that they could formulate only reservations authorized by the treaty. In drafting those provisions, however, he had been thinking of cases in which an organization was in exactly the same position, in regard to a treaty, as a State party. If two customs unions were allowed to negotiate and to sign with States a convention relating, for example, to questions of nomenclature, it was only normal to grant them the faculty to formulate reservations on the same footing as States. If they were denied that faculty, the customs unions—and hence their member States—would not be on an equal footing with the States parties to the convention.

17. It was nevertheless necessary to specify the circumstances in which an international organization must be considered as being in the same position as a State. At one point, he had thought that he could rely on the fact that draft article 9, paragraph 2,¹⁸ provided for the possibility of participation by an international organiza-

¹³ 1432nd meeting, paras. 6 *et seq.*

¹⁴ 1430th meeting, para. 36.

¹⁵ *Ibid.*, paras. 26 *et seq.*

¹⁶ 1431st meeting, paras. 30 *et seq.*

¹⁷ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 15.*

¹⁸ See 1429th meeting, foot-note 3.

tion in an international conference, and he had drafted article 19*bis*, paragraph 2, accordingly. At the 1431st meeting, Mr. Šahović had found that reasoning correct, but Mr. Calle y Calle and Mr. Sette Câmara had raised slight objections, on the ground that participation in a conference was one thing and the conclusion of a treaty another. On reflection, he thought those objections were well founded and might even have been stronger. In the final analysis, it was not the number of participants that was decisive.

18. Mr. Ushakov's comments had also given him food for thought. He too had stressed numbers since he had distinguished between treaties concluded between States with limited participation by international organizations and treaties concluded between organizations with limited participation by States.¹⁹ All of those considerations had led him to seek another approach.

19. After all, the treaties in question were treaties to which an international organization was a party on the same footing as any State, as in the case of the two customs unions which he had mentioned as an example. In that instance, the treaty would continue to exist if one or even both of the international organizations ceased to be parties to it. Thus, the proportion of States and international organizations parties to a treaty mattered little: if the treaty, with its object and purpose, subsisted after the withdrawal of the international organizations, they could be considered as being in the same position as States. That criterion could be applied to the future convention on the law of the sea. If EEC became a party, together with its member States in so far as that instrument concerned them, the convention would not cease to exist if the Community withdrew from it. Conversely, if an international organization withdrew from a treaty relating to the supply of nuclear material to a State by that organization, the treaty would no longer have any object or purpose. The same would apply to an agreement on the provision of assistance by an international organization and with greater reason to a headquarters agreement.

20. Where the participation of an international organization was closely bound up with the object and purpose of the treaty, it was natural that the organization should be able to formulate only the reservations authorized by the treaty. For example, it was possible that a tripartite treaty for the supply of nuclear material would allow an international organization to formulate reservations on certain points, but it was inconceivable that the organization would be free to enter any kind of reservation whatsoever. In that connexion, Mr. Verosta had rightly emphasized the role of the international organization's function.²⁰ Whenever an organization was not in the same position as a State, it was precisely because of its function. It could even be asserted that, where an international organization participated in a treaty because of its functions, it lost its right to formulate reservations.

21. For States, the situation was simpler: they continued to be subject to the rules of the Vienna Convention, that was to say, to liberal or restrictive rules as appropriate.

If an international organization was invited to take part in an international conference on nuclear problems with a large number of participating States, it was natural to specify what reservations the organization could formulate when it became a party to the treaty being drawn up, and equally natural that the States should benefit, in regard to reservations, from the liberal régime of the Vienna Convention. On the other hand, if the same organization and the same States were negotiating a treaty prohibiting the use of nuclear weapons, the restrictive rule set out in article 20, paragraph 2, of the Vienna Convention would certainly apply, even if the States were very numerous, and neither they nor the international organization would be able to formulate reservations because of the integral character of the treaty.

22. In his opinion, the draft should not deal with the question of objections to reservations. It might well be asked whether an international organization which was a party, together with about 20 States, to a convention on public health problems, for example, and which had supervisory functions, could object to a reservation formulated by a State. Rather than seek a general formula to cover such cases, the Commission should give particulars in the commentary. In an extreme case, it might possibly be one of the functions of the organization to ensure that its member States did not formulate reservations that conflicted with the object of the treaty. Again, the organization might only be required to supervise the technical application of the treaty and not to verify the legality of the normative rules it contained. In such cases, the rule applicable was the general rule that an international organization could formulate reservations only if the treaty authorized it to do so. That rule could then be extended to other acts relating to reservations.

23. If the Commission subscribed to his new views, article 19*bis* should be amended to include a formulation which might read:

In the case of a treaty concluded between one or more States and one or more international organizations whose participation in the treaty is, in particular by reason of the functions assigned to the organization or organizations, essential to the object and purpose of the treaty, the organization or organizations may formulate reservations only in the cases authorized by the treaty.

The States would be subject to the rules of the Vienna Convention. In other cases, where the participation of the organization was not linked with the object and purpose of the treaty, the rules of the Vienna Convention would likewise apply to it.

24. Mr. USHAKOV said that he would like to ask four questions.

25. First, were there any concrete cases in which international organizations had formulated, accepted or objected to reservations to a treaty?

26. Second, if the United Nations was a party to the convention on the law of the sea and could enter reservations concerning the régime of the territorial sea, what would be the effect of those reservations in regard to the relations between the States parties and to the relations between the States parties and the United Nations?

27. Third, should not the principle of reciprocity, which was recognized in international law, play a part

¹⁹ 1430th meeting, para. 36.

²⁰ 1432nd meeting, para. 1.

in a case such as that of reservations to the régime of the territorial sea?

28. Fourth, under the general rule stated in article 19*bis*, paragraph 1, in the case of a treaty concluded between States and international organizations, a State could formulate reservations "only if the reservation is expressly authorized either by the treaty or in some other manner by all the contracting States and international organizations." Must it be inferred that, if the United Nations participated in the convention on the law of the sea, the States parties would not be authorized to make reservations as between themselves and would thus be subject to a régime different from that prescribed for the four Geneva conventions on the law of the sea?

29. Mr. AGO said he was greatly attracted by the solutions proposed by the Special Rapporteur, but would also like to ask a question; for it often happened that, at diplomatic conferences, States did not agree on the problem of reservations and took the easiest but most unwise way out, which was to ignore it. Where the parties to a convention included one or two international organizations, did the obligation for the authors of the convention to specify the articles to which the international organizations could make reservations also include an obligation to take a position on the faculty of States to make reservations? In other words, if the treaty stipulated that the international organizations could make reservations to certain articles only, would the same apply to the States, or would the treaty also have to specify the articles to which States could make reservations?

30. Mr. REUTER (Special Rapporteur), replying to the questions asked by Mr. Ushakov, said that he knew of no concrete cases in which international organizations had formulated, accepted or objected to reservations.

31. As to the effect of the reservations the United Nations might formulate if it was a party to the convention on the law of the sea, he had already said that, in his opinion, the United Nations should not be a party to that convention, because it was not competent to undertake the necessary commitments. But supposing that the United Nations did become a party to the convention on the law of the sea in order to protect the general interests of mankind as a whole, it was inconceivable that it would make a reservation concerning the régime of the territorial sea or object to a reservation concerning that régime for it had no territorial sea of its own and could not assume a commitment for something it did not possess. On the other hand, if it was accepted that the United Nations had the right to navigation, it must be permitted to make reservations on questions affecting navigation interests, such as the breadth of the territorial sea, and to object to reservations on such questions.

32. With regard to the principle of reciprocity mentioned by Mr. Ushakov, it should be noted that, according to that principle, land-locked States which became parties to the convention on the law of the sea should not have the right to formulate, accept or object to reservations concerning the provisions of the convention which related to the territorial sea or the continental shelf because they possessed neither. But it could also be argued

that a State which had no territorial sea was entitled to object to a reservation by a State which had a territorial sea in so far as that reservation affected its right of navigation. It would thus be possible for land-locked States to make reservations in regard to something they did not possess, which would be contrary to the principle of reciprocity. That was why the general principle he had formulated was to base the faculty to formulate, accept or object to reservations on the capacity to enter into commitments. That principle was valid for States themselves, for it amounted to saying that a State could not make reservations to a treaty with respect to a capacity it did not possess.

33. With regard to Mr. Ushakov's fourth question, he had completely abandoned the idea of making States subject to a régime that was necessarily symmetrical with that for international organizations. Because he had, in general, laid down a restrictive rule for international organizations, there was no reason why States should be subject to the same rule. It was the rule in the Vienna Convention that applied to States, that was to say, the general rule of freedom in the matter of reservations.

34. In reply to the question asked by Mr. Ago, he pointed out that the adoption of a restrictive rule for international organizations might perhaps lead States to specify, in the text of conventions in which one or more international organizations participated, the reservations those organizations were authorized to formulate. As a matter of legislative policy, he thought that, if States authorized certain reservations by international organizations, they would naturally not remain silent about their own reservations, but would include specific provisions on them too. However, if States authorized certain reservations by international organizations, did that not mean, *ipso facto*, that those reservations were also authorized for States? In other words, a State could not object to a reservation formulated by another State if that reservation was authorized for an international organization, since the fact that a reservation had been authorized for an international organization proved that the States were agreed that it was not contrary either to the object or purpose of the treaty. Reservations authorized for international organizations could therefore have positive consequences in regard to reservations by States.

35. The CHAIRMAN said that, in the course of his very valuable statements, Mr. Reuter had shown the qualities of clarity and flexibility, combined with firmness, which were exactly what was needed in a Special Rapporteur. The time had perhaps come for the Commission to turn its attention to articles 20 and 20*bis*.

36. Mr. USHAKOV said that articles 20 and 20*bis* were so similar in content to articles 19 and 19*bis* that they did not require a separate discussion. He proposed that all four articles, together with the new article proposed by the Special Rapporteur, should be referred to the Drafting Committee.

37. Mr. SETTE CÂMARA congratulated the Special Rapporteur on his very lucid statement. The Special Rapporteur's proposal for a new article, which would act as a kind of bridge between the articles relating to reservations and article 6, was of the utmost importance,

and its bearing on other provisions of the draft should be carefully weighed. Having adopted article 6, which recognized the capacity of an international organization to conclude treaties, the Commission had no choice but to acknowledge the right of international organizations to formulate, accept and object to reservations. The problem was to determine what limitations should be imposed on the exercise of that right. Initially, the Special Rapporteur had favoured the adoption of a liberal régime modelled closely on that of the Vienna Convention; subsequently, he had come round to the view that some restrictions should be placed on the freedom of international organizations in the matter of reservations, in order to avoid a chaotic situation in the future. The new article the Special Rapporteur had proposed could solve many of the problems confronting the Commission in that area. He (Mr. Sette Câmara) had no objection to Mr. Ushakov's suggestion that that article, together with articles 19, 19*bis*, 20 and 20*bis*, should be referred to the Drafting Committee.

38. The Commission should not shy away from practical cases, whatever their special characteristics might be. The question of the capacity of the United Nations Council for Namibia, for instance, had recently been discussed in some considerable detail at the United Nations Water Conference, held at Mar del Plata, and at the United Nations Conference on Succession of States in respect of Treaties, held at Vienna, and it would doubtless come up again in the future. The situation of the Council for Namibia was, of course, a *sui generis* case, but the matter could not simply be left aside until such time as Namibia attained independence and became a full member of the international community. The status of EEC was another practical case which the Commission could not ignore.

39. Mr. EL-ERIAN said he had no objection to the articles on formulation and acceptance of, and objection to, reservations being referred to the Drafting Committee, provided that members were given an opportunity to make additional comments on articles 20 and 20*bis*, when those articles came back to the Commission. In any event, many of the points he had wished to raise had been covered in the statement made by the Chairman, particularly in his analysis of the basic differences between States and international organizations in regard to the formulation of reservations.²¹

40. He was grateful to the Special Rapporteur for his further comments on the question of consulting international organizations. He now realized that there was no exact analogy between the present topic and the question of the representation of States in their relations with international organizations, a field in which there existed a wealth of material and abundant practice. In the case of treaties concluded between States and international organizations or between international organizations, the practice was extremely limited and the problems far more delicate.

41. Mr. FRANCIS said he would comment on articles 20 and 20*bis* after they had been examined by the Drafting Committee.

42. The CHAIRMAN said it was clear that there would have to be some further discussion on articles 20 and 20*bis* after they had been considered by the Drafting Committee. On that understanding, if there was no objection, he would take it that the Commission agreed to refer to the Drafting Committee articles 19, 19*bis*, 20 and 20*bis*, as well as the new article proposed by the Special Rapporteur.²²

*It was so agreed.*²³

The meeting rose at 12.55 p.m.

²² See para. 11 above.

²³ For the consideration of the text(s) proposed by the Drafting Committee, see 1446th and 1448th meetings, 1450th meeting, paras. 48 *et seq.*, and 1451st meeting, paras. 1-11.

1434th MEETING

Monday, 6 June 1977, at 3 p.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/285,¹ A/CN.4/290 and Add.1,² A/CN.4/298)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (continued)

ARTICLE 21 (Legal effects of reservations and of objections to reservations)

1. The CHAIRMAN extended a warm welcome on behalf of the Commission to Professor H. Valladão, observer for the Inter-American Juridical Committee.
2. He invited the Special Rapporteur to introduce article 21, which read:

Article 21. Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 19*bis*, 20, 20*bis* and 23:

(a) modifies for the reserving State or international organization in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

¹ *Yearbook...1975*, vol. II, p. 25.

² *Yearbook...1976*, vol. II (Part One), p. 137.

²¹ 1432nd meeting, paras. 19 *et seq.*

(b) modifies those provisions to the same extent for that other party in its relations with the reserving party.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When, as provided in article 20, paragraph 3 (b), and in article 20bis, paragraph 2 (b), a contracting State or international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving contracting party, the provisions to which the reservation relates do not apply as between the two contracting parties to the extent of the reservation.

3. Mr. REUTER (Special Rapporteur) said that the preceding articles on reservations, of which he had just submitted a new version to the Drafting Committee, raised a basic question, on which the Commission had not yet taken a decision: could international organizations be allowed to make reservations or objections which were not expressly authorized by the text of the treaty to which they were parties? The reply to that question might affect the texts of articles 21, 22 and 23 if the Commission adopted a very restrictive position in regard to reservations and objections by international organizations. However, since it would probably lead to a simplification of those texts, the Commission could begin its consideration of articles 21, 22 and 23 without having taken a definite position on the other articles relating to reservations.

4. Articles 21, 22 and 23, which were contained in his fifth report (A/CN.4/290 and Add.1) and which the Commission was considering for the first time, followed the text of the Vienna Convention³ very closely because he had thought it wise not to depart from that Convention where the concept of reservations was concerned. It was possible, however, that some of the questions raised during the discussion of the preceding articles might throw new light on the question of reservations.

5. In connexion with articles 19bis and 20bis, Mr. Ushakov had raised the question whether a land-locked State which was a party to the future convention on the law of the sea could conceivably formulate reservations to the provisions of that convention relating to the territorial sea, and had given a negative answer. In supporting that view, he (the Special Rapporteur) had cited the definition of a "reservation" given in article 2, paragraph 1 (d), of the Vienna Convention and had stressed that a State could not make a reservation on a question concerning which it could not itself assume any commitment. The arbitral award which was to be rendered shortly in the dispute between the United Kingdom and France concerning the continental shelf in the Channel and part of the Atlantic might clarify some notions relating to reservations.

6. The wording of article 21 differed only slightly from that of article 21 of the Vienna Convention: the words "or international organization" had been added after the word "State" in paragraph 1 (a) and in paragraph 3, and the word "State" had been deleted in paragraph 1 (b). He was not sure whether he had been right to add the word "contracting" in paragraph 3 and whether it might not be better to delete that word at the beginning of the paragraph and, at the end of the paragraph, to

replace the words "the two contracting parties" by the words "the reserving party and the objecting party".

7. Mr. TABIBI said that article 21, which had been so brilliantly introduced by the Special Rapporteur, followed logically from articles 19, 19bis, 20 and 20bis. He had no difficulty in subscribing to the rule clearly formulated in paragraph 1, according to which a reservation established with regard to another party to a treaty modified, for the reserving State or international organization in its relations with that other party, the provisions of the treaty to which the reservation related to the extent of the reservation, and modified those provisions to the same extent for that other party in its relations with the reserving party. He could also accept the rule laid down in paragraph 3, under which an objection to a reservation did not in itself prevent the entry into force of the treaty between the objecting and the reserving contracting parties. Article 21 could be referred to the Drafting Committee forthwith.

8. Mr. CALLE Y CALLE thanked the Special Rapporteur for his lucid introduction of article 21, the purpose of which was to identify the legal effects of reservations and of objections to reservations made by States or international organizations before consenting to be bound by a treaty. During the Commission's discussions on articles 19, 19bis, 20 and 20bis, some members had advocated a liberal approach to reservations while others had argued in favour of a more restrictive attitude. The practice of reservations had been described as an evil, although perhaps a necessary one, which should ideally be eliminated from treaty relations between States and, more particularly, from treaty relations between States and the international organizations which were their creation and of which they were members. But if reservations were admitted, their legal effect was obviously to modify the relations between the reserving party and the party with regard to which the reservation was established. That truth was stated in paragraph 1. Paragraph 2 made it clear that such a reservation did not affect relations between the other parties to the treaty. Paragraph 3 was also sufficiently clear, though it would be better not to use the term "contracting", which implied that the State or international organization concerned had already expressed its consent to be bound by the treaty.

9. Mr. USHAKOV, referring to article 23, asked whether the representative of an international organization who was authorized to sign a treaty was also authorized to formulate reservations at the time of signature, as was the representative of a State, or whether he would need special powers issued by a competent organ of the international organization he represented. The same question arose in regard to authorization to accept reservations or, what was even more important, to object to reservations formulated by the other parties to the treaty.

10. He regretted the fact that the Special Rapporteur had not divided article 21 into two separate articles, one dealing with treaties concluded between international organizations only, and the other with treaties concluded between States and international organizations; for, like article 20bis, article 21 raised the question whether an international organization could object to a reservation formulated by a State party with respect to a provision

³ See 1429th meeting, foot-note 4.

which concerned only the States parties to the treaty. As it stood, the article proposed by the Special Rapporteur provided for that possibility in so far as it made no distinction between treaties concluded between international organizations and treaties concluded between States and international organizations. As the Special Rapporteur himself had said, it was obvious that the final form of that article would depend on the decision taken by the Drafting Committee on articles 19, 19*bis*, 20 and 20*bis*.

11. He nevertheless believed that the draft should contain a separate provision dealing with agreements concluded mainly between States, but to which one or two international organizations were parties, for that was the category of agreements referred to by the words "international agreements to which other subjects of international law are also parties" in article 3 (c) of the Vienna Convention. Article 3 of the Vienna Convention did not provide that the Convention applied to that category of agreements obligatorily, but that it could apply to them. Thus, it was for the Commission to indicate what rule was applicable to them.

12. Mr. SETTE CÂMARA said he thought article 21 should be referred to the Drafting Committee. That article brought out a number of interesting aspects of the fabric of bilateral relationships established in the context of a multilateral relationship by the operation of the mechanism of reservations. The practice of making reservations was a common expedient of international law whose merits or demerits the Commission should, in his view, refrain from assessing. While it might be considered preferable to preserve the provisions of a treaty in their entirety, it could also be argued that the mechanism of reservations made for wider participation in treaties. The practice of reservations was a fact of international life which the Commission should accept.

13. Mr. VEROSTA said that Mr. Ushakov had raised a very important question when he had asked, in connexion with article 23, whether the representative of an international organization was authorized to formulate reservations or objections to reservations when signing a treaty. He himself had already drawn the Commission's attention⁴ to the need to amend article 6⁵ in accordance with the decisions to be taken by the Drafting Committee on articles 19, 19*bis*, 20 and 20*bis*. He now considered that it would also be necessary to expand article 7 to take account of the problems raised, in article 21, by reservations and objections to reservations. Article 7, paragraphs 3 and 4, specified the conditions in which a person was "considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty" and "for the purpose of communicating the consent of that organization to be bound by a treaty", but they did not specify the conditions in which a person was considered as representing an international organization for the purpose of formulating reservations or objecting to reservations, for it was difficult to accept that the words "consent to be bound" implied

the faculty to formulate reservations or to object to reservations.

14. He nevertheless had no difficulty in associating himself with the members who had proposed that article 21 should be referred to the Drafting Committee.

15. Mr. EL-ERIAN noted with satisfaction that, as the Special Rapporteur had pointed out in his commentary, article 21, as compared with the corresponding text of the Vienna Convention, contained only the drafting changes necessitated by its specific subject. He believed that the Commission should not engage in a discussion of the provisions of the Vienna Convention relating to the very difficult problem of reservations, but should consider how to adapt those rules to the topic under consideration. Mr. Ushakov's idea of formulating two sets of provisions, one covering treaties between States and international organizations and the other treaties between two or more international organizations, held some attraction for him and was worthy of consideration.

16. Mr. FRANCIS said that he thought article 21 could be referred to the Drafting Committee for refinement.

17. With regard to the possibility, first referred to by Mr. Ushakov, that a land-locked State party to the future convention on the law of the sea might seek to formulate a reservation concerning the territorial sea, he wished it to be placed on record that, in his view, such a reservation was in principle admissible. Although, for reasons of convenience, the negotiations concerning the future convention had been divided into separate subjects, the various aspects of the law of the sea formed an organic whole and were inextricably linked. He believed that it would be quite correct to allow Zambia, Bolivia or other land-locked countries to make a reservation concerning the territorial sea, not just because their shipping might be affected by the provisions of the future convention but also because the delimitation of the territorial sea, as currently envisaged, would certainly affect their interests on the high seas. A further consideration to bear in mind was that the land-locked States were participating fully in the elaboration of the convention and it had never been suggested that they should be denied the right to vote. They should, therefore, enjoy the same rights as the other parties to the future convention in regard to the formulation of reservations. If a land-locked State made a reservation which was not relevant, the other parties to the convention could exercise their right to object to it.

18. Mr. DADZIE said that article 21 was the logical consequence of the preceding articles. The Special Rapporteur had rightly decided to base his draft on the Vienna Convention, an instrument which enjoyed a particular status. Any departure from its provisions might create problems for the international community. He found the rules laid down in article 21 perfectly acceptable and thought they could be referred to the Drafting Committee without delay.

19. With regard to drafting, it seemed to him that paragraph 1 (a) and paragraph 3 could be more concise. In the first of those provisions, he saw no need to make a distinction between a State and an international organization since the rule laid down could equally well apply

⁴ 1432nd meeting, para. 5.

⁵ See 1429th meeting, foot-note 3.

to either. It would surely be sufficient to refer to the "reserving party". Similarly, in paragraph 3, the expression "contracting State or international organization" might be replaced by a simpler term such as "contracting party" or simply "party".

20. Mr. REUTER (Special Rapporteur) noted that the members of the Commission seemed to be in general agreement that article 21 should be referred to the Drafting Committee though several of them had emphasized that final adoption of the article would depend on the position taken by the Drafting Committee in regard to the questions of principle raised by articles 19, 19*bis*, 20 and 20*bis*.

21. The question regarding article 23, raised by Mr. Ushakov and taken up by Mr. Verosta, had two aspects: an international aspect concerned with powers, and a constitutional aspect concerned with the internal law of international organizations. The points to be decided were, first, what powers the representative of an international organization must produce in order to be authorized to formulate, accept or object to reservations provisionally and, second, what organ of an international organization was competent to formulate, accept or object to reservations definitively. Mr. Ushakov had raised the question only in regard to international organizations, but it also arose in regard to States.

22. With regard to powers at the international level, it was obvious that, in view of the sovereign power of States, a representative of a State who was authorized to sign a treaty had no need to prove that he was also authorized to formulate or object to reservations.

23. At the constitutional level, on the other hand, the question was not nearly so clear for the constitutional law of many States did not specify who was authorized to formulate or object to reservations. In some States, the executive power sought authorization from parliament to ratify a convention but not to make reservations to it, since the right to formulate and object to reservations was considered to be part of the function of government.

24. Thus, as Mr. Verosta had said, the question was whether a special provision should be drafted to indicate that the person signing the treaty, even provisionally, must be provided with powers authorizing him to formulate or object to reservations. He saw no reason why a provision of that kind should not be introduced.

25. However, the question who, in an international organization, was authorized to formulate or object to reservations came under its constitutional law, which could vary from one organization to another. Later on, when reconsidering article 7, the Commission could specify that the powers of the representative of an international organization must state whether he was authorized to enter or object to reservations. The Drafting Committee could consider that question in connexion with article 23.

26. Mr. Ushakov and later Mr. El-Erian had raised the question whether a distinction should not be made, in article 21, between treaties concluded between international organizations and treaties concluded between States and international organizations. He (the Special Rapporteur) had thought it better not to make that

distinction in article 21 so as not to make the wording unduly complicated, but he was willing to do so if the members of the Commission thought it necessary.

27. As to the question asked by Mr. Francis, he had fully recognized that, in the case of the future convention on the law of the sea, a land-locked State party could object to a reservation formulated by another State party concerning the provisions relating to the territorial sea, since reservations concerning the territorial sea necessarily impaired the right of navigation on the high seas in so far as they imposed limits on the high seas. In that instance, there was no doubt about the right to object to reservations, but there was some doubt about the right to make them.

28. Could a State which had no territorial sea, on acceding to the future convention on the law of the sea, make reservations concerning the territorial sea? Some members had answered that question affirmatively, others negatively. The Drafting Committee would have to solve the problem in connexion with articles 19*bis* and 20*bis*. He himself believed that there was a link between the power to enter into commitments, the power to make reservations and the power to object to reservations; he had submitted to the Drafting Committee a new article which stated that principle.

29. The CHAIRMAN said, that if there was no objection, he would take it that the Commission agreed to refer article 21 to the Drafting Committee.

*It was so agreed.*⁶

ARTICLE 22 (Withdrawal of reservations and of objections to reservations)

30. The CHAIRMAN invited the Special Rapporteur to introduce article 22, which read:

Article 22. Withdrawal of reservations and of objections to reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or international organization which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:
(a) the withdrawal of a reservation becomes operative in relation to another contracting State or international organization only when notice of it has been received by that State or international organization;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the reserving party.

31. Mr. REUTER (Special Rapporteur) said he had no comments to make on the text of article 22, which merely reproduced, with appropriate drafting changes, the text of the corresponding article of the Vienna Convention.

32. Mr. CALLE Y CALLE asked the Special Rapporteur to explain why he thought, as he had stated in the second sentence of his commentary to the article in his fifth report (A/CN.4/290 and Add.1), that it might be necessary

⁶ For the consideration of the text proposed by the Drafting Committee, see 1451st meeting, paras. 16-20.

“to complete article 22 and in particular to provide for wider notification”.

33. Mr. REUTER (Special Rapporteur) said he would answer that question at the next meeting.

34. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer article 22 to the Drafting Committee.

*It was so agreed.*⁷

ARTICLE 23 (Procedure regarding reservations)

35. The CHAIRMAN invited the Special Rapporteur to introduce article 23, which read:

Article 23. Procedure regarding reservations

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and international organizations and other States and international organizations entitled to become parties to the treaty.

2. If formulated when signing the treaty

by a State subject to ratification, acceptance or approval of the treaty

by an international organization subject to formal confirmation, acceptance or approval of the treaty

a reservation must be formally confirmed, as the case may be, by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

36. Mr. REUTER (Special Rapporteur) said that article 23 called for little comment. If the Drafting Committee thought it advisable to include in the draft a special provision on the power of representatives of international organizations to execute an act relating to reservations, it might be inserted in article 23 or perhaps in article 7.

37. In paragraph 2, the words “a reservation must be formally confirmed” had been taken from the corresponding article of the Vienna Convention. The Commission had decided, however, after long discussions, that the act whereby an international organization, after signing a treaty, finally expressed its consent to be bound by that treaty, should be called “formal confirmation” and not “ratification”. Accordingly, in order to avoid any possible confusion, the words “formally confirmed” in paragraph 2 should be replaced by the words “expressed for a second time”, on the understanding that the two expressions had exactly the same meaning.

38. Mr. CALLE Y CALLE said he thought the risk of confusion with the terminology of draft article 11, which the Special Rapporteur had just mentioned and to which he referred in his commentary to article 23 (A/CN.4/290 and Add.1) could be avoided by deleting the word “formally” from the last subparagraph of paragraph 2. That change would not reduce the effectiveness of the

provision in any way, since the confirmation of a reservation, whether it was qualified as “formal” or not, merely consisted in formulating the reservation again.

39. Mr. SETTE CÂMARA reminded the Commission that it had decided to make of the expression “formal confirmation” a term of art, meaning the act by an international organization corresponding to ratification of a treaty by a State. That being so, he agreed with the Special Rapporteur that the expression should not be used for other purposes, as in the last subparagraph of article 23, paragraph 2.

40. Referring to the comments by Mr. Ushakov, he said that if, as the Special Rapporteur had suggested and he himself hoped, the Drafting Committee introduced an article establishing a link between reservations and the provisions of article 6, the question of the power to enter, accept or object to reservations on behalf of an international organization would have to be settled in accordance with the relevant rules of the organization concerned.

41. Mr. USHAKOV said that, although seemingly straightforward, article 23 raised questions of substance, in particular, that of the powers concerning reservations to be conferred on the person or persons representing an international organization. He doubted whether it was really necessary or useful to give an international organization the faculty to formulate reservations when signing a treaty. An authorization to do so would be required from the competent organ, which might not even have decided to sign the treaty. Consequently, he was not in favour of a system by which the competent organ would be obliged to decide, at the time of signature, both on signing and on reservations. It was rather at the time of formal confirmation that reservations should be formulated.

42. According to paragraph 1 of the article, “A reservation, an express acceptance of a reservation and an objection to a reservation must be ... communicated to the contracting States and international organizations and other States and international organizations entitled to become parties to the treaty”. In the case of treaties of a universal character concluded between States and international organizations, such communications would thus have to be made to all existing States. For the same category of treaties and also treaties concluded between international organizations only, it would, however, be more difficult to determine what international organizations were “entitled to be come parties”. If 10 international organizations were parties to a treaty, to what other international organizations would the communications have to be sent? That fundamental question should be settled either in the text of article 23 or at least in the commentary.

43. Again, paragraph 1 of article 23 was linked to article 78 of the Vienna Convention, which governed the procedures for notifications and communications. It was important therefore to bear that provision in mind when considering article 23.

44. As all of the points he had raised could be discussed in the Drafting Committee, he thought article 23 could be referred to that Committee.

⁷ *Idem.*

45. Mr. VEROSTA, referring to the expression "entitled to become parties to the treaty" said that, in order to determine whether States were so entitled, it was enough to ascertain whether or not they had been invited to become parties, in other words, whether the treaty was open or restricted. The same did not apply to international organizations for, as the Special Rapporteur had rightly pointed out in his sixth report (A/CN.4/298, para. 6), there were major differences between them and States. States were sovereign entities whereas the powers of international organizations were subordinate to their functions. Thus, the question whether an international organization was entitled to become party to a treaty also depended on its function. It would be asserted that, in the end, it was the organization itself which decided whether accession to a treaty fell within its functions. That decision, however, did not depend upon the constituent instrument of the organization but upon the competent organ, in other words, on a certain number of States. Consequently, a limitation based on the functions of international organizations should be introduced into the article. As it stood, it might give the impression that, where reservations were concerned, States and international organizations were on an equal footing. Perhaps the Drafting Committee could consider that question.

46. Mr. CALLE Y CALLE said he interpreted article 23, paragraph 1, as meaning that reservations and acceptances of or objections to them must be communicated not only to the States and international organizations which had negotiated a treaty or expressed their consent to be bound by it, but also to those which were "entitled to become parties to the treaty" by virtue of the provisions of the instrument itself. He did not think that entitlement depended, in the case of international organizations, on the existence of a link between the functions of the organization and the object and purpose of the treaty. Consequently, he saw no objection to reproducing the wording of the corresponding paragraph of article 23 of the Vienna Convention, as the Special Rapporteur proposed.

47. Mr. SCHWEBEL said that he was unclear why Mr. Ushakov considered that an international organization which was able to formulate reservations to a treaty should not be able to do so at the stage of signature as well as at the stage of formal confirmation. Mr. Ushakov might be right in saying that it was easier to communicate reservations to States than to international organizations, but it could also be difficult to communicate them to States which had not participated in the formulation or negotiation of the treaty. There was not always agreement as to whether entities on, or allegedly on, the international scene were in fact States.

48. In his view, an international organization was entitled to become a party to a treaty if there was a link between the basic function for which it had been created and the object and purpose of the treaty. The decision on whether such a link existed would presumably lie with the depositary of the treaty, if there was one.

49. Mr. REUTER (Special Rapporteur) said that he thought the majority of the members of the Commission would agree with him that article 23 should be referred to the Drafting Committee, on the understanding that the Committee would also consider the question of the special

powers to be required of the representatives of international organizations.

50. Mr. Ushakov had said that it was not perhaps necessary or useful to give international organizations the faculty to formulate reservations when signing a treaty. He (the Special Rapporteur) thought it was always better to make a reservation then than at the time of formal confirmation. In his opinion, no great importance need be attached to the question whether it was premature to formulate a reservation on signing the treaty because the intergovernmental organ actually empowered to commit the organization did not normally intervene in the proceedings until later. In practice, the intergovernmental organs concerned generally had cognizance of the text of a treaty long before it was signed. Such was the case at least among international organizations whose member States assumed major commitments. Moreover, both the Vienna Convention and the present draft encouraged the withdrawal of reservations so that, if an international organization wished to reconsider a reservation formulated at the time of signature, it could always refrain from confirming it and enter a definitive reservation later. He thought it would be a serious matter to deprive international organizations of the capacity to make a reservation at the time of signing, since that was precisely the time the other parties considered most appropriate for doing so.

51. With regard to the phrase "entitled to become parties to the treaty", it would be remembered that the Vienna Convention did not contain any general rule indicating which States were entitled to become parties to a convention of any kind. In 1962, the Commission had drawn up a bold and generous draft article which gave States a subjective right to participate in treaties.⁸ The absence of any provision on that point in the Vienna Convention meant that entitlement to become party to a treaty concluded between States was necessarily determined by the treaty itself. Nevertheless, the fact remained that treaties which concerned all States should be open to all States. The same would apply to international organizations: it would be determined in each case whether international organizations could become parties to a treaty and, if so, which organizations. It was conceivable that a treaty might one day be open to all existing intergovernmental organizations, though that day seemed far off. Legally, the expression "entitled to become parties to the treaty" applied to States and international organizations so designated by the treaty in question. Those who thought that States and international organizations should not be placed on the same footing were thus advancing considerations dictated by sentiment rather than logic. Nevertheless, as those considerations should be taken into account, reference could be made, on the one hand, to States entitled to become parties to the treaty and, on the other, to international organizations invited by the treaty and having the capacity to become parties to it in conformity with article 6. Personally, he did not feel the need to make that distinction, but it would be for the Drafting Committee to decide.

⁸ *Yearbook* ... 1962, vol. II, p. 167, document A/5209, chap. II, sect. II, art. 8.

52. The Drafting Committee would also have to consider the question of notifications and communications, raised by Mr. Ushakov. That should not present any difficulties, however, since the international organizations designated in a treaty would probably always have the necessary means of communication.

53. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer article 23 to the Drafting Committee.

*It was so agreed.*⁹

Gilberto Amado Memorial Lecture

54. The CHAIRMAN announced that Judge Elias had informed the Committee for the Gilberto Amado Memorial Lecture that his duties at the International Court of Justice would unfortunately prevent him from accepting its invitation to give the lecture that year. In view of the difficulty a substitute speaker would have in preparing himself adequately if the lecture was to be delivered as usual before the end of the International Law Seminar, the Committee proposed that the lecture should be postponed until the following year, when Judge Elias had said he hoped to be available.

55. If there was no objection, he would take it that the Commission agreed to that proposal.

It was so agreed.

The meeting rose at 6 p.m.

⁹ For the consideration of the text proposed by the Drafting Committee, see 1451st meeting, paras. 16-20.

1435th MEETING

Tuesday, 7 June 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/285,¹ A/CN.4/290 and Add.1,² A/CN.4/298)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR (continued)

¹ Yearbook ... 1975, vol. II, p. 25.

² Yearbook ... 1976, vol. II (Part One), p. 137.

ARTICLE 22 (Withdrawal of reservations and of objections to reservations)³ (concluded)⁴

1. Mr. REUTER (Special Rapporteur), replying to a question asked by Mr. Calle y Calle at the previous meeting,⁵ explained what he had had in mind when he had suggested, in the commentary to article 22 (A/CN.4/290 and Add.1), that it might be necessary "to complete article 22 and in particular to provide for wider notification when the withdrawal of an objection to a reservation results in a modification of the conventional régime to which a treaty is subject".

2. As he had already said, it was possible that a treaty concluded between States, but which had been open to one or two international organizations might at some time become a treaty between States only. In his opinion, such an "intermittent" treaty should continue to be governed by the draft articles. With regard to reservations and objections to reservations to a treaty of that kind, an international organization might formulate a reservation and two States might raise an objection to it, thus depriving the international organization of its status as a party in relation to them. For both those States, the treaty would then be a treaty between States only, whereas for the other States parties and the two organizations, it would still be a treaty between States and international organizations. If the two States in question subsequently withdrew their objection, the situation would return to normal; for them, the treaty would again be a treaty between States and international organizations and the rules of the draft articles would apply. In such a case, however, it would be advisable for all the parties, and not only the reserving party, to be notified of the withdrawal of the objection, as provided in draft article 22. In any event, his own opinion was that a treaty governed by the rules of the draft articles should be considered as remaining subject to them, even if it temporarily became a treaty between States only.

ARTICLE 24 (Entry into force) and

ARTICLE 25 (Provisional application)

3. The CHAIRMAN invited the Special Rapporteur to introduce draft articles 24 and 25 in his fourth report (A/CN.4/285), which read:

Article 24. Entry into force

1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States and international organizations may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States and international organizations.

3. When the consent of a State or international organization to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State or organization on that date, unless the treaty otherwise provides.

4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States and international

³ For text, see 1434th meeting, para. 30.

⁴ See 1434th meeting, foot-note 7.

⁵ *Ibid.*, para. 32.

organizations to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

Article 25. Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(a) the treaty itself so provides; or

(b) the negotiating States or international organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States or international organizations have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or organization shall be terminated if that State or organization notifies the other States or organizations between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

4. Mr. REUTER (Special Rapporteur) said that the two articles were based on the corresponding provisions of the Vienna Convention,⁶ from which they differed only to the extent of the drafting changes needed in order to take account of international organizations. Since the text of article 24 of the Vienna Convention was extremely flexible, it could be adapted to any situation which might result from agreements concluded by international organizations. That was why he had not distinguished between treaties concluded between organizations and treaties concluded between States and international organizations. He had not made that distinction in draft article 25 either.

5. Mr. FRANCIS observed that article 2, paragraph 1 (g),⁷ seemed to be based on the premise that there could be some difference between the negotiating posture of a State and that of an international organization, but that, when no such difference existed, an organization would assume the character of a "party", as defined in that provision. Article 24, paragraph 1, seemed to contemplate a situation in which the State and the international organizations concerned were on equal terms.

6. Similarly, the provisions of article 25, paragraph 1 (a), would give international organizations a voice in determining whether a treaty in the negotiation of which they had participated with States could apply provisionally. Article 25, paragraph 1 (b), however, seemed to imply that, where both international organizations and States had negotiated a treaty, only the latter could determine whether or not it should apply provisionally. Difficulties would also arise from article 25, paragraph 2, since an international organization would not be able to give the notice to which that provision referred to "other" States because it was not itself a State. If the intention was that international organizations should have the same rights with respect to the entry into force and the provisional application of treaties as the States with which they had negotiated those treaties, paragraph 1 (b), and paragraph 2 of article 25 would have to be amended.

7. Mr. REUTER (Special Rapporteur) said he thought the comments made by Mr. Francis raised a question of

intention and a question of drafting. His intention had been to place States and international organizations on an equal footing, as that could not cause any difficulties. The drafting of the articles under consideration might be defective; an extremely simple solution would be to follow a procedure already adopted in other articles, which referred neither to States nor to international organizations but to "contracting parties".

8. Mr. USHAKOV said he was convinced that the same formula could not be applied to States and to international organizations and that there must be one provision for treaties concluded between international organizations and another for treaties concluded between States and international organizations.

9. According to article 24, paragraph 1, a treaty entered into force "in such manner and upon such date as it may provide or as the negotiating States and international organizations may agree". If that paragraph was divided into two provisions, the provision concerning treaties concluded between international organizations would not cause any difficulty: the agreement in question would be an agreement between the negotiating international organizations. But the same did not apply to treaties between States and international organizations, which might be concluded either by a large number of States and a single international organization or by a large number of international organizations and a single State. Would a refusal by the international organization, in the first case, or by the State, in the second, to consent to the entry into force of the treaty be enough to prevent its entry into force? The seriousness of the resultant difficulties would depend on the many possible variations between those two extreme cases.

10. The same was true of article 24, paragraph 2. If that provision related only to treaties concluded between international organizations, there would be no objection to basing it on the corresponding provision of the Vienna Convention. In the case of treaties between States and international organizations, however, paragraph 2 of article 24 raised the same problems as paragraph 1 where only a small number of international organizations or of States were parties.

11. Article 25 presented just the same difficulties. The case of treaties between international organizations and that of treaties between States and international organizations should again be dealt with separately, having regard to all the possible situations.

12. The difficulties he foresaw would depend on the final wording of articles 19 and 19bis. If those articles were drafted as he proposed, the drafting of the following articles would be greatly simplified.

13. Mr. CALLE Y CALLE said he agreed with the view expressed by the Special Rapporteur in his commentaries to articles 24 and 25 (A/CN.4/285) that, subject to drafting changes, the corresponding articles of the Vienna Convention were flexible enough to cover all imaginable hypotheses in regard to the entry into force or provisional application of treaties to which international organizations were parties. The simple wording reproduced by the Special Rapporteur had been discussed at length in the Commission, explained in its commentaries and adopted with-

⁶ See 1429th meeting, foot-note 4.

⁷ *Ibid.*, foot-note 3.

out difficulty by the United Nations Conference on the Law of Treaties. While he agreed with Mr. Ushakov that it was essential to make a distinction between States and international organizations in certain articles, he did not think that was necessary in articles 24 and 25.

14. Mr. ŠAHOVIĆ said he thought that all the comments made on articles 24 and 25 could be considered by the Drafting Committee. The Special Rapporteur had probably been right to use almost the same wording as the corresponding provisions of the Vienna Convention, for it was difficult to see how the basic rules on the entry into force and provisional application of treaties, which the Commission was now considering, could be otherwise expressed. In view of the method followed by the Commission in drafting other provisions, however, it might be advisable to adopt Mr. Ushakov's suggestion and subdivide the articles under consideration, so as to make them easier to understand. If he favoured such a solution, it was essentially for reasons of method; apart from that, he believed that, in their capacity as parties to treaties, States and international organizations should be on an equal footing.

15. In the light of the definitions given by the Commission in article 2, paragraph 1 (e), the word "negotiating" should not present any difficulties.

16. Mr. REUTER (Special Rapporteur) said that, in view of the concern expressed by Mr. Ushakov and of what Mr. Šahović had just said, he would try to draft separate provisions for treaties between international organizations and treaties between States and international organizations.

17. With regard to Mr. Ushakov's other comments, he stressed that, in the articles under consideration, he had deliberately placed States and international organizations on the same footing. All the members of the Commission seemed to approve of that position except Mr. Ushakov, who had nevertheless made it clear that his opposition depended on how articles 19 and 19*bis* would be drafted. He did not share the point of view of Mr. Ushakov, who did not see why, in a treaty concluded between a large number of international organizations and a single State, that State should take part, on the same footing as the international organizations, in drawing up an agreement on the entry into force or provisional application of the treaty. In taking that view, Mr. Ushakov was calling in question the notion of a party to a treaty. He (the Special Rapporteur) believed that the agreement of the single State was essential if, for example, the treaty related to assistance to be provided to that State by a number of international organizations. Similarly, it was inconceivable that a treaty concluded between a large number of States and an international organization, which made that organization responsible for nuclear monitoring, could enter into force or be applied provisionally without the organization's consent. If the Commission decided to give international organizations a special status, it would be necessary to amend not only articles 19 and 20 but also the following articles so that restrictive rules would apply to international organizations. If the Commission chose that course, he would defer to its wishes, although he held a different view. In the circumstances, he thought that articles 24 and 25

could be referred to the Drafting Committee for consideration in the light of articles 19 and 20.

18. Mr. USHAKOV said that his position was based on concrete cases. It was not a question of agreements between "parties", as the Special Rapporteur had said, but of agreements between "negotiating" States and international organizations. Article 3 (c) of the Vienna Convention reserved the application of that Convention to the relations of States as between themselves under international agreements to which other subjects of international law were also parties, and he did not see how the articles under consideration would make it possible to apply that provision to treaties to which a large number of States and a single international organization were parties. According to article 25, for example, it would be necessary for the negotiating international organization to agree to the provisional application of the treaty. If the future convention on the law of the sea provided for the participation of the United Nations and did not contain any provisions on entry into force or provisional application, the agreement of the United Nations would be necessary for the entry into force or provisional application of that instrument.

19. The CHAIRMAN said he hoped that the discussion on articles 24 and 25 need not be unduly prolonged since the point raised by Mr. Ushakov was essentially one which could be handled by the Drafting Committee.

20. Mr. DADZIE reminded the Commission that its task was to draft rules which would apply to the types of treaty mentioned in draft article 1. The question of the position of States in regard to treaties having been settled by the Vienna Convention, the Commission had to decide what status it ought to accord to international organizations in regard to treaties; that was not a question which could be referred to the Drafting Committee. It had been suggested, and he agreed, that international organizations ought to be placed on the same footing as States where treaties were concerned. If that was so, the Commission should not draft parallel rules for States and international organizations in regard to treaties to which both were parties.

21. He had little difficulty in accepting the substance of articles 24 and 25 and thought they could both be referred to the Drafting Committee.

22. The CHAIRMAN explained that his appeal for brevity had been made solely because the question whether the Commission should adopt the method of drafting in parallel, to which Mr. Dadzie had referred, had already been discussed at length in relation to earlier articles. While every member of the Commission naturally remained free to raise such points concerning individual articles as he wished, practice had shown that, once members had made their views clear in the Commission, it was better to leave to the Drafting Committee the discussion of issues which, like that mentioned by Mr. Dadzie, called for abstract decisions of principle. No such decision had been taken in the case in question. The starting point for the Commission's current work was the definition of a "party" to a treaty given in article 2, paragraph 1 (g).

23. Mr. FRANCIS said that, while, as a new member, he was grateful to the Chairman for his explanation of

the background to the present situation, he none the less thought that the Commission had left something undone at the start of its study of the topic.

24. Article 3, subparagraph (c) of the Vienna Convention envisaged "the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties"; the word "also" was important, for it showed that the participation in the agreements concerned of States and of "other subjects of international law", which included international organizations, was regarded as being equal participation. In his view, that was the starting point for the Commission's work. Accordingly while he did not agree with all that Mr. Ushakov had said, he believed that it would be useful and would enable the Commission to avoid the problems it had encountered in discussing articles 24 and 25 if a provision was inserted at the beginning of the draft to the effect that, although States and international organizations were not equal *per se*, the latter were to be considered as assimilated to the former for the purpose of the draft articles.

25. The CHAIRMAN pointed out that, although the matter had not yet been dealt with, the Special Rapporteur's fifth report showed that both he and the Commission were very conscious of the basic problem which might arise from the application of article 3, subparagraph (c) of the Vienna Convention. In view of the difficulty of the problem, the Commission would probably make better progress by taking it up at the end rather than at the beginning of its deliberations.

26. Mr. VEROSTA read out the definition of the term "treaty" contained in article 2, paragraph 1 (a), of the Vienna Convention. The definition covered bilateral treaties, multilateral treaties and multilateral treaties with limited participation. Whenever the Commission or the Conference on the Law of Treaties had not been able to take account of all those different kinds of treaty in a single provision, they had had to draft separate provisions. Thus, most of the provisions of the Vienna Convention related to bilateral treaties, but there were also some provisions relating either to multilateral treaties or to restricted multilateral treaties.

27. According to draft article 1, the draft articles did not apply to treaties in general but to two particular kinds of treaty, namely, treaties between one or more States and one or more international organizations and treaties between international organizations. Those were therefore the two categories of treaties which the Commission should take into account in formulating the draft articles. What Mr. Ushakov wanted was, in short, that the distinction made in article 1 should also be made in article 19 and the following articles. He (Mr. Verosta) thought it was for the Drafting Committee to decide whether separate provisions should be drafted for treaties concluded between international organizations only.

28. Mr. SCHWEBEL said that the excellent point made by Mr. Francis might best be incorporated in the commentary to the draft articles. The Special Rapporteur had shown in his reports how well the distinction between States and international organizations might be brought out in the commentary.

29. The point concerning the differences between international organizations and States was certainly a valid one, to which all the members of the Commission subscribed, but it should not be pressed too far. It should be borne in mind that international organizations were intergovernmental organizations which expressed the will, not of any single State, but of States acting collectively. As such, those organizations were international persons entitled to a full measure of respect.

30. It had been argued that, where the parties to a treaty comprised a large majority of States and only one or a few international organizations, the treaty was by its nature an inter-State treaty. He was not convinced that an attempt to categorize treaties according to the preponderant type of party would be a productive endeavour. As the Special Rapporteur had pointed out, it was possible to conceive of a treaty on nuclear matters, the great majority of the parties to which were States but in which an international organization played a critical role.

31. Mr. USHAKOV said he fully agreed with the Chairman's opinion in regard to the Drafting Committee's work. It was, indeed, impossible for the Commission to examine the draft articles in detail and to take definite positions on certain questions of principle because the answers to those questions depended on the specific provisions which would be adopted. The Drafting Committee's role was therefore a very important one, for it could examine the draft articles in detail and amend them or even draft new articles on the basis of the Commission's discussions. It was the Drafting Committee which did the most difficult and also the most fruitful work.

32. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer articles 24 and 25 to the Drafting Committee.

*It was so agreed.*⁸

ARTICLE 26 (*Pacta sunt servanda*)

33. The CHAIRMAN invited the Special Rapporteur to introduce article 26, which read:

Article 26. Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

34. Mr. REUTER (Special Rapporteur) said that he had no particular comments to make on article 26.

35. Mr. CALLE Y CALLE said that, before article 26 was referred to the Drafting Committee, he wished to pay homage to the principle of *pacta sunt servanda*, which was of vital importance in the life of States, and to express his conviction that, whereas States might sometimes fail to perform treaties, international organizations, which were more susceptible to public opinion and to the influence of small and medium-sized States, would comply with that sacrosanct rule of international law in exemplary fashion.

⁸ For the consideration of the text proposed by the Drafting Committee, see 1451st meeting, paras. 21-45.

36. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer article 26 to the Drafting Committee.

*It was so agreed.*⁹

ARTICLE 27 (Internal law of a State, rules of an international organization and observance of treaties)

37. The CHAIRMAN invited the Special Rapporteur to introduce article 27, which read:

Article 27. Internal law of a State, rules of an international organization and observance of treaties

Without prejudice to article 46, failure to perform a treaty may not be justified

(a) in the case of a State, by the provisions of its internal law;

(b) in the case of an international organization, by the rules of the organization.

38. Mr. REUTER (Special Rapporteur) said that, although article 27 appeared to be relatively simple, it raised questions both of terminology and of substance.

39. As to terminology, it might be asked what expression could be used, in the case of international organizations, to replace the expression "internal law" used in regard to States. The Commission had taken up that question before, particularly in connexion with article 2, paragraph 2, as he had indicated in his commentary to article 27, and it had decided in favour of the expression "rules of an international organization", which he had used in his draft article. A point in favour of that expression was that it had been used in the Vienna Convention and in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character,¹⁰ both of which referred to the "relevant rules of the organization". He thought it preferable not to use the expression "internal law" with reference to international organizations, because it was not appropriate in all cases.

40. Article 27 also raised a question of substance. As he had said in paragraph 4 of his commentary, the expression "rules of the organization" was to be understood in a broad sense. According to the definition given in article 1, paragraph 1 (34), of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, that expression included the constituent instrument of the organization, such written rules as it might have been able to elaborate in the exercise of its powers and the unwritten rules resulting from the practices established by the organization. But a problem arose in regard to treaties concluded by the organization: should the rules of the organization include rules deriving from some of the treaties it had concluded, such as headquarters agreements? That problem was rather outside the scope of article 27, for it came within that of article 30, as he had indicated at the end of his commentary. The Commission could therefore

take a decision on the matter after it had considered article 30. At that stage, it might well decide to add to article 27, as a precaution, the words "without prejudice to article 30".

41. Mr. SETTE CÂMARA said that, notwithstanding the Special Rapporteur's enlightening introduction of article 27, he had some doubts about subparagraph (b). The solution proposed by the Special Rapporteur in that subparagraph was clearly motivated by his desire to establish a parallelism between the Vienna Convention and the draft articles under consideration. There was, however, a substantial difference between article 6 of the Vienna Convention and draft article 6. Under article 6 of the Vienna Convention, the treaty-making capacity of States was completely unfettered and unlimited, and no reference was made to any restrictions on that capacity deriving from internal law. In the case of an international organization, on the other hand, the relevant rules of the organization defined and shaped the contours of its treaty-making capacity. Consequently, the rules of an international organization were quite different from the provisions of a State's internal law in the case contemplated in article 27.

42. He was, of course, aware of the provisions of article 46 of the Vienna Convention concerning manifest violations. If it was the intention of the Special Rapporteur to reproduce a similar kind of provision in the article under consideration, it might perhaps cover extreme cases. In any event, however, he did not see how the solution proposed in subparagraph (b) could be accepted without further clarification.

43. Mr. USHAKOV said he was not sure whether the rule stated in article 27 was justified in the case of international organizations. In the case of States, the rule in article 27 of the Vienna Convention provided that a State party to a treaty could not "invoke the provisions of its internal law as justification for its failure to perform a treaty". That meant that a State party to a treaty was required to amend its internal law if that law was not in conformity with the commitments it had assumed under the treaty. But could an international organization which was a party to a treaty be required to change its own rules if they were incompatible with performance of the treaty? Could it be required, for example, to amend its constituent instrument in order to bring it into line with the provisions of the treaty? That, in his opinion, was the real problem raised by article 27. To apply the strict rule of the Vienna Convention to international organizations might have very serious consequences for them.

44. Mr. NJENGA said he shared the doubts expressed by Mr. Sette Câmara and Mr. Ushakov concerning subparagraph (b). As he saw it, the relevant rules of an international organization were the very key to its capacity to enter into agreements with States or with other international organizations. Consequently, to imply that, notwithstanding such rules, international organizations could still incur legal responsibilities was going too far. A State could become a party to a treaty even if the provisions of that treaty contravened its constitution; but as could be seen from the provisions of draft article 6, the capacity of an international organization to conclude treaties was governed by the relevant rules of the organ-

⁹ For the consideration of the text proposed by the Drafting Committee, see 1451st meeting, para. 46.

¹⁰ *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. 207.

ization. Any attempt by an international organization to conclude a treaty which was contrary to its rules would give rise to a serious contradiction. It could, of course, be argued that such an attempt would be a manifest violation within the meaning of article 46 of the Vienna Convention. But if there was some rule which militated against the conclusion of an agreement by an international organization, it would be manifest in all cases since a potential party to such an agreement ought first to establish that it was within that organization's powers to conclude it.

45. Thus, to refer to the written rules and regulations of an international organization would do violence to the whole approach adopted by the Commission in the draft articles and would run counter to its acknowledgement of the restricted capacity of international organizations to conclude treaties. The difficulty might, perhaps, be overcome by referring, instead, to "the practices of the organization". Moreover, it could be seen from paragraph (4) of the Special Rapporteur's commentary to article 27 that he had intended the wording of subparagraph (b) to cover "the unwritten rules resulting from the practices established by the organization". It was possible to imagine a case in which, for instance, although the internal practice of an international organization required its executive head to represent it in treaty negotiations and to sign treaties on its behalf, those functions were in fact performed by a lesser official. In such a case, the correct procedure would not be known to the other negotiating parties from the constituent instrument of the organization concerned, and the organization could not be allowed to invoke its normal internal practice as a reason for invalidating its consent to be bound by the treaty. On the other hand, violation of the written rules or constituent instrument of an international organization would vitiate any legal consequences ensuing for States from a treaty thus irregularly concluded by the international organization concerned.

46. The CHAIRMAN said it was clear from the discussion that the Commission needed to analyse rather more closely the effect on international organizations of the rule laid down in subparagraph (b) and to consider the different types of situation that might arise in practice. For instance, it might be within the capacity of an international organization to contract a financial obligation, but that obligation might be vitiated by one of the organization's rules.

47. Mr. SCHWEBEL said it had been observed that the treaty-making power of a State was unlimited. That was not altogether true, at least in the case of the United States, which was restricted by the rules of its constitution. Although the Supreme Court had never found a case in which the United States had entered into a treaty unlawfully—"treaty" being used in the sense given to that term by the United States Constitution—it had found certain executive agreements having the international effects of a treaty to be unconstitutional.

48. Clearly, an international organization should not enter into a treaty in contravention of its internal rules. In the event that it did so, however, what would be the exact legal situation? Would the treaty become void and would the other parties to it have any recourse? One

solution which should not be excluded *a priori* was amendment of the relevant rules of the organization concerned. That would not necessarily entail amendment of the organization's constituent instrument—an undertaking which, as Mr. Ushakov had rightly pointed out, was no simple matter—but might involve no more than revision of the rules of procedure of a particular organ of the organization or of the administrative regulations issued by its executive head. He had the impression that the advisory opinion of the International Court of Justice in the case *Certain Expenses of the United Nations*¹¹ might be relevant in that regard. Some passages of that opinion might be read as suggesting that an act of an international organization, even though not altogether regularly embarked upon or expressed, might have valid international effects.

49. If the rule on that question was not to be formulated as the Special Rapporteur had proposed, how should it be? So far, he had heard no better proposal. It was possible to imagine a case in which all the parties to a treaty had believed that an international organization had acted in conformity with its rules, but in which the organization concerned found it to its advantage to plead that it had not. The rule proposed by the Special Rapporteur would then be extremely useful.

50. Mr. FRANCIS said that article 27 covered the practical application of the *pacta sunt servanda* rule. The question was how to ensure observance of that rule while at the same time avoiding the pitfalls to which Mr. Sette Câmara and Mr. Ushakov had referred. He noted from paragraph (4) of the commentary to article 27 that the Special Rapporteur understood the expression "rules of the organization" to include not only the constituent instrument of the organization but also other written rules and unwritten rules resulting from the practices established by the organization. In his view, a distinction should be made between an act of an international organization which infringed its constituent instrument (and was therefore not only *ultra vires* but also unlawful) and an irregular act involving only a breach of the organization's secondary rules or its practice. The suggestion made by Mr. Njenga¹² might provide the basis for a possible solution. It might be stipulated that, in the case of an international organization, failure to perform a treaty could not be justified unless the organization had committed an act prohibited by its constituent instrument. That would be the only case in which the *pacta sunt servanda* rule would not apply.

51. Mr. SUCHARITKUL said that he agreed with the principle of the article proposed by the Special Rapporteur but wished to make three drafting comments. First, he noted that article 27 of the Vienna Convention stated that a party could not "invoke the provisions of its internal law" as justification for its failure to perform a treaty, whereas draft article 27 referred directly to the justification of failure to perform a treaty.

52. With regard to subparagraph (a), he wondered whether a State could not invoke the provisions of the

¹¹ *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, *I.C.J. Reports 1962*, p. 151.

¹² See para. 45 above.

internal law of another State as justification for its failure to perform a treaty.

53. Lastly, he thought that the rules of an international organization might include the rules of one of its organs, such as the rules of the European Commission of Human Rights or even a declaration concerning the agricultural policy of EEC.

The meeting rose at 1 p.m.

1436th MEETING

Wednesday, 8 June 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/285,¹ A/CN.4/290 and Add.1,² A/CN.4/298)

[Item 4 of the agenda]

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

ARTICLE 27 (Internal law of a State, rules of an international organization and observance of treaties)³ (*concluded*)

1. The CHAIRMAN, referring to the suggestion he had made at the previous meeting that the Commission should give further thought to the problems raised by article 27, said that, since that article was expressed in negative form or in the form of a saving clause, it did not really matter how broad the meaning of the words "the rules of the organization" was. The real problem to be solved would arise in connexion with article 46. He therefore suggested that, pending the examination of that article, the words "Without prejudice to article 46", in article 27, should be placed in square brackets.

2. Mr. DÍAZ GONZÁLEZ said that, although logic and pragmatism were not necessarily incompatible, he was of the opinion that, in the case of article 27, they had converged rather than moved on parallel lines. Thus, even though article 27 offered the advantages of

being the logical consequence of the preceding articles and, in particular, of article 6,⁴ and of laying a foundation for subsequent articles, and even though it had been drafted pragmatically so as not to cause unnecessary complications, he thought that greater emphasis should have been placed on the distinction between the capacity of States and the capacity of international organizations to conclude or to be bound by treaties.

3. When a State consented to be bound by a treaty, it did so in full awareness of the consequences of its act. It could, if necessary, adapt its internal law to the provisions of the treaty it had concluded, which would prevail over its internal law if there was a conflict between them. As Mr. Njenga had pointed out at the previous meeting,⁵ however, article 6 limited the capacity of international organizations to conclude treaties. Thus, the representatives of international organizations could not sign treaties, and the competent organs of international organizations could not consent to them, if the obligations they imposed were not within the limits of the specific functions provided for in the constituent instruments of the organizations. Those constituent instruments were, moreover, nothing less than multilateral treaties, which in many cases required the agreement of a two-thirds majority of the parties in order to be amended. He therefore believed that, when an international organization signed a treaty, its representative was acting only on behalf of the organization and not on behalf of its member States.

4. Mr. TABIBI said that, on the face of it, article 27 seemed quite simple and straightforward. The problem of a manifest violation of the internal law of a State was relatively easy to solve because it involved only one State. But article 27, subparagraph (*b*), raised considerable difficulties because international organizations did not exist in the abstract; they reflected the views and interests of their member States. The problem of the violation of the rules of an international organization was therefore a very serious one. An example was provided by the case of the Congo in 1960, which had involved all the States Members of the United Nations. A number of Security Council and General Assembly resolutions had authorized the Secretary-General to assign civilian and military representatives to the Congo. The arrangements which those representatives had made had affected the interests of the Organization and of all its Member States, which were much more important than the interests of a single State. Thus, the problems raised by article 27, subparagraph (*b*), were very delicate ones to which the Commission should pay particularly close attention, because that article was related not only to article 46 but also to articles 5 and 7 of the Vienna Convention.⁶

5. Mr. ŠAHOVIĆ said there was no denying the need to extend to international organizations the rule stated in article 27 of the Vienna Convention, which was a direct consequence of the *pacta sunt servanda* rule stated in article 26. Most of the members of the Commission had nevertheless emphasized the difficulties of applying

¹ *Yearbook ... 1975*, vol. II, p. 25.

² *Yearbook ... 1976*, vol. II (Part One), p. 137.

³ For text, see 1435th meeting, para. 37.

⁴ See 1429th meeting, foot-note 3.

⁵ 1435th meeting, para. 44.

⁶ See 1429th meeting, foot-note 4.

that rule to international organizations because of their specific nature. In his opinion, those difficulties were not insurmountable. He was prepared to take part in the efforts of the Drafting Committee to find a better wording, but thought it would be better not to tamper with the principle stated by the Special Rapporteur in article 27. The meaning which the Special Rapporteur had given to the words "rules of the organization" seemed logical and, furthermore, corresponded to the definition contained in article 1, paragraph 1 (34), of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.⁷

6. Mr. VEROSTA said that, despite the Special Rapporteur's explanations in paragraph (4) of his commentary to article 27 (A/CN.4/285), he wondered whether article 2 should not include a definition of the "rules of the organization", since article 6 already contained the expression "relevant rules of that organization".

7. Mr. USHAKOV said that article 27 and article 46 of the Vienna Convention were very different; article 27 related to performance of a valid treaty, whereas article 46 related to competence to conclude treaties and provided that a State could, in certain cases, invoke a violation of its internal law as vitiating its consent. Thus, the rule set out in article 27 was without prejudice to article 46 since it applied only if the treaty was valid.

8. Mr. CALLE Y CALLE said that, as Mr. Šahović and Mr. Díaz González had pointed out, article 27, relating to the observance of treaties, gave effect to the *pacta sunt servanda* principle, which simply meant that the States parties to a treaty could not invoke their internal law as justification for their failure to perform that treaty or to respect the rules it created.

9. The case of international organizations was somewhat different, however, and he agreed with Mr. Verosta that the Commission should clarify the meaning of the expression "rules of the organization", used in article 27, subparagraph (b). Article 6 contained the expression "relevant rules of that organization", which related to the constitutionality of the will of organizations and was closely linked with the validity of treaties. For treaties were validly concluded if they were concluded in accordance with the valid constituent instrument of the organization. That rule raised a problem, however, because the constituent instruments of some organizations did not contain provisions relating to their capacity to conclude treaties. In some cases, therefore, that capacity could only be presumed. Fortunately, however, there were other articles, such as article 46, which took account of cases in which the representatives or organs of an international organization went beyond the limits of their powers and manifestly violated the rules of the organization.

10. Mr. EL-ERIAN said that article 27 was a logical corollary of article 26, which embodied the *pacta sunt servanda* principle. It was therefore important to define the modalities of application of that basic principle, which was the cornerstone of the law of treaties. Indeed, some jurists, such as Hans Kelsen, visualized the obliga-

tions of the international community as a pyramidal structure with the *pacta sunt servanda* principle at its base. The Commission's problem was to determine how that basic principle was to be applied to the case of treaties concluded by international organizations, to which article 27, subparagraph (b), related.

11. In the case of relations between States, the problem was not very complicated because the stability of international relations required the primacy of international law. Thus, States could not invoke their internal law to free themselves from their obligations under international law, whether customary or conventional, general or special. It was much easier to identify a violation of the internal or constitutional law of a State than a violation of the rules of an international organization, which, over the years, had come to mean not only its constituent instrument but also the rules deriving from its practice, resolutions, decisions and rules of procedure. In that connexion, he drew the Commission's attention to the definition of the expression "rules of the organization" contained in article 1, paragraph 1 (34), of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

12. Although he had no difficulty in accepting the rule that the internal law of a State could not be invoked as a justification for failure to perform a treaty, he did not see how the same rule could be adopted in article 27, subparagraph (b), which would apply to treaties concluded between States and international organizations and treaties concluded between two or more international organizations. That rule was put to the test much more frequently in inter-State relations, where the treaty-making process was subject to checks and balances. In the case of treaties concluded between States and international organizations, there had been very few instances in which international organizations had invoked their rules as a justification for non-performance of a treaty. He therefore considered that the Drafting Committee should try to improve the wording of article 27, subparagraph (b).

13. Mr. AGO said that article 27 concerned a problem related to the performance of a valid treaty, and that excluded cases in which the validity of the treaty could be called in question. Could a parallel be drawn in regard to that problem between the position of a State and that of an international organization? It was obvious that a State could not invoke its internal law to justify failure to fulfil an international obligation imposed on it by the treaty. That was why States sometimes hesitated to assume international obligations, the fulfilment of which would pose problems of internal law. For instance, the United States was hesitant to ratify some international labour conventions because, under its internal legal system, the individual federated States were competent in matters of labour law whereas the federal State was competent to conclude treaties. Thus, the federal State might be placed in a delicate situation if internal difficulties arose with regard to the fulfilment of obligations it had assumed at the international level.

14. Was the situation identical in the case of an international organization? Could an international organization have an internal legal system that prevented it from

⁷ See 1435th meeting, foot-note 10.

performing a treaty which it was competent to conclude? That possibility could not perhaps be excluded. However, the rule stated in article 27 of the Vienna Convention was a rule of international responsibility. It was no accident that the same rule appeared in article 4 of the draft articles on State responsibility, which stated:

An act of a State may only be characterized as internationally wrongful by international law. Such characterization cannot be affected by the characterization of the same act as lawful by internal law.⁸

There could be no doubt, however, that if it adopted article 27, subparagraph (b), the Commission might have to envisage the possibility of international responsibility being incurred by an international organization for failure to fulfil an obligation validly assumed at the international level. In principle, he had no objection to such a hypothesis and could well imagine that it might one day be possible to speak of the responsibility of an international organization for an internationally wrongful act. However, the Commission must understand what it would be undertaking by adopting the rule stated in article 27, subparagraph (b), which might lead it a very long way.

15. Mr. FRANCIS said that he had given a great deal of thought to the issue being discussed in connexion with article 27 and had come to the conclusion that sufficient emphasis had not been placed on the distinction between the constituent instruments of international organizations and the constitutions of States. The scope and purpose of all State constitutions were essentially the same, namely, to regulate the internal order of States. To the extent that the constituent instruments of international organizations helped to regulate the internal affairs of those organizations, they could be compared to the constitutions of States. The comparison could not be taken too far, however, because a constituent instrument such as the Charter of the United Nations was more than the "internal law" of the Organization. It was also a multilateral treaty which regulated relations between the Organization and its Member States, and it could, in some cases, regulate the conduct of non-member States. Those three features made it quite different from the constitution of a State.

16. In that connexion, he drew attention to paragraph (4) of the Special Rapporteur's commentary to article 30 (A/CN.4/285), the last sentence of which read:

... it is quite clear that if the United Nations was to conclude an international treaty which was contrary to the provisions of the Charter, there would be not merely a question of priority, but a question of nullity since it seems—and this is a question which will be discussed later in connexion with a draft article corresponding to article 46 of the 1969 Convention—that such a treaty might be null and void.

That sentence made it quite clear to him that the Special Rapporteur had to conclude that, if an act violated the basic instrument of an international organization, the principle of *pacta sunt servanda* would not apply at all. It was also quite clear from that sentence that the Special Rapporteur had contemplated excluding such a situation

from the scope of article 27. He therefore hoped that, in considering article 27, the Drafting Committee would pay close attention to the difference between the internal law of States and the constituent instruments of international organizations, as exemplified by the Charter of the United Nations.

17. Mr. SCHWEBEL said that article 27, subparagraph (b), was not, of course, an invitation to an international organization to conclude a treaty which was not in accordance with its rules. It was a recognition that a case could occur in which an organization that had concluded a treaty might wish to justify failure to perform it on the ground that the performance or conclusion of the treaty was not in accordance with its rules. In that connexion, the Commission should, as Mr. Ago had suggested, envisage the possibility that an organization might act in violation of a treaty of or customary international law and thereby incur international responsibility.

18. With regard to Mr. Tabibi's reference to the United Nations operations in the Congo, his own impression was that, in a marginal sense, the Congo operations might have provided an example of a violation of international law, in that some units of the United Nations Force in the Congo had been accused of acting in ways that violated international legal principles relating to the treatment of civilians, and the Secretary-General had apparently accepted responsibility on behalf of the Organization, which at any rate had paid compensation to the victims of such acts.

19. He would venture to give another hypothetical example. If, under Article 43 of the Charter, the Security Council entered into an agreement with a State or a group of States which placed forces at its disposal and if, in approving such an agreement between the United Nations and the State or States concerned, the Security Council acted with an abstaining vote of one or more of its permanent Members, he wondered whether the United Nations might be able to say that it was not bound by such a treaty on the ground that, in agreeing to it, it had not acted in accordance with its rules and, in particular, with Article 27 of the Charter, which provided for the concurring votes of the permanent members of the Security Council. Such an example might seem rather far-fetched in the light of the history of the interpretation of article 27 of the Charter and of the advisory opinion of the International Court of Justice in the *Namibia* case, that an abstention did not amount to a veto,⁹ but he thought it was the kind of case that could conceivably occur when an international organization resorted to an exculpatory argument. In the light of such a possibility, however unlikely it might be, he thought that the principle which the Special Rapporteur had enunciated in article 27 was a sound one. Subparagraph (b) might, however, be improved by the Drafting Committee, which could take account of the view expressed by Mr. Francis.

⁸ *Yearbook ... 1976*, vol. II (Part Two), p. 73, document A/31/10, chap. III, sect. B, subsect. I.

⁹ *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. 22.

20. Mr. QUENTIN-BAXTER said that, although the relationship between capacity to conclude treaties and article 27 was a fundamental one, there seemed to be a contradiction between the rule stated in article 27, subparagraph (b), and the basic rule in article 6, which provided that international organizations had limited capacity to conclude treaties. The more he thought about the problem, however, the more he was convinced that the apparent contradiction was, in fact, only apparent and not real, because there could never be full equality between the contractual capacity of international organizations and the contractual capacity of States. The real problem was that of determining when the situation changed and came to be dominated by the rule stated in article 27, as tempered by the rule which would correspond to article 46 of the Vienna Convention.

21. He had some doubts about the advisability of trying to change the present wording of article 27, subparagraph (b). As other members of the Commission had noted, the words "rules of the organization" had come to mean so much, and were so well defined in commentaries, that the whole delicate structure of the interpretation of constituent instruments was now based on them. He found it difficult to see where a new dividing line could be drawn. As Mr. Francis had pointed out, the rule which the Commission would state in article 46 would, of course, be very important, but, in article 27, it was saying that, in view of the limited contractual capacity of international organizations, those organizations could be expected to work within the limits of that capacity so that none of the other parties to treaties would be at a disadvantage. Moreover, he thought it quite possible that the internal processes leading to the ratification of treaties by international organizations would help to develop the rules of those organizations and would be pertinent to the interpretation of their constituent instruments.

22. Mr. TABIBI said that the rule proposed in article 27 did not make a clear distinction between the capacity of States and the capacity of international organizations to conclude treaties. It was therefore necessary to explain the meaning of the words "rules of the organization" for, unlike the constitutions of States, the constituent instruments of international organizations did not specify how those organizations were to carry out their functions. Moreover, international organizations concluded treaties not only on the basis of their constituent instruments but also on the basis of their practice, which was evolving daily, whereas the constitutions of States changed only very slowly. A definition of the words "rules of the organization" should therefore be included both in the text of article 27 and in the commentary to that article.

23. Mr. RIPHAGEN said he did not see how the Commission could omit to draft an article such as article 27, which was the logical consequence of the *pacta sunt servanda* rule that a party to a treaty could not invoke other rules to justify non-compliance with the treaty it had concluded.

24. In referring to specific examples, the Commission should distinguish clearly between the problem of competence, the problem of the validity of treaties, and the problem of responsibility for non-compliance, to which Mr. Ago had referred.

25. The United Nations and its Charter were usually referred to when specific examples were given of treaties concluded between States and international organizations or between two or more international organizations. The Charter was, however, a very particular type of constituent instrument because it contained rules for the Organization itself as well as rules which could be said to be universal, or rules of *jus cogens*, which prevailed over all other existing rules. Other international organizations also had to be taken into account because some of their constituent instruments did not contain universal rules or rules of *jus cogens*. To solve that problem, it might be specified that article 27 referred only to the rules of the United Nations. Some of the other fears expressed in regard to article 27 might also be allayed if that article was made to include a reference to Article 103 of the United Nations Charter, which provided for the case in which the obligations of the Members of the United Nations under the Charter conflicted with their obligations under any other international agreement.

26. Mr. DADZIE said he shared the view that the wording of article 27 posed some problems. The difference between the capacity of States and the capacity of international organizations to conclude treaties lay in the fact that States could, by virtue of their sovereign powers, enter into treaties and then deal with the performance of those treaties later, if necessary by amending their rules of internal law, whereas international organizations could conclude treaties only if they were permitted to do so by their constituent instruments; if they concluded treaties, they could not invoke the rules contained in their constituent instruments as a justification for their failure to perform the treaties.

27. It also seemed to him that the problems the Commission was now discussing were not real problems. Indeed, he could not conceive of a situation in which an international organization concluded a treaty in accordance with its rules and then invoked those rules to justify its inability to perform the treaty. The real problem was that the rules of international organizations were not always expressed in writing and that some rules had developed from their practice. Thus, it was not always easy to ascertain that a particular organization would subsequently find it difficult to perform a treaty.

28. In order to solve that problem, he suggested that the Drafting Committee might consider amending article 27, subparagraph (b), by adding the words "and practices" after the words "by the rules".

29. The CHAIRMAN, speaking as a member of the Commission, said it was quite clear that both parts of article 27 were necessary. Although he was convinced that a reference to "the rules of the organization" should be included in the article, he was not sure whether a definition of those words was necessary, particularly in the light of developments which had taken place since 1969, when no definition of the meaning of the words "rules of the organization" had been included in the Vienna Convention. In 1975, a definition of those words had been given in article 1, paragraph 1 (34), of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. He therefore suggested that the Drafting

Committee might consider the possibility of preparing a definition on the lines of that contained in the 1975 Vienna Convention. He also hoped that the Drafting Committee would take account of the suggestion he had made at the beginning of the meeting because he thought that the Commission would encounter a number of problems when it came to discuss article 46.

30. Mr. REUTER (Special Rapporteur), summarizing the discussion on article 27, noted that, in the main, the Commission favoured a provision dealing separately with States and international organizations. In the case of States, its wish seemed to be to keep closer to the corresponding provision of the Vienna Convention. On the other hand, many members had expressed doubt or hesitation about the wording, but not the content, of subparagraph (b). He would therefore discuss the main points which caused them concern.

31. To begin with, it should be made clear, as a number of members had pointed out, that article 27 was based on the presumption of a treaty that was not only in force but was also valid. It was therefore necessary to reserve both article 46 and any other provisions of the Vienna Convention that might affect, if not the validity, at least the applicability of the treaty. Another point had been raised by Mr. Ago in connexion with the expression "failure to perform", and it had been taken up by other members of the Commission. In formulating article 27, the Commission was not entering the realm of responsibility; it was not deciding whether international organizations were active or passive subjects of responsibility. To assert that an international organization could not justify failure to perform a treaty by invoking its own rules did not mean that the organization incurred responsibility.

32. Nevertheless, since many members had mentioned the problem of the validity of the treaty, he wished to clarify certain points, first in regard to States and then in regard to international organizations, to see whether their position differed from that of States. With regard to States, a relatively simple case had been suggested in which a State that was bound by a treaty was unable to have the law necessary for performance of that treaty passed by its parliament. Judicial decisions were numerous and clear on that point; a State could not invoke an act of one of its organs as justification for failure to perform a treaty. One member had raised the question whether a State could invoke a constitutional obstacle as justification for not performing a valid treaty. It was, indeed, conceivable that a State which had validly concluded a treaty in conformity with its constitution might experience difficulties when it came to performing the treaty. For example, the constitution, although it required the State to enact a financial law, might also contain an obstacle to the enactment of that law. At the Second International Peace Conference (The Hague, 1907), when States had signed the convention relative to the creation of an international prize court, it had been planned to set up a tribunal to hear appeals from judgments of national courts. Before the conclusion of the convention, however, the United States had discovered that its Constitution presented an obstacle to the application of the proposed régime. A protocol had therefore been added to the

convention, providing for the award of compensation instead of the setting aside of national judgments by decision of the international prize court.

33. Turning to another example, he wondered whether a State could validly conclude a treaty if it was aware, when doing so, that it might not have all the necessary means to perform the treaty. In doing that, the State would be taking a risk. That was true of some federal States, such as Canada. According to decisions of the Supreme Court of Canada, the Canadian federation could validly enter into binding commitments but there was no certainty that it would be able to fulfil them. In the event of non-performance, it would at least owe compensation. His conclusion was that the constitutions of some States might contain an obstacle to the performance of a treaty. Consequently, when the Vienna Convention provided that a party to a treaty could not invoke the provisions of its internal law as justification for its failure to perform the treaty, a State's constitution fell within the concept of internal law. Although there was no international jurisprudence on that point in regard to treaties, there was in regard to international custom.

34. Where international organizations were concerned, the drafting of article 46 might prove difficult, as the Chairman had observed, but article 27 did place international organizations and States within the same framework. First of all, the treaty to which the international organization was a party had to be considered to be valid and in force. For an international organization, the problem should in principle be posed in the same terms as for a State. An international organization could validly bind itself by a treaty, even if it was not absolutely certain of being able to perform it. That was true of the United Nations, for example, when it signed financial agreements. If it had no funds, it would nevertheless remain a debtor. One could even imagine a customs union, possessing international personality, which was competent to establish rules for determining the customs value of imports into the union and to conclude an agreement on that subject. The agreement would not, however, be implemented by the customs union itself but by officials of its member States at customs posts on the periphery of the union. If some of those officials broke the agreement, the union could not claim that it was not responsible because it had not committed the breach or because its constituent instrument did not give it the means to perform the agreement.

35. Although it was not strictly necessary for the purposes of article 27, he could imagine an even more complicated example. EEC, applying a clause of the treaty it had concluded with the United States, might grant United States ships the same rights as those granted to the Community by the United States. If a French patrol vessel became guilty of conduct contrary to the agreement in regard to a United States ship, the United States could make a claim either against France or against EEC or against both, depending on the content of the jurisdictional clause in the treaty. That example showed the need—which had often been mentioned—not only to protect States against the organization of which they were members, but also to protect States which entered into contractual relations with the organization. It was

one aspect of the problem that was already adumbrated in article 27.

36. Lastly, many drafting suggestions had been made during the discussion. Personally, he thought the rules of the organization necessarily included its constitutional rules and also some of its acts in law. He hesitated to use the French word *acte* in the article because it was difficult to translate into English. As to whether a special provision should be drafted to define the expression "rules of the organization", other articles of the draft might call for different definitions. The Commission could nevertheless formulate a general definition, even if it had to be changed later. It could also amend article 27 or merely expand the commentary. As those questions lay with the Drafting Committee, he thought the article could be referred to it.

37. The CHAIRMAN suggested that it might be useful if the commentary to article 27 fully reflected the Commission's discussion of the article and also contained some references to the relevant jurisprudence of the International Court of Justice, such as its advisory opinions in the cases of *Certain Expenses of the United Nations*¹⁰ and the *Effects of Awards of Compensation made by the United Nations Administrative Tribunal*.¹¹

38. Mr. USHAKOV said he thought the Special Rapporteur's examples showed that, while in some cases an international organization could not invoke its own rules as justification for failure to perform a treaty, other examples could be quoted to show the opposite. For instance, the Security Council might conclude a perfectly valid agreement with a State, to send troops of that State to a certain region for several years to maintain international peace. A few months later, the Security Council might decide, still in conformity with the Charter of the United Nations, to replace the troops of the State in question by troops from another State. If the first State protested, could the Security Council invoke the provisions of the Charter in support of its new decision? In his opinion, article 27, subparagraph (b), did not provide a satisfactory answer to that question. He believed the Charter could be invoked, not only to justify the second decision by the Security Council but also to support a subsequent decision by another organ, such as the General Assembly. The article under consideration was not so simple as it appeared and it would be wrong to rely only on some examples and ignore others which indicated the contrary.

39. Mr. REUTER (Special Rapporteur) said he agreed that it was always dangerous to quote particular examples, but he was not troubled by the example given by Mr. Ushakov. The real problem in that case was to ascertain what commitment the United Nations had assumed. Pursuant to a decision by the Security Council, the United Nations entered into an agreement with a State, in which that decision would no doubt be mentioned. The implication seemed to be that the decision could be revoked in the event of a contrary decision by the Security Council, and that consequently the agreement would terminate.

¹⁰ See 1435th meeting, foot-note 11.

¹¹ Effects of awards of compensation made by the United Nations Administrative Tribunal, Advisory Opinion, *I.C.J. Reports 1954*, p. 47.

The question was one which depended on the law of the United Nations or even the interpretation of the agreement, but did not concern the Commission. On the other hand, if the Security Council entered into a commitment it was manifestly not entitled to assume, the case would fall under article 46.

40. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer article 27 to the Drafting Committee.

*It was so agreed.*¹²

ARTICLE 28 (Non-retroactivity of treaties)

41. The CHAIRMAN invited the Special Rapporteur to introduce draft article 28, which read:

Article 28. Non-retroactivity of treaties

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.

42. Mr. REUTER (Special Rapporteur) said that the text of article 28 was identical with that of the corresponding article of the Vienna Convention. Admittedly, the Vienna Convention enunciated a very general principle which, like any general formula, was open to criticism, but it was not his task to criticize it.

43. Mr. SETTE CÂMARA said he thought there was very little ground for discussion on article 28, since the rule it laid down could be placed on the same footing as that of the *pacta sunt servanda* rule and the text was identical with that of the corresponding article of the Vienna Convention. He would, however, be grateful if the Special Rapporteur would say whether the Commission could accept a situation in which it had to consider the possibility of retroactive application of a relevant rule of an international organization. To take the example given by Mr. Ushakov, if a peace-keeping force had been established by a valid treaty but a subsequent decision of the international organization concerned sought to withdraw it, could one of the States parties to the treaty plead for the maintenance of the force on the ground that the treaty had been valid when signed and that the decision of the organization was a supervening rule which had no retroactive effect?

44. Mr. REUTER (Special Rapporteur) said that the article reserved all possibilities, depending on the intentions, and it was drafted so flexibly that it should not present any danger. It might even be thought that the rule it stated was rather vague.

45. The CHAIRMAN said that, while the Commission could, of course, adjust the text of the Vienna Convention to take account of the characteristics of international organizations, he doubted whether it could usefully redraft provisions of that instrument, which, like article 28, laid down general principles in language chosen after long discussion. The Commission would save time if it bore that point in mind.

¹² For the consideration of the text proposed by the Drafting Committee, see 1451st meeting, paras. 47 *et seq.*, and 1459th meeting, paras. 6 *et seq.*

46. Mr. SETTE CÂMARA said he had asked his question of the Special Rapporteur largely as a matter of curiosity. It did, however, seem strange that, although both article 27 and article 28 of the present draft laid down general rules, mention of the relevant rules of international organizations had been made only in the former.

47. The CHAIRMAN emphasized that it was not his intention to prevent the consideration of points which, like that just raised by Mr. Sette Câmara, related exclusively to international organizations, but merely to avoid renewed discussion of article 28 of the Vienna Convention as such.

The meeting rose at 1 p.m.

1437th MEETING

Thursday, 9 June 1977, at 10.10 a.m.

Chairman: Sir Francis VALLAT
later: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Co-operation with other bodies

[Item 10 of the agenda]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRMAN invited Mr. Valladão (Observer for the Inter-American Juridical Committee) to address the Commission.

2. Mr. VALLADÃO (Observer for the Inter-American Juridical Committee) said that the Inter-American Juridical Committee, which had been established by the Third International Conference of American States (Rio de Janeiro, 1906), had originally been known as the International Commission of American Jurists and that its mandate had been to formulate a code of public international law and a code of private international law governing relations between the countries of America. On the basis of a draft code of public international law prepared by Mr. Epitácio Pessôa and a draft code of private international law prepared by Mr. Lafayette Pereira, that Commission had elaborated two important drafts in 1912 and in 1927, which had become multilateral treaties, signed at Havana in 1928. Those treaties, which had been ratified and were still in force, had been the world's first multilateral treaties of public international law. They dealt with such subjects as the status of foreigners, treaties, diplomatic staff, consular staff, mari-

time neutrality, asylum and the rights and duties of States in civil wars. A Convention on Extradition, which was still in force, had been signed at the Seventh International Conference of American States (Montevideo, 1933). The International Commission of American Jurists had pursued its activities and, when the Inter-American Juridical Committee was established, the two bodies had continued to work side by side for some time. In 1948, the Charter of the Organization of American States had established the Inter-American Council of Jurists, which it had entrusted with the task of assessing the Committee's work, but, when the Charter was revised in 1967, the Council was dissolved and the Committee became the sole codification body.

3. The Committee had continued to provide legal assistance to OAS, particularly by preparing draft treaties and conventions of public and private international law, several of which were in force. As examples, he referred to the Convention on Territorial Asylum and the Convention on Diplomatic Asylum (Tenth Inter-American Conference, Caracas, 1954) and to the conventions adopted by the Inter-American Specialized Conference on Private International Law (Panama City, 1975), particularly in the areas of international trade law and international procedural law.

4. When the United Nations established the International Law Commission in 1947, several international multilateral instruments prepared by the International Commission of American Jurists, which had preceded the Inter-American Juridical Committee, were already in force. Eight of those instruments related to questions of public international law and one was a code of private international law. That was one of the reasons why article 26, paragraph 4, of the Statute of the International Law Commission recognized "the advisability of consultation by the Commission with intergovernmental organizations whose task is the codification of international law, such as those of the Pan-American Union". Similarly, the Statute of the Inter-American Juridical Committee, formulated in 1948, provided in article 22 for the invitation of representatives of international institutions of a worldwide character. The meeting of the two bodies had thus been inevitable.

5. The Committee's mandate was broader than the Commission's. Although both had been entrusted with the task of promoting the progressive development of international law and its codification, the Committee was, in addition, the advisory body of OAS. Accordingly, it studied problems relating to the integration of the developing countries of the American continent and the possibilities of harmonizing their legislation. In the field of international law, it studied questions of public international law and private international law. Referring to the codification and progressive development of international law, he pointed out that, as early as 1906, at the time of the establishment of the International Commission of American Jurists, Mr. Amaro Cavalcanti, the distinguished representative of Brazil, had considered that the partial and gradual codification of international law was preferable to the elaboration of a comprehensive and definitive code; that view had been endorsed nearly 30 years later by the Seventh International Conference

of American States (Montevideo, 1933). The broad outline of the Committee's work had been determined at that time: it was to pursue the partial and gradual codification of international law by drafting specialized conventions or treaties. Similarly, the Charter of the United Nations had entrusted the General Assembly with the task of initiating studies and making recommendations for the purpose of "encouraging the progressive development of international law and its codification".

6. Codification had been one of the lofty ideals of the nineteenth century, which had produced quite a crop of civil codes in Europe and in Latin America. They had been codes in the Roman sense of the term, in that they had embodied existing law, but with many major and inevitable changes. Influenced by the trend towards the codification of internal law, the leading international law scholars of the time, and, in particular, Bluntschli in Switzerland, Fiore in Italy, and Field in the United States, had embarked upon the codification of international law.

7. The codification of internal law was now on the decline. Attempts were being made either to replace the famous civil, commercial, penal or procedural codes by laws or codes of more limited scope or to modernize them. The Inter-American Juridical Committee had also become involved in revising the treaties based on its drafts. Indeed, many anachronistic and unfair international texts, such as Article 38 of the Statute of the International Court of Justice, which referred to the general principles of law recognized by "civilized nations", needed to be revised and adapted to contemporary law. The Committee had therefore oriented its work towards specialization and revision. It had prepared several draft reforms relating to certain aspects of the Bustamante Code of 1928, which was still in force in 15 American States.

8. Several specialized conferences on private international law had been held under the auspices of OAS. At the first conference, held in 1975, six inter-American conventions had been signed and had already entered into force. They related to such matters as conflict of laws concerning bills of exchange, promissory notes, invoices and cheques; international commercial arbitration; letters rogatory; the taking of evidence abroad; and the legal régime of powers of attorney to be used abroad. At its last two sessions held in 1976 and 1977, the Committee itself had approved several draft conventions, which would be submitted to the Second Inter-American Specialized Conference on Private International Law; to be held at Montevideo in late 1977. Those drafts related to the following matters: commercial companies; extradition; evidence of foreign law; enforcement of interim measures; maritime and land transport; extra-territorial enforcement of foreign arbitral awards and decisions; and conflict of laws relating to cheques. The text of those drafts would be distributed to the members of the Commission for information.

9. He said that he would also provide the Commission with copies of the volume containing the third international law course organized by the Committee in 1976 and the text of a lecture which he had given at the second course, held in 1974, on the importance of updating the rules of private international law applied in inter-Ameri-

can relations. He noted that the fourth course, which would be given in July and August 1977, would cover the law of treaties, the inter-American system and certain topics of public international law, the law of the sea and private international law. Those courses took place at the same time as the Committee's sessions. The Committee's next session would focus on two priority topics: the principle of self-determination and its field of application, and conflict of laws and the need for a uniform law relating to cheques in international circulation.

10. In conclusion, he reaffirmed the Committee's standing invitation to the Commission to attend its sessions.

11. The CHAIRMAN thanked Mr. Valladão for his statement, which had not only provided historical background but had also touched on some fundamental problems in the Commission's work. The Commission was indeed faced with problems of progressive development; the Special Rapporteur was very conscious of those which related to the topic under discussion. The reminder that the Commission should consider not only public but also private international law was particularly pertinent to the study of succession of States in respect of matters other than treaties. The reference to the potential obsolescence of codified international law was also very apposite for the problem was one of which the Commission was particularly aware in connexion with the topic currently under study. It was true that there existed no convenient international machinery for the adjustment of texts.

12. Mr. EL-ERIAN expressed the hope that copies of Mr. Valladão's outstanding speech, with its wealth of historical information, could be distributed not only to the members of the Commission but also to the participants in the International Law Seminar.

13. Mr. CALLE Y CALLE agreed entirely with Mr. Valladão that there was a need to modernize international law and make it more democratic. There must be a single system of law, free from aristocratic origin, which would apply equally to all peoples throughout the world. That need was felt most acutely in the third world countries, which had for so long been deprived of justice and equality.

14. Mr. REUTER congratulated the Observer for the Committee on his masterly statement, in which he had clearly demonstrated his unshakeable faith in the merits of codification. All the members of the Commission shared that belief but they sometimes needed to hear it defended by someone with greater seniority and with as much enthusiasm as Mr. Valladão. The message he had conveyed was one of hope in a better future for the "new world", a term which no longer applied to America alone but also to Asia and Africa.

15. Mr. USHAKOV said that it was an honour for the Commission to welcome Mr. Valladão, a great master of international law, whom he congratulated warmly on his brilliant statement.

16. Mr. TABIBI said that, although the activities of the Inter-American Juridical Committee were funded by OAS, its members, like those of the Commission, served in their personal capacity, a fact which, he was sure, contributed to the success of their work in the fields

of private and public international law. He hoped that the close co-operation between the jurists of Latin America and the third world, which was evidenced by the meetings of the Asian-African Legal Consultative Committee, would continue and would grow.

17. Mr. DÍAZ GONZÁLEZ said that Mr. Valladão had spoken on behalf of the entire Latin American continent, which had traditionally upheld the concept of a system of international law applicable to all and dominated by none and had demonstrated its attachment to international legal norms, which transfusions from Asia, Africa and Latin America would bring up to date.

18. Mr. SCHWEBEL said that, as a new member of the Commission and one from a country which was a member of the Inter-American Juridical Committee, he was very grateful to Mr. Valladão for his most instructive statement.

19. Mr. SETTE CÂMARA said that, as his compatriot, he could not but feel a certain pride in the presence of Mr. Valladão, in the fact that he had not merely given a formal report of the activities of the Inter-American Juridical Committee but had delved into problems of interest to all members of the Commission, and in the response his statement had evoked.

20. Mr. DADZIE said that he had found Mr. Valladão's statement deeply inspiring. He had himself pleaded before the Sixth Committee of the General Assembly that the time had come to rewrite international law to take account of the customs of the third world countries, and he agreed with Mr. Valladão that the reference in the Statute of the International Court of Justice to the general principles of law recognized by "civilized nations" had no meaning in the modern world, where no nation could be considered uncivilized. Mr. Valladão's statement had shown the contribution the third world had to make to the development of the law of nations.

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/285,¹ A/CN.4/290 and Add.1,² A/CN.4/298)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR
(continued)

ARTICLE 28 (Non-retroactivity of treaties)³ (concluded)

21. The CHAIRMAN said that, if there was no objection, he would take it that the Commission decided to refer article 28 to the Drafting Committee.

*It was so agreed.*⁴

ARTICLE 29 (Territorial scope of treaties)

22. The CHAIRMAN invited the Special Rapporteur to introduce draft article 29 (A/CN.4/285), which read:

¹ *Yearbook ... 1975*, vol. II, p. 25.

² *Yearbook ... 1976*, vol. II (Part One), p. 137.

³ For text, see 1436th meeting, para. 41.

⁴ For the consideration of the text proposed by the Drafting Committee, see 1458th meeting, para. 4.

Article 29. Territorial scope of treaties

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each State Party in respect of its entire territory.

23. Mr. REUTER (Special Rapporteur) said that every set of draft articles contained articles with which he was satisfied and others with which he was less satisfied. Article 29 came within that second category.

24. Although he was an ardent defender of the Vienna Convention,⁵ he was not convinced that article 29 of that Convention, on which draft article 29 was based, was entirely satisfactory. Since that provision was entitled "Territorial scope of treaties", it might be expected to concern the scope of application of treaties—in other words, the spatial extent of the territory in which a legal matter was governed by the rules of a treaty. It was not an unnecessary provision since the rules of a treaty, like the rules established in an internal law, could apply to acts or situations extending beyond the territory of a State and it would be presumptuous to try to define, in an article, the legal acts and situations which might fall within the territorial scope of a treaty. The authors of article 29 of the Vienna Convention had, however, had something else in mind, as shown in the wording of that provision. Article 29 did not concern the scope of application of treaties; it was designed to create a link between each party and the whole of its territory. That meant that, in the absence of a provision to the contrary, the commitments made by a State applied to its territory as a whole and not to a part of its territory. It was possible that the authors of that provision had simply wanted to enunciate a rule for the interpretation of treaties, namely, the rule that every provision of a treaty was applicable to the entire territory of the States which were parties to it. In that case, however, the problem of the scope of application of treaties still had to be solved.

25. In the case of treaties to which international organizations were parties, it would be very dangerous to refer to the territory of an international organization. Some treaties or constituent instruments of international organizations probably contained references to the notion of the territory of an organization, but a closer look at that expression showed that, when it was used in that context, it meant something entirely different from what it meant when applied to States. For example, the single postal territory of UPU corresponded in fact to a single postal régime, which covered the entire territory of the States members of that organization, and the "territory of GATT" meant the single régime that applied to the territory of the States parties to GATT. He had therefore adopted a solution which he did not consider very brilliant, but which remained faithful to the Vienna Convention. He had used the corresponding provision of that Convention, which was applicable to the States parties to treaties concluded with international organizations, and had not referred to international organizations at all. Perhaps the Commission would wish to delete the article under consideration, but it might like to retain it or even tackle the problem of the scope of application of treaties. He would bow to its decision but he had wished to draw its

⁵ See 1429th meeting, foot-note 4.

attention to the difficulties to which a solution other than the one he was proposing might give rise.

26. Mr. USHAKOV said that article 29 would be perfectly acceptable to him if the words "between one or more States and one or more international organizations" were added after the words "appears from the treaty".

Mr. Sette Câmara, first Vice-Chairman, took the Chair.

27. Mr. FRANCIS said that his initial misgivings concerning article 29 had not been entirely dispelled by the Special Rapporteur's candid introduction of that article. Those misgivings derived from the fact that the wording of article 29 was extremely similar to that of the corresponding article of the Vienna Convention. In the present case, however, the Commission was dealing not with treaties concluded between States but with treaties concluded between one or more States and one or more international organizations, a fact which was not immediately evident from the existing wording of article 29. The additional phrase suggested by Mr. Ushakov would help to clarify the point.

28. Mr. ŠAHOVIĆ said that it might be preferable to delete article 29, as the Special Rapporteur himself had suggested. If, however, the Commission decided to retain that article, he thought that it should adopt Mr. Ushakov's suggestion. In his opinion, the Special Rapporteur's views on the specific situation of international organizations warranted a more thorough analysis.

29. Mr. DADZIE said that, in its present form, article 29 failed to meet the needs of the exercise on which the Commission was engaged. In article 1,⁶ it was stated that the present articles applied to treaties concluded between one or more States and one or more international organizations, and treaties concluded between international organizations. However, article 29 made no provision for such cases and was therefore inappropriate to the object of the Commission's deliberations. An effort should be made to devise a formula which would cover treaties concluded between international organizations or between international organizations and States. If such a formula could not be worked out, it would be better to delete article 29 altogether.

30. Mr. TABIBI said that the text of article 29, which had been so ably introduced by the Special Rapporteur, would be perfectly acceptable were it not for the fact that the Commission was dealing with cases involving not only States but also international organizations. Of course, international organizations did not have territory in the sense that States did. They did, however, exercise activities which extended over large areas of territory. For instance, FAO, which had its headquarters in Rome, might conclude a treaty which would involve the mobilization of food resources in the Americas for use in relieving the consequences of a drought in Africa. Similarly, operations conducted under a treaty signed by WHO, which was based at Geneva, might involve the WHO Regional Offices in New Delhi, Istanbul or Latin America. In some cases, the problem might be further complicated by the fact that activities under a treaty were carried out, not by the international organization as such, but

by a connected organ having autonomous status. One example was the United Nations Special Fund, which had its own Board of Governors and membership and whose operations were funded directly by its member States. The same was true of UNICEF, which concluded many treaties and exercised its activities through regional offices situated in Asia, Latin America, Europe and elsewhere.

31. If the Commission was to bring international organizations within the scope of article 29, as he believed it should, it would have to include an additional provision concerning the area of activity of such organizations. Alternatively, it might cover all eventualities in a very comprehensive commentary or decide to eliminate article 29 altogether.

32. Mr. CALLE Y CALLE said that, in paragraph 3 of the preface to his fourth report (A/CN.4/285), the Special Rapporteur had recognized that the task of adapting the wording of article 29 of the Vienna Convention to the purposes of the present draft raised difficult problems. The Special Rapporteur's solution to those problems had been to insert the word "State", thus emphasizing the fact that the question of the territorial scope of treaties concerned only States. Of course, international organizations did not have any territory in the physical or indeed the legal sense, and it might therefore be argued that there was no need for a provision concerning territorial scope in the case of treaties concluded between States and international organizations. If the Commission decided to delete article 29, it should indicate its reasons for so doing in the commentary.

33. Consideration might, however, be given to the possibility of including a provision defining the scope of application of treaties within international organizations. Such organizations were entities of a composite structure, comprising principal, subsidiary and associated organs. In the case of the United Nations, for instance, it was conceivable that there might be a conflict of competence between the General Assembly, the Security Council and the Trusteeship Council. It would be recalled that, at the United Nations Conference on the Representation of States in their Relations with International Organizations, there had been considerable discussion concerning the question of offices established by international organizations away from their headquarters. A case might arise in which an international organization considered that obligations assumed by it under a treaty were of a limited nature, applying only to one particular field of its activity or only to some of its organs and not others. The Commission might provide for that eventuality and at the same time differentiate between treaties concluded by States *inter se* and treaties concluded between States and international organizations, by indicating that the provisions of a treaty involving the participation of an international organization were binding on that organization as a whole and must be respected in all areas of its activity, unless a different intention appeared from the treaty or was otherwise established.

34. Mr. VEROSTA said he thought that the retention of article 29 was absolutely essential and that the Commission must not merely refer to the question of the territorial scope of treaties in the commentary. The clarification of the word "treaty" proposed by Mr. Ushakov was

⁶ *Ibid.*, foot-note 3.

also essential for, according to article 2, paragraph 1 (a), the term "treaty" meant an agreement concluded between one or more States and one or more international organizations or between international organizations. The present wording of article 29 did not, however, contain any reference at all to treaties between international organizations; it covered only treaties between States and international organizations.

35. The second paragraph which the Special Rapporteur had proposed in paragraph (6) of his commentary (A/CN.4/285) introduced a new element, namely, that of the scope of application of treaties, which posed some very difficult problems. He considered that, for the time being, it might be preferable not to add a second paragraph to article 29 and that, before dealing with the question of the scope of application of treaties in the case of international organizations, it might be better to examine draft articles 34 to 38 (section 4 of the draft articles), which involved the problem of the application of the two categories of treaties to third parties. The Commission could then decide whether or not it was necessary for article 29 to contain a second paragraph relating to the scope of application of treaties in the case of international organizations.

36. Mr. REUTER (Special Rapporteur) said that he would be willing to accept Mr. Ushakov's suggestion that the category of treaties covered by article 29 should be specified in the text of that article.

37. He noted that many of the members of the Commission had said that they were in favour of a second paragraph relating to treaties between international organizations. Some members had suggested that reference should be made to the area of activity of the international organization but reference might also be made to the territories in which the competence of the organization could be exercised.

38. The majority of the members of the Commission seemed to think that article 29 should be retained, provided that acceptable wording could be found for a reference to international organizations. If that proved impossible, some members had said that the present text should be retained in any event, whereas others had said that they would be inclined to delete the article altogether.

39. He therefore proposed that article 29 should be referred to the Drafting Committee, which might consider the possibility of adding a second paragraph. The article would then come back to the Commission, which would decide, on the basis of the Drafting Committee's proposals, whether or not it should be retained. If the Commission decided to delete article 29 altogether or not to add a second paragraph, it would have to indicate the reasons for its decision in the commentary.

40. Mr. USHAKOV pointed out that the area of activity of an international organization was sometimes very difficult to define. For example, the area of activity of WMO or of ITU could be the atmosphere or even outer space.

41. Mr. REUTER (Special Rapporteur) said that the competence of some international organizations was, in fact, exercised outside the territory of the member States. Therefore, in speaking of the area of activity of

an international organization, reference should not be made to the territory of the member States.

42. The CHAIRMAN said that, if there was no objection, he would take it that the Commission decided to refer article 29 to the Drafting Committee.

It was so agreed?

ARTICLE 30 (Application of successive treaties relating to the same subject-matter)

43. The CHAIRMAN invited the Special Rapporteur to introduce article 30, which read:

Article 30. Application of successive treaties relating to the same subject-matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States and organizations parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. 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.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between States or international organizations parties to both treaties the same rule applies as in paragraph 3;

(b) as between a State or international organization party to both treaties and a State or international organization party to only one of the treaties, the treaty which binds the two parties in question governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State or another international organization under another treaty.

44. Mr. REUTER (Special Rapporteur) said that, although the adaptation of article 30 of the Vienna Convention to the draft on treaties between international organizations and treaties between States and international organizations should not give rise to any substantive difficulties, it did pose particularly difficult drafting problems owing to the complexity of the subject-matter. He did not think that the present text of article 30 was very satisfactory. Moreover, an involuntary omission had been made in paragraph 5, in which the words "or an international organization" should be added after the words "which may arise for a State".

45. He drew the Commission's attention to the fact that article 30 related to five different possible cases. There could be two successive treaties to which two or more international organizations were parties, two successive treaties to which two or more international organizations and an undetermined number of States were parties, or two successive treaties to which two or more States and an undetermined number of international organizations were parties. In those first three cases,

⁷ For the consideration of the text proposed by the Drafting Committee, see 1458th meeting, para. 4.

the two successive treaties were either treaties between international organizations only or treaties between States and international organizations.

46. There were, however, two other possible cases, namely, that of an initial treaty between two or more international organizations and a second treaty between two or more international organizations and an undetermined number of States; and that of an initial treaty between two or more States and a second treaty between two or more States and an undetermined number of international organizations. In the latter case, the initial treaty would be covered by the Vienna Convention whereas the second treaty would be covered by the draft articles. That fifth case thus raised the problem of the relationship between the Vienna Convention and the draft articles.

47. If the Commission considered that, in those five cases, there was no reason not to follow the rules of the Vienna Convention, the only problem to be solved would be of a drafting nature; if however, it considered that the rules of the Vienna Convention should not apply in some of those cases, it would be necessary to isolate them and apply special rules to them.

48. He was of the opinion that the rules of the Vienna Convention could be said to apply to all those cases and that, consequently, article 30 could be retained and simplified. Instead of referring to the "States or international organizations parties" to the treaty, it would be enough merely to refer to the "parties" to the treaty.

49. If the Commission decided that article 30 should make a distinction between some of those cases, they would all have to be listed in the title, which would then be inordinately long. For the sake of brevity and in order to simplify the text, he proposed to use the term "treaties between States and international organizations", without referring to any particular category of treaties between States and international organizations, and to indicate in a definition the different categories of treaties covered by that term.

50. He therefore proposed that the following definition should be added to article 2, paragraph 1 (a):

In the present articles, the term "treaty between States and international organizations" designates, depending on the case and according to the object of the article and the context, one or more of the following categories of treaties, to which the contracting parties or parties are:

- a State and an international organization, or
- a State and two or more international organizations, or
- an international organization and two or more States, or
- two States and two international organizations, or
- more than two States and more than two international organizations.

The meeting rose at 1 p.m.

1438th MEETING

Friday, 10 June 1977, at 10.05 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr.

Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/285,¹ A/CN.4/290 and Add.1,² A/CN.4/298)

[Item 4 of the agenda]

DRAFT ARTICLE SUBMITTED BY THE SPECIAL RAPporteur (continued)

ARTICLE 30 (Application of successive treaties relating to the same subject-matter)³ (concluded)

1. Mr. USHAKOV said that, before considering the various categories of treaties between States and international organizations envisaged by the Special Rapporteur, the Commission could divide article 30 into two parts, one dealing with treaties between international organizations only, and the other with treaties between States and international organizations.

2. It was plain that Article 103 of the United Nations Charter covered treaties between States and international organizations since it provided that, in the event of a conflict between the provisions of the Charter and those of an international agreement, the provisions of the Charter prevailed. But it was not certain that Article 103 could be invoked in regard to treaties between international organizations for the Charter did not apply expressly to that category of treaties. The rule set out in paragraph 1 should therefore be different, according to whether treaties between States and international organizations or treaties exclusively between international organizations were concerned. Apart from paragraph 1, however, the rules should be the same for both categories of treaties.

3. With regard to treaties between States and international organizations, paragraph 4 raised the most difficulties. The Commission could either delete the whole of that paragraph, and paragraph 5 along with it, or examine the categories of treaties which could raise problems. He was convinced that the Drafting Committee would be able to overcome those difficulties if it made a distinction in article 30 between treaties between States and international organizations and treaties between international organizations only.

4. Mr. ŠAHOVIĆ said he considered, like Mr. Ushakov that a distinction should be made in article 30 between treaties between international organizations and treaties between States and international organizations, but he thought the rule should be the same for both categories. The problem posed by Article 103 of the Charter seemed to him extremely complex and he saw no alternative but the one proposed in paragraph (6) of the Special

¹ *Yearbook ... 1975*, vol. II, p. 25.

² *Yearbook ... 1976*, vol. II (Part One), p. 137.

³ For text, see 1437th meeting, para. 43.

Rapporteur's commentary (A/CN.4/285). Obviously, Article 103 of the Charter only applied to States Members of the United Nations and the Commission might perhaps be going too far by extending it to international organizations at the present time.

5. Like Mr. Ushakov, he thought that paragraphs 2 and 3 raised no difficulties. The rule in paragraph 4 seemed logical and he was inclined to accept it. As paragraph 5 referred to articles which the Commission had not yet taken up, he proposed that it be placed provisionally in square brackets, pending examination of articles 41 and 60.

6. Mr. CALLE Y CALLE said he believed that there was a consensus among the members of the Commission on the principles underlying article 30 and the substance of the rules laid down in it. It would therefore be appropriate to refer the article to the Drafting Committee, which would be better able to consider how those rules should be expressed so as to cover the five cases referred to by the Special Rapporteur in his introductory statement.⁴

7. Mr. VEROSTA said that, in view of the definition the Special Rapporteur was proposing to insert in article 2, paragraph 1 (a),⁵ he thought the Drafting Committee could be left to examine more closely those cases which, for the moment, seemed to him to be very abstract.

8. Mr. REUTER (Special Rapporteur) said the Commission seemed to think that article 30 should be referred to the Drafting Committee, and he agreed. It also appeared to think that a distinction should be made between treaties concluded between international organizations and treaties concluded between States and international organizations. Some of the members believed that, while treaties between international organizations did not raise any problem, difficulties did arise in the case of treaties between States and international organizations. He welcomed Mr. Šahović's suggestion that paragraph 5 should be placed in square brackets, if the Commission adopted it.

9. The reference in paragraph 1 to Article 103 of the Charter raised a serious problem, which went beyond the framework of article 30. The question was to what extent the draft articles applied, in general, to treaties concluded by the United Nations. That was something the Commission would have to reflect on and discuss in its commentary.

10. Again, he wondered whether a reservation should not also be made in article 27 concerning Article 103 and the other relevant provisions of the Charter so as to dispel the doubts of some members of the Commission. He therefore hoped that any decision the Drafting Committee might take regarding a reference to Article 103 would be provisional only.

11. Mr. SCHWEBEL said he agreed with previous speakers that article 30 could be referred to the Drafting Committee. If he had to choose between the text of paragraph 1 as it stood and the alternative text for that

paragraph set out in paragraph (6) of the commentary, he would be inclined to favour the former, since it could be concluded by various means that Article 103 of the United Nations Charter was effectively binding on the Organization itself as well as on its Members. It might, however, be asked whether it was necessary to make any reference to Article 103 at all, since, notwithstanding the provisions of draft article 27, Article 103 was couched in such imperative terms that it would be extremely odd if a treaty, particularly one concluded under United Nations auspices in pursuance of the progressive development and codification of international law, could reasonably be interpreted as weakening the force of Article 103. It might perhaps be preferable to clarify that point in the commentary and to refrain from mentioning Article 103 in the text of draft article 30.

12. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer article 30 to the Drafting Committee.

*It was so agreed.*⁶

PROPOSED AMENDMENT TO ARTICLE 2, PARAGRAPH 1 (a)

13. Mr. REUTER (Special Rapporteur) proposed that article 2, paragraph 1 (a), should be replaced by the following text:

(a) "treaty" means an international agreement governed by international law, whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation, and concluded in written form:

(i) between international organizations; or

(ii) between one or more States and one or more international organizations; in the present articles, the expression "treaty between States and international organizations" designates, depending on the case and according to the object of the article and the context, one or more of the following categories of treaties:

treaties to which the contracting parties or parties are:

a State and an international organization,
a State and two or more international organizations,
an international organization and two or more States,
two States and two international organizations,
more than two States and more than two international organizations;

14. He would like to hear the Commission's views on the definition of the expression "treaty between States and international organizations", which he was proposing to insert in paragraph 1 (a) (ii) of article 2, so that he could use a fairly concise expression if it did not present any ambiguity in the context of a given article.

15. Mr. USHAKOV said he was convinced that it was very useful to distinguish between the various categories of treaties covered by different articles, but he was not entirely sure that it was necessary to mention those categories in a definition in article 2. An enumeration in article 2 of the various categories of treaties between States and international organizations would be justified only if the Commission thought it necessary to draft separate articles for each category. Otherwise, it need

⁴ 1437th meeting, paras. 45-46.

⁵ *Ibid.*, para. 50. For the reference to the text of article 2, see 1429th meeting, foot-note 3.

⁶ For the consideration of the text proposed by the Drafting Committee, see 1458th meeting, paras. 20-32, and 1459th meeting, paras. 1-5.

only mention those categories in the commentaries to certain articles. It would therefore be preferable, for the time being, to reserve the decision to be taken on the definition proposed by the Special Rapporteur.

16. Mr. FRANCIS said that his first tentative reaction to the new text for article 2, paragraph 1 (a), submitted by the Special Rapporteur was that he preferred the original formulation, partly because of its greater simplicity. As to the new text itself, it would be more logical for the words "concluded in written form" to qualify the words "international agreement" in the beginning of subparagraph (a).

17. Mr. ŠAHOVIĆ said that, like Mr. Ushakov, he doubted whether it was necessary to define the expression "treaty between States and international organizations" and whether such a definition ought to appear in article 2, paragraph 1 (a), which reproduced article 2, paragraph 1 (a), of the Vienna Convention.⁷ In his opinion, there were only two categories of treaties: treaties between international organizations and treaties between States and international organizations. All the other types of treaty that fell within the second category were simply different forms of relationship between States and international organizations, which depended on the number of parties to the treaty.

18. Mr. VEROSTA said that the different types of treaties between States and international organizations mentioned by the Special Rapporteur should be illustrated by examples. Headquarters agreements fell within the first category because they were agreements concluded between a State and an international organization, but the other States members of the international organization, which had representatives at the organization's headquarters, were also directly affected by those agreements.

19. The agreements provided for in Article 43 of the United Nations Charter, which stated:

All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

fell within the first or the third category, since they were agreements "concluded between the Security Council and Members or between the Security Council and groups of Members" of the United Nations; but the other States involved in the conflict were also affected by those agreements.

20. Mr. SCHWEBEL said he had the impression that the Special Rapporteur had prepared his new text in response to a persistent line of questioning in the Drafting Committee. It now appeared, however, that many members of the Commission doubted the need for such a detailed definition, at any rate in the body of the draft articles rather than in the commentary. He, too, doubted that such a high degree of specification was required, though he would be prepared to accept the new text if it was considered necessary.

21. Mr. RIPHAGEN said he had no difficulty in accepting the original formulation of article 2, paragraph 1 (a). On the other hand, he would have no objection to the more detailed version under consideration if it was preferred by the Commission.

22. As to the wording of the proposed new text, he wondered whether the expression "contracting parties or parties" in subparagraph (a) (ii) was altogether appropriate, since a number of articles of the draft dealt with treaties which were still at the negotiating stage and to which there were not yet any contracting parties or parties.

23. Mr. DADZIE said that, for the time being, he considered the original definition of the term "treaty" perfectly satisfactory for the purposes of the draft articles. The exhaustive classification proposed in the new text seemed unnecessary. He endorsed the comment by Mr. Francis concerning the expression "concluded in written form".

24. The CHAIRMAN, speaking as a member of the Commission, said that, although he had no strong objections to the new text proposed by the Special Rapporteur, he, like other speakers, considered that the original formulation was quite adequate for the Commission's purposes. Moreover, at least some of the distinctions made in the new text seemed superfluous. It seemed to him that the new definition would complicate the draft needlessly.

25. Mr. REUTER (Special Rapporteur) noted that the members of the Commission did not think it necessary, for the time being, to introduce a new definition in article 2 and that, if a definition of that type did become necessary later on, they would prefer to keep as close as possible to the text of article 2, paragraph 1 (a), of the Vienna Convention.

26. Mr. VEROSTA said that the Special Rapporteur's efforts to define the notion of a treaty between States and international organizations would prove extremely useful for the consideration of later articles, particularly articles 30 to 38.

27. The CHAIRMAN thanked the Special Rapporteur for working out a text which clearly specified the various situations that could arise. Like Mr. Verosta, he believed that that text would be extremely useful for the subsequent work of the Commission. The Commission might perhaps reconsider the need for a more detailed definition of the term "treaty" at some future stage if that seemed desirable in the light of its discussions on other articles.

ARTICLE 31 (General rule of interpretation),

ARTICLE 32 (Supplementary means of interpretation) and

ARTICLE 33 (Interpretation of treaties authenticated in two or more languages)

28. The CHAIRMAN invited the Special Rapporteur to introduce articles 31, 32 and 33, which read:

Article 31. General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

⁷ See 1429th meeting, foot-note 4.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 33. Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic text discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

29. Mr. REUTER (Special Rapporteur) said that articles 31, 32 and 33 were simply an expression of the philosophy of consensus and reproduced the text of the corresponding articles of the Vienna Convention.

30. Mr. USHAKOV said that, among the supplementary means of interpretation, article 32 might mention pertinent decisions of international organizations parties to the treaty and the circumstances in which those decisions had been taken.

31. Mr. CALLE Y CALLE said he agreed with Mr. Ushakov. The Special Rapporteur, in his general commentary to part III, section 3 of the draft articles (A/CN.4/285), had observed that the corresponding articles of the Vienna Convention did not use the word "State" and could therefore also be applied to treaties involving international organizations. The Special Rapporteur had further stated that the interpretation of such treaties presented no special features, except in the case of the constituent instrument of an international organization, where it might be appropriate to take account of teleological factors. He agreed with the Special Rapporteur

on the importance that should be attached to such factors, since the capacity of an international organization to conclude treaties was subject to its functions and purposes.

32. Article 31, paragraph 2 (b), provided that the context for the purpose of the interpretation of a treaty should comprise "any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty". In the case of international organizations, besides full powers, such instruments might include resolutions and documents of the organization, and it might perhaps be appropriate to make some reference to such decisions and documents as being of relevance for the purpose of interpreting a treaty to which an international organization was party.

33. Mr. RIPHAGEN said that he had some doubts about the suggestion that reference should be made, in one of the articles under discussion, to the various acts of an international organization which entered into a treaty with another organization or with a State, for that would mean mentioning what was in effect an internal matter for one of the parties to the treaty. The articles contained no such reference in the case of States, and he thought the existing balance in their treatment of States and international organizations should be maintained.

34. Mr. VEROSTA said he agreed with Mr. Riphagen. The text proposed by the Special Rapporteur was adequate and there was no need to stress, for example, decisions taken after the signing of the treaty.

35. The CHAIRMAN, speaking as a member of the Commission, said he fully agreed with the comments made by Mr. Riphagen and Mr. Verosta. It was well known that determination of the authentic interpretation of a treaty could entail consideration of the preparatory work for it. However, to extend that notion to include the resolutions or similar decisions of international organizations would be to enter a field which was specific to one of the parties to the treaty and could not, therefore, be considered a supplementary means of interpretation.

36. Mr. FRANCIS submitted that Mr. Ushakov's suggestion could not be dismissed altogether. The parties to a treaty were at liberty to vary its application and, to the extent that such a variation was accepted by all the parties, a decision of an international organization could be interpretative of their modified intent.

37. Mr. REUTER (Special Rapporteur), before summarizing the discussion on articles 31, 32 and 33, pointed out that two separate matters had arisen: the usefulness, or even the necessity, of mentioning acts of the organization prior to the conclusion or application of the treaty, and the question of acts subsequent to the conclusion or application of the treaty.

38. Personally, he felt bound to say that it was quite impossible to mention the latter category of acts. It was true that the authentic interpretation of a treaty was determined by all the parties to the treaty, whether States or international organizations, but he had the most extensive reservations regarding the value to be attached to a resolution of an international organization, which was a unilateral act and could not be used for the

authentic interpretation of a treaty. Moreover, the rules of interpretation of treaties varied from one organization to another, even for treaties concluded by the organizations themselves. Consequently, he was not in favour of a formulation that was ambiguous on that point.

39. Speaking in his capacity as Special Rapporteur, he noted that, during the discussion, several members had suggested that the value of the resolutions of an international organization for the interpretation of a treaty concluded by that organization should be mentioned, if not in the text of article 32, at least in the commentary. The question did not seem to have arisen in connexion with article 31. If it had, the problem would have been more serious, because article 31 referred to agreement between the parties and not to the position adopted unilaterally by the organization. In short, he would prefer to mention the acts of an international organization only in connexion with the preparatory work, that was to say, in article 32 only.

40. Despite the hesitation of some members, it appeared to be the general wish of the Commission that the articles should be referred to the Drafting Committee, on the understanding that the Committee would see whether some reference could be made in article 32 to the participation of international organizations in the preparatory work.

41. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer articles 31, 32 and 33 to the Drafting Committee.

*It was so agreed.*⁸

ARTICLE 34 (General rule regarding non-party States or international organizations)

42. The CHAIRMAN invited the Special Rapporteur to introduce his sixth report (A/CN.4/298), which contained section 4 (Treaties and non-party States or international organizations) of part III of the draft, beginning with article 34, which read:

Article 34. General rule regarding non-party States or international organizations

A treaty does not create either obligations or rights for a State or organization not party to the treaty without its consent.

43. Mr. REUTER (Special Rapporteur) said that his sixth report contained articles that were few in number but important and difficult. The Vienna Convention had adopted a classical, simple and absolutely clear approach to the question of the effects of treaties with respect to third parties: a treaty created neither obligations nor rights for a third State without its consent. That idea was the foundation for all the other articles relating to third parties. Nevertheless, through a mechanism which was simply an agreement, treaties could, with the consent of all concerned, produce effects with respect to third parties. The mechanism, which was that of the collateral agreement, had been described rather flexibly in the Vienna Convention in order to meet the concern expressed by many members of the Commission, who had held that the possibility of a *stipulation pour autrui* in regard to

rights should not be excluded. Moreover, the Vienna Convention did not preclude certain treaties from having effects with respect to third parties, in the absence of any collateral agreement, by virtue of an institution that was foreign to the law of treaties and thus of no concern to the Commission in the present instance.

44. The articles of the Vienna Convention relating to treaties and third States had a dual basis: first, the general principle of consensus, according to which, in internal law as in international law, all contracts, agreements and conventions bound the parties only; and second, the notion of the sovereignty of States, of which both the Commission and the United Nations Conference on the Law of Treaties had been very sensible. It was because of the sovereign equality of all States, without exception, that the extension of the effects of a treaty to a third State had been made subject to the requirement of written acceptance.

45. The chief difficulty in extending the relevant articles of the Vienna Convention to the treaties with which the Commission was now concerned lay precisely in the principle of the absence of effects of treaties with respect to third parties. The notion of consensus did not in itself raise any problem. The Commission was probably not prepared to accept the idea that an international organization was always in the same position as a State in regard to treaties. However, once it was accepted that an international organization was a party to a treaty, it was logical to infer that the rules of consensus applied in principle. After all, international organizations were only a means of collective action by States. On the other hand, the notion of sovereignty could not be extended to international organizations. The rules, which were justified by the need to protect the sovereignty of States, did not apply to international organizations, which could not be assimilated to States in that respect. The competence of international organizations was not governed by the notion of sovereignty but by the fact that they were at the service of States.

46. Those considerations had led him to drop the requirement of written form for the extension of rights or obligations to an international organization. It was clear from abundant practice that international organizations willingly agreed to place themselves at the service of States and to assume the new responsibilities entrusted to them by States. Obviously, they could accept those responsibilities only within the limits of their competence but generally speaking there was an internal procedure for acceptance by communication or notification. That was why he had adopted a flexible formula on that point.

47. Again, he had taken a position on a point of drafting which he was prepared to reconsider if the Commission did not support him. In his opinion, it would not be felicitous, either in French or in the other languages, to speak of a "third organization", as the counterpart to a "third State". He had therefore opted for the expression "non-party international organizations", being convinced that the definition of the word "party" in article 2, paragraph 1 (g), permitted of such a change from the standpoint of substance.

48. There remained the important question of the presence among the parties to a treaty of States members of

⁸ For the consideration of the texts proposed by the Drafting Committee, see 1458th meeting, para. 5.

an organization beside States that were entirely unconnected with it. He doubted whether that problem could be left out of account in considering the effects of treaties on third parties. It did not arise in so acute a form in the case of treaties concluded exclusively between international organizations, although the discussion had more than once shown the need to bear in mind that an international organization was an intergovernmental organization and, after all, only a means by which States could enter into collective commitments. In the case of treaties between States and international organizations, on the other hand, the need to protect States which concluded treaties with an international organization against the dangers inherent in the fact that the organization was made up of a certain number of States could not be left out of account. Furthermore, the parties to a treaty might include international organizations and States some of which were members of one of those organizations. Because he believed that those situations called for special provisions, he was submitting to the Commission an article which obviously had no equivalent in the Vienna Convention. Nevertheless, in view of the delicate problems it raised, the Commission would no doubt refrain from taking up that article before the appropriate time.

49. Mr. USHAKOV said that the Vienna Convention was completely silent on a fundamental question: could a treaty concluded between States create obligations or rights for non-party international organizations? He wondered whether that question had escaped the attention of the authors of the Vienna Convention, whether they had deliberately left it aside or whether they had refrained from answering it because of the difficulties it raised. If that question was to be answered in the affirmative, the Commission should now consider its opposite and decide whether a treaty concluded between international organizations could create obligations or rights for a non-party State.

50. Mr. REUTER (Special Rapporteur) said that he would reserve for later the detailed reply that Mr. Ushakov's question merited. For the time being, he would merely point out that the Vienna Convention contained special provisions on treaties constituting international organizations. It therefore recognized the power of States to establish international organizations. Some people even took the view that a certain treaty between States conferring privileges and immunities on an international organization had made the organization a party to that treaty. That might lead one to believe that States could, by means of a treaty, make an offer of rights or obligations to an international organization without, of course, imposing anything on it.

The meeting rose at 1 p.m.

1439th MEETING

Monday, 13 June 1977, at 3.05 p.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis,

Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/285,¹ A/CN.4/290 and Add.1,² A/CN.4/298)

[Item 4 of the agenda]

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

ARTICLE 34 (General rule regarding non-party States or international organizations)³ (*concluded*)

1. Mr. USHAKOV asked what rules would apply to the consent which an international organization had to give in order that a treaty to which it was not a party might create rights and obligations for it. In article 6,⁴ when dealing with the capacity of an international organization to conclude treaties, the Commission had referred to the relevant rules of the organization, namely, its constituent instrument or statutes. It should also determine which were the relevant rules applicable in the present case.

2. Mr. REUTER (Special Rapporteur) said he thought that Mr. Ushakov's question related not to the forms of consent, which were dealt with in later articles, but to the principle of the capacity of an organization to express the consent referred to in article 34. Clearly, the provisions of article 6 again applied. If the Commission agreed, that might be specified in the draft.

3. Consequently, the organization, as such, must first possess capacity to accept the rights or obligations arising for it from a treaty to which it was not a party. Then, the acceptance must be in conformity with the constitutional rules of the organization. Those rules varied from one organization to another but practice in the matter was fairly abundant. It often happened that, when formulating in a treaty a set of rules which would apply to them, States entrusted an international organization with the task of supervising the application of the treaty or of helping to settle disputes. In such cases, the organization had to consent to the new responsibilities entrusted to it, and the question whether it was competent would be determined by its constitutional rules. For example, in regard to the settlement of disputes, the Vienna Convention⁵ established obligations and rights for the United Nations, subject to its consent. Similarly, the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil

¹ *Yearbook ... 1975*, vol. II, p. 25.

² *Yearbook ... 1976*, vol. II (Part One), p. 137.

³ For text, see 1438th meeting, para. 42.

⁴ See 1429th meeting, foot-note 3.

⁵ *Ibid.*, foot-note 4.

Thereof,⁶ which was an agreement between States, conferred powers on the Security Council, subject to its consent. It was thus quite clear that treaties could not create rights and obligations for a non-party international organization without its consent.

4. Mr. CALLE Y CALLE said he agreed with the conclusion the Special Rapporteur had drawn in paragraph 25 of his sixth report (A/CN.4/298), which he had reached only after consideration of the articles of the Vienna Convention corresponding to those he now proposed, and of the work already done by the Commission on the problem of treaties which include international organizations. He also agreed with the suggestion made by the Special Rapporteur in paragraphs 27 to 32 of the report, that it would be more convenient to refer to "non-parties" than to "third States or third organizations" to a treaty.

5. The problem dealt with in paragraphs 33 to 40 of the report, namely, the effect of a treaty concluded by an international organization on its member States, merited careful thought. At the centre of that problem lay the question how far the States members of an international organization could consider themselves "third States" in relation to such a treaty within the meaning of article 2, paragraph 1 (*h*), of the Vienna Convention. His own view was that they would be bound within the limits of the capacity to conclude a treaty which they had given to the organization concerned. An international organization represented the institutionalization of the collective will of its members; the obligations it assumed would affect those members, for it was they who gave the organization the power to conclude treaties and they who, acting within the framework of the organization, confirmed the agreements into which it entered. At the moment of expressing that confirmation, the States members of an organization themselves assumed the obligations which the organization had contracted on their collective behalf.

6. The Special Rapporteur had given some examples, in paragraph 36 of his report, of formal techniques which had been devised for associating the States members of an organization with the obligations of that organization, but those techniques would seem to be valid only in the case of organizations with a relatively small number of members. He would be grateful, therefore, if the Special Rapporteur would elaborate on the situation which would obtain when the States members of an international organization were so numerous that not all of them could sign a treaty at the same time as the organization itself. It seemed to him that in such a case the States concerned would be faced with the assumption of two obligations: one as States and the other within the framework of the agreement entered into by the organization.

7. Mr. REUTER (Special Rapporteur) said he thought that it would be better to wait until article 36*bis* was being examined before discussing the questions raised by Mr. Calle y Calle concerning the effects on the member States of an organization of a treaty to which that organization was a party. The solution of making the member States as well as the organization parties to the treaty, which had sometimes been adopted by the European Communities, did not offer only advantages. Mixed agreements of that

kind often left much uncertainty about the respective powers of the organization and its member States, not to mention the fact that the advantage of a collective commitment by the member States was lost with that arrangement. If IAEA concluded a treaty with a regional nuclear organization composed of only five or six States, only the ratification of those five or six States would be required, in addition to the formal confirmation by the Agency and by the regional organization. But the greater the number of member States of an organization, the longer the procedure would take. That technique had therefore its limitations.

8. Nevertheless, it was not so much the problem of mixed agreements that the members of the Commission would have to study, when the time came, as the problem that article 36*bis* was intended to solve: namely, by what set of rules could guarantees be given to States which contracted with an international organization, without sacrificing the necessary independence of member States in relation to the organization's commitment. The Commission might decide to delete article 36*bis*, but it had been his duty to draw its attention to the problem dealt with in that article. Once it was agreed that an international organization could itself assume a commitment, it became necessary to ensure a balance between the independence of the member States vis-à-vis the organization and the security of third States. In the interests of that security, the member States should not be able to claim, unconditionally and in all cases, that they had no part in the agreements concluded by the organization.

9. Mr. USHAKOV pointed out that in practice it was bilateral treaties, rather than multilateral treaties, which provided for obligations or rights for third parties. Moreover, such treaties usually created rights rather than obligations for international organizations.

10. He thought the expression "a State or organization not party to the treaty" was acceptable in principle since, according to article 2, paragraph 1 (*h*), of the Vienna Convention, the term "third State" meant a State not a party to the treaty. A distinction should nevertheless be made between a third State which was not a party to a bilateral treaty—that was to say, a State which had not taken part in the negotiation of that treaty and had not signed it—and a third State which was not a party to a multilateral treaty, but which might have taken part in its negotiation and even have signed it. The term "non-party" might be interpreted as applying to a State or an organization which was not a party to a bilateral treaty, but which had nevertheless taken part in its negotiation and had perhaps signed it. He therefore preferred the term "third State", which would be interpreted according to the Vienna Convention, and the term "third organization", which would designate an organization that was completely foreign to a treaty.

11. He therefore proposed that article 34 should be divided into two paragraphs, which would read:

"1. A treaty between one or more States and one or more international organizations does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization;

⁶ General Assembly resolution 2660 (XXV), annex.

“2. A treaty between two or more international organizations does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.”

12. As he had pointed out at the previous meeting,⁷ the case of a treaty between States which created obligations or rights for a third international organization was not covered by the Vienna Convention. Nevertheless, a treaty concluded between a large number of States and one or two international organizations, which created obligations for the organizations, being essentially a treaty concluded by States, did come under the Vienna Convention. But if it was agreed that a treaty concluded by States with limited participation by international organizations could create obligations or rights for international organizations, it must logically follow that a treaty concluded only by States should also be able to create such obligations or rights. Recognition of that faculty in the case of treaties between States and international organizations would thus indirectly supplement the rules of the Vienna Convention. Thus, not only the scope of article 34 of that Convention but also that of the following articles would be widened. That result would not give rise to any difficulties if it was absolutely certain that such an extension was implicit in the Vienna Convention.

13. The question of the relationship between the draft articles and the Vienna Convention could become singularly complicated. Not only two States but also two international organizations could create obligations for a third international organization. Furthermore, when two States concluded a treaty creating obligations for a third organization, one of those States might be a member of the organization. Personally, he had no solution to propose for those difficult problems and would merely observe that, in the case of a treaty concluded by States with limited participation by international organizations, the rules of the Vienna Convention should apply to the creation of obligations or rights for international organizations.

14. Mr. TABIBI said he fully understood the concern felt by Mr. Ushakov. His own conclusion, however, after studying the Special Rapporteur's written and oral introductions to his sixth report, was that the approach he had adopted in drafting the articles it contained was correct. He was particularly strengthened in that conclusion by the presence of article 36*bis*. All the members of the Commission recognized that international organizations were different from States, essentially because they were not sovereign; but the Commission had recognized, in earlier draft articles, that organizations had the capacity to conclude treaties and it could therefore agree that they also had the capacity to accept or reject obligations or rights arising from treaties. It could also accept the principles underlying the articles proposed in the Special Rapporteur's sixth report for another reason: international organizations were created by sovereign States and their powers with respect to treaties were limited to those which the States chose to grant them in their constituent instruments.

15. Mr. REUTER (Special Rapporteur), summing up the discussion, noted that, although the principle stated in article 34 did not seem to be contested, its negative character had given rise to certain doubts. Some drafting comments had also been made. He saw no objection to replacing the words “a State or organization not party” by the words “a third State or third organization”; and he could also agree to the division of article 34 into two paragraphs, though he himself did not feel the need for that change. At the present stage in the discussion, it therefore seemed that article 34 could be referred to the Drafting Committee.

16. The comments concerning the whole set of articles relating to third parties had dealt with possible conflicts between the draft articles and the Vienna Convention, and with the difficulties which might result for a State from an agreement concluded between two international organizations. First of all, he wished to remind the Commission that all the articles in section 4 were based on the idea that the treaties which the Commission was now considering did not produce any effects for third parties. When any such effects were produced, they would be the result of a collateral agreement between the third party which accepted the effects and the States or international organizations which had previously decided, by a treaty, to extend them to it. Once it had been agreed that a treaty between two international organizations could not produce effects for a third State, it might be asked whether such a treaty could contain an offer to contract addressed to a State. If so, there could not be any conflict with the Vienna Convention since that instrument did not deal with the problem of such offers. The Vienna Convention did not deal, either, with the faculty which States might have of directly creating rights for private individuals. As the Convention was based on the sovereignty of States, he would be tempted to conclude that States did have that faculty.

17. There were many examples of the situations he had in mind. For instance, two international banks having the status of international organizations might agree to offer financial assistance to a State. They could either conclude a trilateral agreement with that State or they could sign an agreement between themselves establishing the conditions of the offer they would make to the State. In the latter case, the agreement would be supplemented by a second agreement, which generally created not only rights but also obligations for the third State. There were many such agreements. The multilateral agreements by which States sometimes established organizations, such as supervisory bodies, for the purpose of those agreements, were causing a gradual proliferation of international organizations. For example, in the sphere of narcotic drugs, a small organization had first been set up, and then, by successive agreements concluded between different States, new rights and new obligations had been created for it. It seemed that in each case the organization in question had to accept the new obligations and rights. There again, there was a wealth of practice.

18. Mr. DADZIE said that he had studied article 34 in the light of the written and oral comments by the Special Rapporteur and found no difficulty in accepting it as it stood. It did seem to him, however, that the expres-

⁷ 1438th meeting para. 49.

sion *non partie* would be more accurately rendered into English by the phrase "not a party", but that, as the Special Rapporteur had used the expression *non partie* as a term of art in his written introduction, it would be better still if the English text of the article read "... for a State or organization non-party to the treaty...".

19. Mr. FRANCIS observed that, if it had already adopted article 36*bis*—the rationale of which he fully accepted—the Commission would have had to qualify the statement in article 34, for it would have admitted that it was not really true that a treaty could not create rights or obligations for a State which had not been a party to the negotiations. Furthermore, when Mr. Ushakov had asked, at a previous meeting, whether States which concluded a treaty *inter se* could thereby create obligations or rights for an international organization which was not a party to the instrument, the answer had been that they could. That seemed both logical and reasonable, especially where the States concerned were members of the international organization in question. In that situation, the requirement of the consent of the organization, stated in article 34, would be academic.

20. He had listened with great interest to Mr. Ushakov's comments on the term "third party", but thought that, so long as the meaning was clear, either that term or the expression "not party" could be used. For reasons of elegance, he preferred the wording chosen by the Special Rapporteur.

21. With regard to another comment by Mr. Ushakov, he was not certain whether a State which took part in the negotiation of a treaty but did not ratify it became a "third party" in relation to the treaty. His own feeling was that such a State might have no standing with respect to the treaty at all.

22. Mr. SUCHARITKUL said that he could accept article 34 as proposed by the Special Rapporteur. That article was not only negative, as some members of the Commission had said, since it permitted obligations or rights to be created for a State or an organization not party to a treaty, with its consent. That consent would be expressed in a collateral agreement, which could be made subject to other conditions.

23. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer article 34 to the Drafting Committee.

*It was so agreed.*⁸

ARTICLE 35 (Treaties providing for obligations for non-party States or international organizations)

24. The CHAIRMAN invited the Special Rapporteur to introduce article 35, which read:

Article 35. Treaties providing for obligations for non-party States or international organizations

1. Without prejudice to article 36*bis*, an obligation arises for a State not party to a treaty from a provision of that treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the non-party State expressly accepts that obligation in writing.

⁸ For the consideration of the text proposed by the Drafting Committee, see 1458th meeting, paras. 6-11.

2. An obligation arises for an organization not party to the treaty from a provision of that treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the non-party organization accepts that obligation in an unambiguous manner and in accordance with the relevant rules of the organization.

25. Mr. REUTER (Special Rapporteur) said that article 35 dealt with the case in which a treaty provided for obligations for non-party States or international organizations. He had distinguished between the case of States and that of international organizations, devoting a separate paragraph to each. The Commission might perhaps decide also to make a distinction between treaties concluded between international organizations and treaties concluded between States and international organizations and to devote separate articles—articles 35 and 35*bis*—to those two categories of treaties, examining, for each category, obligations created for a State and obligations created for an international organization.

26. With regard to third States, he had closely followed the rule of the Vienna Convention, which was stricter than that proposed by the Commission,⁹ since the United Nations Conference on the Law of Treaties had added the obligation of acceptance in writing. The only substantive difference between the text of paragraph 1 of his draft article and that of article 35 of the Vienna Convention consisted in the addition of the words "Without prejudice to article 36*bis*". Those words should be placed in square brackets for the time being, since they would only be retained if the Commission decided to adopt article 36*bis*.

27. The rule he had drafted for third organizations was much more flexible than the rule for third States. He had replaced the requirement of acceptance in writing by the requirement of acceptance in "an unambiguous manner", thus reverting to the equivalent of the original wording which the Commission had proposed for third States at the United Nations Conference on the Law of Treaties. He had considered the fact that international organizations often accepted new functions—in other words, obligations—and that such acceptance should be made easy, because Governments were seeking to avoid the proliferation of international organizations by entrusting new functions to those already in existence. For example, in the sphere of narcotic drugs, the two organizations established by the 1925 and 1931 conventions had been combined into a single body by the Single Convention on Narcotic Drugs, 1961, while the terms of reference of that body had been expanded by the Convention on Psychotropic Substances, 1971.

28. In view of that tendency to rationalize the functions of international organizations, he thought that the rule to be formulated for them should be less strict than the rule for States, provided however that acceptance of the obligation was in accordance with the "relevant rules of the organization". That would not rule out the requirement of acceptance in writing but, if it was imposed, it would be by virtue of the relevant rules of the organization, not of the draft articles.

⁹ *Yearbook ... 1966*, vol. II, p. 181, document A/6309/Rev.1, part II, chap. II, draft articles on the law of treaties, art. 31.

29. Mr. USHAKOV pointed out that the Vienna Convention did not provide that a treaty between States could create an obligation for an international organization not a party to the treaty. In adopting the rule proposed by the Special Rapporteur in article 35, the Commission would be stating a residuary rule. Whether it could do so was an extremely delicate question. He did not believe that a treaty between two States could create an obligation for a natural person, as the Special Rapporteur had said it could, for in his opinion a natural person was not a subject of international law.

30. Moreover, in the case of an agreement concluded between a State and an international organization of which that State was a member, the State, after concluding the agreement, could vote against it in the organization. A situation of that kind would be very delicate, not only from the legal but also from the political point of view.

31. It might also be asked how, in the case of an agreement between two international organizations, those two organizations could provide for an obligation for a third State or a third organization. The Special Rapporteur had given the example of a treaty between two banking organizations which offered a loan to a third State or a third organization, but that would involve the creation of a right, not an obligation.

32. There was, at present, no practice relating to collateral treaties. He therefore proposed that article 35 should state the following rule, which seemed to him to be the only one possible, since it derived from the Vienna Convention:

“An obligation arises for a State from a provision of a treaty between two States and one or more international organizations if the States parties to that treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.”

33. Mr. CALLE Y CALLE said that he was in full agreement with the substance of article 35 and with the treatment of cases involving States and those involving international organizations in two separate paragraphs. With the exception of the introductory phrase, paragraph 1 essentially reproduced the wording of article 35 of the Vienna Convention. Paragraph 2 provided that an obligation could arise for an organization not party to a treaty from a provision of that treaty only if the parties to the treaty intended that provision to establish such an obligation, which must be directly related to the functions of the organization concerned, and if that organization clearly expressed its consent to be bound by the obligation. As the draft article stood, however, a non-party State was required to accept an obligation expressly and in writing, whereas a non-party organization was required only to accept it “in an unambiguous manner”. He would suggest that the latter expression might be replaced by the word “expressly” or the words “expressly and formally” since, if it was to be governed by the future convention, such an acceptance of an obligation must take the form of an international agreement concluded in written form, in accordance with the definition adopted in article 2. It was not enough, for instance, for the executive head of an international organization to accept an obligation

orally; the consent must be embodied in a written instrument.

34. Mr. SCHWEBEL said that he had no difficulty in accepting the sound and straightforward text for article 35 proposed by the Special Rapporteur, though he saw no reason why the two paragraphs of that article could not be merged into one. The phrase “in an unambiguous manner and in accordance with the relevant rules of the organization” seemed to him to be adequate. Although the valuable suggestions made by Mr. Calle y Calle certainly deserved consideration, he thought it obvious that a non-party organization’s acceptance of an obligation would be expressed in writing, whether in a resolution adopted by one of its organs, in minutes recording a consensus reached by such an organ, or in some other way.

35. With regard to Mr. Ushakov’s stimulating statement, his preliminary reaction was that, if the Commission was to draw up a convention of sufficient flexibility and durability, it must inevitably provide for a range of possibilities which had not yet manifested themselves on the international scene or which had done so only in insignificant measure. Mr. Ushakov had wondered whether examples drawn from the sphere of international financing provided persuasive evidence of the need for codification of the kind being attempted. In that connexion, it was possible, for instance, to conceive of the World Bank and the regional development banks preparing a standard model for the reporting by debtor States of the discharge of obligations incident to loans. In so far as a debtor State taking out a loan agreed to adhere to that model, it would be undertaking obligations established by international organizations. To take the opposite case, it was possible to conceive of States meeting together to draft standards to govern the operations of international banks and of such banks accepting those standards. Again, States meeting within the framework of the World Bank might draft such standards, which would in turn be applied by other international finance institutions in their operations. Such examples were relevant, although not necessarily decisive.

36. Mr. Ushakov had further observed that the question of the acceptance of an obligation by an international organization was a delicate one, politically as well as legally, especially as not all States members of the organization concerned might agree to the assumption of such an obligation. On that point, he believed that a State wishing to participate in an international organization must recognize that the organization might take decisions with which it was not in agreement. That was a fact of international life which, in his view, did not detract from the merit of the article proposed.

37. He had also understood Mr. Ushakov to say that, since individuals were not subjects of international law, they could not be vested with obligations or rights. He found that a very surprising statement. For instance, if the Protocol recently signed by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts¹⁰

¹⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts.

affirmed the right of individuals not to suffer indiscriminate bombing, it would be remarkable if it did not also give rise to an obligation for individual pilots not to engage in such bombing. Questions of that kind had been dealt with at the Nuremberg trials, to which the Soviet Union had made a distinguished contribution. He reserved the right to comment on the text proposed by Mr. Ushakov when he had had an opportunity of studying it.

38. Mr. RIPHAGEN said that, as far as third parties were concerned, the Vienna Convention and the draft articles under consideration treated rights and obligations differently. It seemed to him, however, that the very particular rights and obligations deriving from a function exercised by an international organization in regard to the implementation of a treaty were inextricably interwoven and could not be distinguished in that manner. Neither the Vienna Convention nor the draft articles were altogether adequate in that respect. The further question arose whether an international organization not a party to a treaty, which accepted a particular function under that treaty, bound itself to exercise that function indefinitely. Of course, if the effects of treaties on third parties were based entirely on the concept of the collateral treaty, it was clear that the rights and obligations which arose could only be, so to speak, erased by a further collateral treaty. He was not sure, however, that that legal construction was always the correct one to apply to the functions of an international organization envisaged in a treaty between States or between States and other international organizations. For those reasons, he had certain doubts about the wording of article 35, paragraph 2, and, by extension, about the following articles, which dealt with the consequences of the acceptance of an obligation by a non-party organization.

39. Mr. CALLE Y CALLE said that the acceptance by a non-party organization of an obligation under a treaty might precede the conclusion of that treaty. For instance, the statute of an organization whose functions included arbitration might provide that the organization concerned would act as an arbitrator if two States agreed that it should do so. The Special Rapporteur might wish to cover such cases of prior acceptance of an obligation when drafting the final commentary to the article.

40. Mr. REUTER (Special Rapporteur) said that the case referred to by Mr. Calle y Calle should indeed be mentioned in the commentary. That question would come up again in connexion with article 36*bis*. If Mr. Ushakov had been referring to arbitration cases, he might be right in saying that there was no practice concerning collateral treaties, but he (the Special Rapporteur) had already given examples of other collateral treaties.

The meeting rose at 6 p.m.

1440th MEETING

Tuesday, 14 June 1977, at 10.05 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Quentin-

Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/285,¹ A/CN.4/290 and Add.1,² A/CN.4/298)

[Item 4 of the agenda]

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

ARTICLE 35 (Treaties providing for obligations for non-party States or international organizations)³ (*concluded*)

1. Mr. REUTER (Special Rapporteur) said he noted that some members of the Commission more or less accepted, with certain reservations, the rule he had proposed in article 35, whereas others thought the article should deal only with cases which would not oblige the Commission to take a position, directly or indirectly, on the question whether a treaty between States, which was governed by the Vienna Convention,⁴ could create obligations for international organizations.

2. He thought States ought to be informed of all the problems that arose and of all the options open to them, and therefore intended to submit to the Drafting Committee two versions of article 35, reflecting two points of view, one broad and the other more restrictive. The Drafting Committee would consider those two versions and send them back to the Commission, which would then decide which course to adopt. He hoped that the Commission would decide to transmit both versions to Governments (which would not prevent every member from expressing his opinion on them), for the aim should be not to impose a solution on Governments but to offer them the widest possible choice.

3. That method might also be applied to many other articles for, in dealing with difficult questions, it was well to propose a choice between two solutions. The problem was, in fact, very simple: international organizations were not States, and that would justify treating them differently from States; but the Commission was, *ex hypothesi*, considering cases in which international organizations were parties to treaties on the same footing as States. It was therefore necessary to seek a compromise between the principle of relative assimilation of international organizations to States and the fact that they were different from States.

4. Some members of the Commission had asked whether precedents could be cited in support of the rule in article 35. He had not cited many, but he would like to point out that, even if there were numerous precedents for that

¹ *Yearbook ... 1975*, vol. II, p. 25.

² *Yearbook ... 1976*, vol. II (Part One), p. 137.

³ For text, see 1439th meeting, para. 24.

⁴ See 1429th meeting, foot-note 4.

solution, States would not find that a compelling reason for choosing it. Governments might wish to reconsider their positions and they should be free to do so from a critical point of view.

5. In the absence of precedents, it was quite conceivable that two international organizations whose major activities included programmes of assistance to third world countries might conclude an assistance agreement containing an offer of an obligation to a third State, for instance, an agreement providing for a joint programme of training fellowships, under which a third State would be invited to receive trainees.

6. Some members of the Commission had pointed out that the Vienna Convention dealt with only two possible cases: the creation of rights without obligations and the creation of obligations without rights. But there were also cases in which a treaty between States could create both obligations and rights for a third State. What would the solution be in such a case? The United Nations Conference on the Law of Treaties had not gone into that question, but it seemed that the strictest régime should be applied. He thought that, in the case of a treaty between States and international organizations which created new functions for an international organization, that was to say, both rights and obligations, the strictest rules should also be applied.

7. Several members of the Commission had asked about the difference between the terms used in paragraph 1 of article 35, which related to States, and paragraph 2, which related to international organizations. In the first case, the obligation had to be expressly accepted "in writing" whereas, in the second, it had to be accepted "in an unambiguous manner and in accordance with the relevant rules of the organization". It was true that it was difficult to imagine how an international organization could accept an obligation otherwise than in writing. In the case of a State, the words "expressly ... in writing" meant a voluntary act expressing its acceptance in an entirely formal manner whereas, in the case of an international organization, the written expression of its acceptance might take another form. Indeed, it might be asked exactly what was meant by the words "international agreement concluded ... in written form": did they mean an agreement the instruments of which were in writing or an agreement of which there was some evidence in writing? The Conference on the Law of Treaties had not settled that question, and it would have arisen if an amendment proposed by Poland and the United States⁵ had not attenuated the rule on the means of expressing consent to be bound by a treaty, which was subsequently set out in article 11 of the Vienna Convention. As one member of the Commission had pointed out, it was conceivable that an agreement might simply be established by a *procès-verbal* drawn up by the secretariat of the organization. If an organization accepted the offer made to it in a resolution adopted by its competent organ, could one speak of an instrument in writing? He did

not think so, and that was why he had made a slight difference between acceptance by a State and acceptance by an international organization. However, he would not insist on that difference if the Commission found it unnecessary in the draft article and considered that a mention in the commentary would be sufficient.

8. As Mr. Calle y Calle had said at the previous meeting, the question arose whether a collateral agreement might not sometimes be an unwritten agreement. However, to introduce the notion of an unwritten agreement in the draft article would create a new problem, for that type of agreement would not come within the scope of the draft articles, which related only to agreements in written form. Nevertheless, if the Commission took up that idea, it would not be going farther than the Conference on the Law of Treaties, for in the Vienna Convention, which applied only to agreements in written form, the Conference had provided for the creation of rights by a procedure based on agreements which were not necessarily agreements in writing.

9. In conclusion, he explained that he would adopt the solution proposed by the Commission but would in any case submit two versions of article 35: one very strict and the other more flexible in differentiating between States and international organizations.

10. Mr. USHAKOV said he thought that, in each article, a distinction should be made between two categories of agreements, namely, agreements between one or more States and one or more international organizations, and agreements between international organizations, in accordance with the definition contained in article 2, paragraph 1 (a).⁶ He would therefore prefer the Special Rapporteur to deal separately with those two categories of agreements in article 35. In another connexion, he wondered whether, in article 35 and the following four articles, the Commission was concerned with codification or with the progressive development of international law. In his opinion, whereas articles 34 to 38 of the Vienna Convention could be regarded as codification, the corresponding articles which the Commission was now considering were more in the nature of progressive development. There was no doubt that the rules proposed in those articles were possible, but were they really necessary? That was the question the Commission had to answer.

11. Mr. AGO said that it was difficult to imagine that an international organization to which a treaty offered a right or an obligation would not express its acceptance of that right or obligation in writing. The Special Rapporteur had been thinking of certain cases, such as that of a joint arrangement to provide technical assistance to a State, in which acceptance would be expressed in an unambiguous manner, even if it was not in writing. He had also remarked that the distinction made in the Vienna Convention between the creation of rights and the creation of obligations was, in fact, theoretical because the same treaty very often provided for both rights and obligations for third subjects. But there was, nevertheless, a difference between those two cases for,

⁵ *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. 124, document A/CONF.39/14, para. 104(a).

⁶ See 1429th meeting, foot-note 3.

whereas it was in general enough for a right to be accepted in an unambiguous manner, it was more difficult to allow that the acceptance of an obligation need not be expressed in writing. He was none the less prepared to support the Special Rapporteur's proposals for both cases.

12. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer article 35 to the Drafting Committee.

It was so agreed.

ARTICLE 36 (Treaties providing for rights for non-party States or international organizations)

13. The CHAIRMAN invited the Special Rapporteur to introduce article 36, which read:

Article 36. Treaties providing for rights for non-party States or international organizations

1. Without prejudice to article 36bis, a right arises for a State not party to a treaty from a provision of that treaty if the parties to the treaty intend the provision to accord that right either to the non-party State or to a group of States to which it belongs, or to all States, and the non-party State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A right arises for an international organization not party to a treaty from a provision of that treaty if the parties to the treaty intend the provision to accord that right to the organization and the organization assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

3. A State or an organization exercising a right in accordance with the preceding paragraphs shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

14. Mr. REUTER (Special Rapporteur) said that article 36 related to the case in which a treaty created rights for a State or an international organization. Whereas in article 35, for the creation of obligations, he had formulated different rules for States and for international organizations, the rules he was proposing for the creation of rights, in article 36, were the same for States and for international organizations; they were the rules laid down for States in the Vienna Convention. It was thus essentially for drafting reasons that he had proposed separate paragraphs for States and for international organizations. On the one hand, he had considered that the reservation in article 36bis applied only to States and, on the other, that the reference "to a group of States ... or to all States", in the Vienna Convention text, could hardly be adapted to the case of international organizations. It was difficult in fact to see how a treaty between international organizations or between States and international organizations could create rights for all international organizations. Perhaps, however, he should have retained the idea of a group of international organizations, which appeared in the practice, in particular in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.⁷ The organs of the United Nations were, in fact, a group of international organizations of a universal character. He had preferred a more cautious solution, but he was

prepared to reconsider his position if the Commission so desired.

15. Mr. USHAKOV pointed out that the question of the relationship between the draft articles and the Vienna Convention had not yet been settled. He considered, however, that, if the Commission intended to adopt more liberal rules than those of the Vienna Convention, it would be logical for it to draft an additional protocol to that Convention and to supplement articles 34 to 38 by dealing with the case in which a treaty between States created obligations and rights for an international organization.

16. With regard to article 36, paragraph 2, he thought the assent of an international organization could not be presumed, even in the case of a right, since acceptance of a right could cause difficulties and it required a political decision. To accept a right, an international organization had to manifest its will by means of a collective decision taken by a representative organ. Thus, an organization's assent could not be presumed until the competent organ of that organization had given it expressly. If the assent of the organization to a right was presumed, the member States would be required to accept not only the right but also the obligations resulting from it, for article 36, paragraph 3, provided that "A State or an organization exercising a right in accordance with the preceding paragraphs shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty". Such a presumption would be contrary to the organization's constituent instrument, which laid down rules for the adoption of certain decisions. An international organization was bound by its constituent instrument and could not undertake to amend it by an agreement concluded with a State or with another international organization. Unlike a sovereign State, which was free to accept rights and obligations and to enter into commitments both at the internal level and at the international level, an organization had to comply with the decisions taken by its organs in accordance with its rules of procedure. Consequently, he was not sure that it was possible to lay down the rules proposed in article 36, paragraphs 2 and 3.

17. Mr. FRANCIS observed that, whereas article 35 provided that obligations for non-party States or international organizations must be accepted expressly and in writing in the case of States and in an unambiguous manner in the case of organizations, article 36, relating to rights for non-parties, was based on the notion of implicit assent. He found that approach reasonable, and concurred with the Special Rapporteur's decision to prepare separate provisions for non-party States and non-party international organizations.

18. With regard to paragraph 2, he wondered whether Mr. Ushakov's reservations might not be met by stipulating that an international organization's presumed assent to be vested with a right must be in accordance with the rules of that organization. Paragraph 3 provided further evidence that even rights were accompanied obliquely by obligations; to exercise a right arising under paragraph 1 or paragraph 2, non-party States or organizations were required—reasonably, in his opinion—to comply with the conditions for the exercise of that right "provided for in the treaty or established in conformity

⁷ See 1435th meeting, foot-note 10.

with the treaty". He could accept draft article 36 as it stood.

19. Mr. SCHWEBEL said that, while he found article 36 generally acceptable, he was inclined to favour the deletion of the second sentence in paragraph 2, though not for quite the same reasons as those put forward by Mr. Ushakov. International organizations and their internal organs took decisions by consensus or by the vote of a majority of their members, as prescribed in their constituent instruments or rules of procedure. In the case of the United Nations General Assembly, for instance, Article 18 of the Charter provided that decisions on important questions should be made by a two-thirds majority of the members present and voting and decisions on other questions by a majority of the members present and voting. He was uneasy about the prospect of shifting the burden of proof by establishing a presumption that an international organization assented to a right so long as the contrary was not indicated. How could it be determined, in the case of the General Assembly, that the necessary majority of members tacitly favoured the acceptance of a particular right? The problem would be even more acute in the case of the Security Council. His remarks would also apply, *mutatis mutandis*, to other international organizations. Consequently, while acknowledging that consistency of treatment as between States and international organizations had a certain appeal, he was inclined to support Mr. Ushakov's recommendations.

20. Mr. SUCHARITKUL said that the principles stated in articles 35 and 36 were more or less in keeping with contemporary legal practice in south-east Asia. That practice was very abundant because there was a wide range of intergovernmental organizations in that region, several of which, such as ESCAP, ASEAN and the Ministerial Conference for the Economic Development of South-East Asia, had their headquarters in Thailand. Some of those organizations had well-established rules but others did not yet have a constitution. He thought that fact should be taken into account.

21. He also wished to draw the Commission's attention to the forms which the absence of consent could take. For example, in the case of the Fisheries Development Centre, which had been set up by the Ministerial Conference for the Economic Development of South-East Asia and for which the Japanese Government had provided a ship, the absence of the consent of the Burmese Government, which, although it took part in the Conference of Ministers, was not a party to the agreement establishing the Centre, had taken the form of seizing the ship, which had been sailing near its coast. It could thus be seen that the practice of States in that matter was still far from settled.

22. Mr. DADZIE said that, in view of the very close similarities between the rules laid down in the draft articles and those prescribed in the Vienna Convention, he believed that, when the time came to decide what form the provisions under consideration should take, the Commission should give serious consideration to Mr. Šahović's earlier suggestion that the most appropriate type of instrument to adopt would be a protocol to the Vienna Convention.⁸ In a sense, the Commission was

unnecessarily duplicating the work already done in 1969. Whenever the rules governing any particular aspect of the present topic were the same as those laid down in the Vienna Convention, it would be sufficient to state that, in that particular case, the rules of the Vienna Convention applied.

23. As to article 36, he had some difficulty in accepting the principle of the presumption of assent to a right by a non-party State or international organization in the absence of any indication to the contrary. Pressure of work often made it impossible for States or international organizations to be fully conversant with all matters of interest to them. In some cases, it might simply be a question of *timeo Danaos et dona ferentes*. He believed that it would be going too far to adopt the rule proposed, which might be dangerous to international relations. It would be better to leave no room for misunderstanding or doubts. Those considerations also applied to paragraph 3, since it was necessary to determine precisely whether a right had been accepted before providing for its exercise. He would be more disposed to accept article 36 if the last sentence of paragraph 1 and of paragraph 2 were deleted or if it was provided that a right must be accepted expressly.

24. Mr. CALLE Y CALLE observed that under article 36 a State or an international organization not a party to a treaty could choose to avail itself of a right arising from a provision of that treaty. There were two ways in which that option might be exercised: either the treaty might require non-parties to accept the right expressly, or the option might remain open in the absence of any indication to the contrary. On that point, he saw no difficulty in retaining the philosophy and terminology of the corresponding article of the Vienna Convention, according to which the assent of a third State to be vested with a right need not necessarily be expressed, but could be presumed. Of course, in the case of an international organization, some procedure would have to be set in motion to ensure the exercise of the right, but that was a purely internal matter which concerned only the organization. On the other hand, he thought that paragraphs 1 and 2 could be merged into a single provision, since the situation of non-party international organizations was practically the same as that of third States in so far as the granting of rights was concerned. He could subscribe to paragraph 3, which embodied the principle laid down in paragraph 2 of the corresponding article of the Vienna Convention, that a third party benefiting from a right must exercise it in conformity with the conditions laid down in the treaty. In his opinion, the Commission should keep as close as possible to the wording of article 36 of the Vienna Convention.

25. Mr. RIPHAGEN, referring to the principle of the presumption of assent in the absence of any indication to the contrary, cited the example of the treaty between the French Republic and the Federal Republic of Germany relating to the Saar (1956), which had provided that certain decisions concerning the administration of that territory should be taken by the Council of the Western European Union according to a specific system of voting, which was admissible under the constituent instrument of that international organization. If the

⁸ 1430th meeting, para. 24.

provisions of paragraphs 2 and 3 of draft article 36 had applied to that treaty, it would not have been necessary for the organization to take any decision at all, since it would have been bound in the exercise of its powers by the provisions of the treaty. In fact, the members of the Western European Union had made an agreement *inter se* accepting the functions and system of voting provided for in the treaty between France and the Federal Republic of Germany. It seemed to him that that example tended to bear out the point made by Mr. Ushakov and Mr. Schwebel. It was perhaps desirable that, in the case of international organizations, assent should not be presumed in the absence of any indication to the contrary, particularly in view of the necessary consequence attached to that presumed assent in paragraph 3.

26. Mr. REUTER (Special Rapporteur), summing up the discussion, noted that article 36 had attracted the same comments as article 35, namely, that the Commission should not take up problems it could not solve, and that it should not take a position, even indirectly, on the question whether treaties concluded between States could create rights or obligations for non-party organizations. As in the case of article 35, it would thus be advisable to provide two alternatives for article 36, one showing that that difficulty could be overcome and the other that it could not or should not be.

27. The majority of the members of the Commission seemed to be in favour of deleting the second sentence of paragraph 2. While not expressing any opinion on the need to do so, he would comply with their wish.

28. The wording of paragraph 3 had been considered rather harsh. It could be interpreted to mean that a State or an international organization could exercise a right contrary to the rules of the constituent instrument of the organization. Mr. Francis had therefore proposed wording which could be considered by the Drafting Committee and which was intended to make it clear that a right could be exercised only in accordance with the constitutional rules of the organization or even of the State in question.

29. Lastly, he had been asked to recast article 36 so as to make a clear distinction between the two main categories of treaties which the Commission was considering. He would also act on that suggestion, though he hoped the Commission would subsequently revert to simpler wording if a simplification proved possible.

30. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer article 36 to the Drafting Committee.

It was so agreed.

ARTICLE 36bis (Effects of a treaty to which an international organization is party with respect to States members of that organization)

31. The CHAIRMAN invited the Special Rapporteur to introduce draft article 36bis, which read:

Article 36bis. Effects of a treaty to which an international organization is party with respect to States members of that organization

1. A treaty concluded by an international organization gives rise directly for States members of an international organization to rights and obligations in respect of other parties to that treaty if the constituent instrument of that organization expressly gives such effects to the treaty.

2. When, on account of the subject-matter of a treaty concluded by an international organization and the assignment of the areas of competence involved in that subject-matter between the organization and its member States, it appears that such was indeed the intention of the parties to that treaty, the treaty gives rise for a member State to:

(i) rights which the member State is presumed to accept, in the absence of any indication of intention to the contrary;

(ii) obligations when the member State accepts them, even implicitly.

32. Mr. REUTER (Special Rapporteur) said that article 36bis attempted to answer the following question: in the case of treaties concluded by an international organization, to what extent could it be considered that it was the organization which was a party to such treaties and not its member States? In fact, the commitments assumed by an international organization did sometimes have effects for its member States. Legally, that was a very delicate question, and it had been in order to give the members of the Commission a more complete perception of all the problems raised by the topic under consideration that he had drafted article 36bis. The two paragraphs of that article dealt with different cases.

33. The first was that in which the constituent instrument of an international organization which was a party to a treaty provided that the treaties concluded by that organization had legal effects for its member States. That case was relatively simple and had at least one precedent, that of EEC. When a treaty concluded by an international organization had legal effects for its member States, there appeared to be a simple internal solution peculiar to that organization. That solution might be found in one organization but not in another. It was nevertheless important to determine whether that purely internal situation could have the effect of creating rights or obligations for the parties to the treaty concluded by the international organization.

34. There might be some hesitation in replying to that question, not only for legal reasons but also for reasons of legislative policy: was it really in the interests of the co-contractors of an international organization to be certain that the States members of that organization were bound by the treaty it had concluded? From the legal point of view, to what extent could a provision which was only a provision of the internal law of the organization be invoked against those States? In answering the latter question, it must first be recognized that States or international organizations which agreed to contract with an international organization were usually familiar with its constituent instrument. At the time of concluding the treaty, they could therefore expect the agreement concluded by the organization to give rise to rights and obligations for its member States and for themselves. As one member of the Commission had observed, they assented thereto in advance; they knew the situation and accepted it. If the Commission found that legal construction too questionable, however, he would be willing to discard the first case.

35. The second, which was covered by paragraph 2 of article 36*bis*, was not based on the constituent instrument of the organization but on the intention of the parties to a treaty concluded by an organization to create rights or obligations for States members of that organization. To establish that intention, it was enough to refer to the subject-matter of the treaty and to the assignment of powers between the organization and its member States. It was reasonable to believe that the States which contracted with the international organization made a kind of offer to its member States. That hypothesis was much more delicate than the first one because member States had never indicated that they accepted such an offer, so that their interests ought to be protected. That was the purpose of paragraph 2, subparagraphs (i) and (ii), which assumed that member States knew the agreements concluded by the organization. If such agreements created rights for them, they must be granted the faculty of not accepting those rights. Obligations were also subject to their acceptance. To illustrate that case, he referred to a treaty concluded between EEC and the United States, relating to fishing in the exclusive fishing zone established by that country. Formally, that treaty was binding only on EEC and the United States, but there was necessarily a division of competence, relating to the subject-matter of the treaty, between EEC and its member States. In the light of the treaty establishing EEC, it could be considered that the treaty it had concluded with the United States was binding on its member States, as provided in paragraph 1 of the article under consideration. Those States might find the obligations arising from the treaty invoked against them, just as they could invoke the rights arising from the treaty, whether they had expressly accepted them or not.

36. Mr. CALLE Y CALLE said that article 36*bis* was plainly the nucleus of the whole set of draft articles. International organizations, as the Commission defined them, were composed of States, which could have two kinds of relationship to a treaty concluded by an organization of which they were members. In one case, they would not themselves be parties to the treaty but members of the entity which assumed the rights and obligations of a party; in the other case, they would be parties independently of the organization. The Commission had already studied a number of articles relating to the effects of a treaty concluded by an international organization on its member States. For example, it could be seen from article 26⁹ that such a treaty would be binding not only on the organization as a collective entity but also, indirectly, on its members; and from article 18¹⁰ that those members would be obliged to refrain from acts which would defeat the object and purpose of such a treaty. States members of an international organization could not, however, be parties to a treaty concluded by that organization unless they had participated as States in the negotiation of the instrument, as in the case of mixed agreements, or unless the organization had concluded the treaty not on its own behalf but as the specifically appointed representative of its members.

⁹ 1435th meeting, para. 33.

¹⁰ See 1429th meeting, foot-note 3.

37. With regard to the text of the article, the rule stated in paragraph 1 was logical and supported by precedents. The only change he would suggest to that paragraph would be to reserve the phrase "rights and obligations", so as to follow the order in which those matters had been discussed in articles 35 and 36. The rule stated in paragraph 2 of the article was also acceptable.

38. Mr. USHAKOV said that he did not see why article 36*bis* should be included in the section dealing with the effects of treaties concluded by international organizations on non-party States or international organizations. The questions with which the article was concerned could arise in connexion with any article in the draft. Those questions were, first, the competence of an international organization to act on behalf of its member States and, second, whether a treaty concluded by an international organization was binding both on the organization and on its member States.

39. Personally, he had the impression that the entire draft was based on the idea that an international organization, when it concluded an agreement, was acting as an organization, as a separate subject of international law, and that any treaty to which it was a party was binding on it as an organization. The case in which an international organization concluded a treaty on behalf of its member States was entirely different; it was a case of representation, with which the Commission was not concerned.

40. Referring to the example given by the Special Rapporteur, he observed that the Soviet Union had also concluded an agreement with EEC on fishing in certain zones. There was no doubt that, in such cases, EEC was acting on behalf of its member States within the limits of its competence. That situation raised many delicate new problems, which did not yet appear to have been studied by theorists. Moreover, problems of responsibility could arise when it had to be determined whether an organization was solely responsible, whether its member States were solely responsible or whether the organization and its member States were jointly responsible.

41. The problems dealt with in article 36*bis* could certainly arise, but they did not concern the effects that a treaty to which an international organization was a party might produce for a third State or a third organization. The article related to commitments assumed directly by an international organization representing its member States, not commitments resulting from a collateral agreement. The mere fact that paragraph 1 referred to the constituent instrument of the organization showed that no collateral agreement was involved and that the States members of the organization were not third States. The problems covered by article 36*bis* warranted examination but they should form the subject of a provision in the general part of the draft.

42. Mr. REUTER (Special Rapporteur), referring to the comments made by Mr. Calle y Calle and Mr. Ushakov, said that article 36*bis* did not relate to the case in which an international organization represented its member States when concluding a treaty, for in that case the organization would not be a party to the treaty, which would be concluded between its member States and their co-contractors. Also outside the scope of the

article were cases in which one or more States were represented by another State. For example, the members of the European Coal and Steel Community had sometimes authorized the Community to conclude a treaty on their behalf, when the Community was not competent to present its own views on certain matters. Cases of that kind, however, were completely outside the subject under consideration. Just as the United Nations Conference on the Law of Treaties had deliberately left aside all questions of representation, the Commission had already decided not to deal with those questions in the draft articles it was formulating.

43. What he had had in mind in article 36bis, paragraph 1, was, for example, the case in which an international organization, acting as such, entered into a commitment with third States. If the constituent instrument of the organization provided that its member States were bound by the treaties it concluded, could it be considered, in the light of such a provision, that the member States were third parties in relation to the organization? If that idea was thought to be exaggerated, it must be rejected, but if it was not, it would have to be dealt with, as he had attempted to do in article 36bis.

44. A question of that kind had had to be settled in the nineteenth century, when the European Commission for the Control of the Danube had wished to raise loans. The difficulty had been that a loan was more easily granted to the member States of an international organization than to the organization itself, unless it had its own funds. At the present time, some organizations did have their own funds, so that loan agreements could be concluded direct with an international organization, for example, between a State and an international bank. If the lender State was satisfied with such a treaty, the member States of the organization were regarded as third parties. In pure law, such treaties were conceivable, though mixed agreements were more common. If article 36bis did not cover that kind of treaty, it would clearly have no place among the articles relating to third parties.

45. Lastly, the Commission was not called upon to consider questions of responsibility at that time, but Mr. Calle y Calle had been right in saying that State responsibility could have a basis that went beyond the scope of the law of treaties.

46. Mr. USHAKOV, referring to the treaties concluded by EEC with the United States and the Soviet Union respectively, asked whether those treaties had to be confirmed by each State member of the Community and whether the member States were considered as third parties until they had given their confirmation, although the treaty establishing EEC provided that agreements concluded by the Community were binding on its member States.

47. Mr. REUTER (Special Rapporteur) said that the agreement concluded between EEC and the United States had been published in the *Official Journal of the European Communities*¹¹ and in *International Legal*

Materials,¹² but he was not familiar with the agreement concluded between EEC and the Soviet Union. The agreement between EEC and the United States had not been concluded on behalf of the member States of the Community and did not indicate whether the member States were required to confirm it formally. According to the treaty establishing the Community, the member States were bound with respect to the Community. It was only going one step further therefore to conclude that they were bound with respect to the United States, which could require them to perform all the acts within their competence for which the treaty provided. For example, it would be inconceivable for a vessel flying the French flag to be boarded by the United States authorities for infringing the rules laid down in the treaty and for the French Government to claim that France was a third State in relation to that treaty. It was precisely in order to prevent such a result that he had tried to provide legal machinery in article 36bis. The fact remained, however, that for the time being the case dealt with in paragraph 1 of that article was peculiar to EEC. In a treaty concluded between CMEA and Finland, it was specified that the text had been previously approved by the States members of CMEA. However, no such statement appeared in the text of the agreement concluded between EEC and the United States.

The meeting rose at 1 p.m.

¹² *International Legal Materials* (Washington, D.C.), vol. XVI, No. 2, March 1977, p. 257.

1441st MEETING

Wednesday, 15 June 1977, at 10 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov.

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/285,¹ A/CN.4/290 and Add.1,² A/CN.4/298)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL
RAPPORTEUR (continued)

ARTICLE 36bis (Effects of a treaty to which an international organization is party with respect to States members of that organization)³ (continued)

¹¹ Agreement between the Government of the United States of America and the European Economic Community concerning fisheries off the coasts of the United States, *Official Journal of the European Communities* (Luxemburg), 9 June 1977, vol. 20, No. L141, p. 2.

¹ *Yearbook ... 1975*, vol. II, p. 25.

² *Yearbook ... 1976*, vol. II (Part One), p. 137.

³ For text, see 1440th meeting, para. 31.

1. Mr. RIPHAGEN said that, if the Commission wished its draft articles to include a section on the effects of treaties with respect to third States, it seemed inevitable that, in dealing with the question of international organizations as parties to treaties, it should lay down rules governing the legal position of States members of those organizations in relation to the treaties in question. The Commission had recognized, as the basis for its work, that international organizations were or could be subjects of international law, and it must therefore also recognize that they could have that status independently of their member States. Consequently, it could not avoid the questions whether, and to what extent, the States members of an international organization should be treated as third parties in relation to a treaty to which the organization was a party. Since those were the questions dealt with in article 36*bis*, that article constituted an essential part of the draft.

2. The Special Rapporteur had said that, when an international organization concluded a treaty with a State or another organization, it did so in its own name. Consequently, it was to the treaty that attention must first be devoted in each case in order to assess its legal effects on any third parties, including States members of the organization. The treaties of an international organization were often intended to create rights and obligations for the organization only, as distinct from its member States; such a treaty might, for example, refer to matters which only the organization itself could handle, such as the exchange of information on its activities or the question of participation in its work as an observer. States members of an organization which concluded such a treaty were, so to speak, "in the second row" in relation to the instrument, and they could safely be said to be bound by it for they had, at least, a duty to place no obstacles in the way of its implementation by the organization.

3. In other types of treaties concluded by an international organization—those dealt with in article 36*bis*—the role of the member States was more active. For such treaties to exist, the international organization must have the capacity to conclude agreements in fields other than that in which it was completely autonomous in relation to its member States; and the question therefore arose whether the legal effect of those treaties was such as directly to bind the States members of the organization to exercise rights or perform obligations with respect to the organization's co-contractor. As the Special Rapporteur had said, it was easy to accept that such direct rights and obligations did arise when the organization's constituent instrument provided that the members of the organization were bound by the treaty; that explained the rule laid down in article 36*bis*, paragraph 1. However, even in that situation, it could be claimed that the constituent instrument contained no more an offer to the entity with which the organization sought to conclude a treaty, and that it was primarily for that entity and the organization to define the effect they wished the treaty to have. It might be that an organization was fully competent to conclude a treaty binding itself and its member States, but that both it and the entity with which the treaty was to be concluded, or one of them, wished to limit the

relationship resulting from the treaty to the organization and the co-contracting entity. He thought the rule stated in article 36*bis*, paragraph 1, should be redrafted to take account of those possibilities,

4. With regard to paragraph 2 of the article, he agreed with the Special Rapporteur that it was reasonable to presume that, if an international organization concluded a treaty with an external entity, that entity would wish for an assurance that the object of the treaty would not be frustrated because some aspects of its subject-matter were perhaps not within the exclusive competence of the organization. In such a situation, it was clearly in the interest of full application of the *pacta sunt servanda* rule to facilitate the creation of direct rights or obligations for the States members of the organization concerned. But since the organization would presumably be unable to create such rights or obligations itself, its member States must be given the right to opt out of them. That was the purpose of paragraph 2 of article 36*bis*, and he fully approved of it. However, he believed that the rights and obligations to which the paragraph referred should be placed on an equal footing and that each of the members of the organization should be permitted to accept or reject them only as a complete package. He agreed that acceptance of the package could be presumed, but thought that rejection of it should be explicit and timely.

5. Mr. ŠAHOVIĆ said that the Special Rapporteur had been right to devote an article to the effects of a treaty concluded by an international organization with respect to States members of that organization—a matter which had already been frequently raised during the discussions. The question was so fundamental that it seemed relevant not only to the articles concerning third States and organizations but to the whole draft. Generally speaking, he approved of the solutions proposed by the Special Rapporteur, but he wished to ask him a few questions so that he might clarify his position or modify the expression of his ideas on certain points.

6. The importance of article 36*bis* necessarily raised the question of its place in the draft. He was not sure that all the aspects of the problem should be dealt with in section 4 of part III. In particular, paragraph 1 stated a rule which derived from the nature of the constituent instruments of international organizations and was so obvious that it might be better to refer to it in the commentary. It could also be mentioned in the commentary to article 6⁴ or might even lead to definitions being included in article 2 of the terms "third organization" and "third State" as understood in the draft.

7. On the other hand, paragraph 2 of article 36*bis* was certainly necessary. It concerned a very real situation, which seemed likely to arise more and more often in the future. Nevertheless, it was open to question whether the content of that paragraph really belonged in a section of the draft dealing with the effects of treaties on non-party States or organizations.

8. With regard to drafting, it would be advisable to clarify the meaning of the expression "even implicitly",

⁴ See 1429th meeting, foot-note 3.

which appeared in paragraph 2 (ii). In other articles, such as article 35, the Special Rapporteur had used a different formula, which was more precise. Even if the Special Rapporteur's intention in using different expressions was to refer to different conditions, it might perhaps be useful to expand the phrase "even implicitly" or make its meaning more precise.

9. Mr. SUCHARITKUL said that, in view of the practice of certain intergovernmental organizations in south-east Asia, he was convinced that article 36*bis* was useful and necessary. In paragraph 1, the Special Rapporteur referred to the "constituent instrument" of an international organization, which he saw as a general instrument. But the constituent instruments of international organizations possessing legal personality varied as to generality. It was not uncommon for the constituent instrument of an international organization to lack the precise nature of a general instrument at the outset. That did not apply to the Charter of the United Nations, but it was true of the Treaty of Rome, which had acquired its general character in several stages. As to the Bangkok Declaration of 8 August 1967, which had established ASEAN, that instrument did not contain any entirely general provisions. It was also possible for an international organization to have a succession of evolutive constituent instruments. It was to take account of those situations that the Special Rapporteur had included in article 36*bis* a second paragraph which seemed indispensable.

10. With regard to the practice of ASEAN, he pointed out that in 1968 that Association had concluded an agreement with ECAFE, which was now known as ESCAP. That Commission had undertaken to appoint a group of economists to determine the fields in which ASEAN could profitably engage in economic co-operation. The agreement had been concluded by ASEAN itself, so that its member States had not been parties. Nevertheless, those States had accepted the rights and obligations deriving from the agreement—the situation covered by article 36*bis*, paragraph 2—and had undertaken, for example, to provide the group of experts with the facilities necessary for its work. That situation had recurred several times, with the conclusion of agreements between ASEAN and various Governments in Asia or the Pacific. Since the time of the Bangkok Declaration, the constituent instrument of ASEAN had constantly evolved as and when conferences had been held at different levels.

11. Mr. FRANCIS said that article 36*bis* covered a difficult and twilight area of international law. It would be hard for the Commission to be sure that it was anticipating in the article all the situations which needed to be covered, but it must be bold and imaginative.

12. He was in general agreement with the conclusions of the article but, on reading its first paragraph, he felt bound to ask whether the subject of that provision was the direct effect of a treaty concluded by an international organization on the relationship between the organization and its member States, or the effect of the treaty on the constituent instrument of that organization, or yet again the effect of the constituent instrument on the treaty. As he saw it, none of those questions could be answered in direct terms, and the situation to which the paragraph

gave rise was in fact a mixed and entirely new one as far as treaty relationships were concerned. On the other hand, the fears he had expressed concerning the possible need to modify article 34⁵ had been allayed by the Special Rapporteur's introduction of article 36*bis*,⁶ in so far as the Special Rapporteur had shown that States members of an international organization could agree to accept rights and obligations through the organization's constituent instrument.

13. However, problems also arose in regard to article 34 as a result of the provisions of article 36*bis*, paragraph 2. The emphasis in that paragraph was apparently on intention, but was it the element of consent or an element of what might be termed "estoppel", which was the predominant feature of that intention? If it was the former, the rule in article 34 would remain inviolate but, if it was the latter, article 34 would need to be amended by some reference to that fact.

14. The stipulation that the effects of a treaty concluded by an international organization would arise only if the constituent instrument of that organization "expressly" so provided seemed unduly restrictive. For example, it was clear from Article 105 of the Charter of the United Nations that a convention concluded by the United Nations concerning privileges and immunities for itself, its officials or the representatives of its Members, would be binding on the States Members of the Organization if it was proposed by the General Assembly. The situation would, however, be less clear if a treaty of that kind was proposed by the Secretary-General, a procedure which was not "expressly" provided for in the Charter. Or it might be that, in order better to afford mutual assistance in carrying out the measures decided upon by the Security Council (Article 49 of the Charter), certain States Members of the United Nations entered into a treaty with the Organization. If the action decided on by the Security Council was cancelled as unacceptable and the Organization refused to pay the States with which it had concluded the treaty the expenses they had incurred, should those States be deprived of recourse against the members of the Security Council simply because the Charter contained no express reference to such an agreement as they had concluded? Similarly, a regional agency might be called on by the Security Council, acting under Article 53 of the Charter, to take enforcement action and might conclude a treaty with the United Nations for that purpose. If the States Members of the United Nations subsequently decided against the action agreed by the Security Council and therefore withheld payment to the regional agency, should it be deprived of recourse against them because there was no express reference in the Charter to the kind of agreement it had concluded?

15. Mr. USHAKOV said the discussion had shown that, by article 36*bis*, which concerned the relations between international organizations and their member States, the Commission would in fact be imposing an interpretation of the constituent instruments of those organizations. That interpretation would constitute an interference in the

⁵ 1439th meeting, para. 19.

⁶ 1440th meeting, paras. 32 *et seq.*

internal affairs of international organizations. Interpretation of their constituent instruments was not a matter for the Commission or any State, but for the organizations themselves. Any interpretation by the Commission of the Charter of the United Nations or of the constituent instruments of regional economic, political or military organizations was quite inadmissible. If the Commission persisted in its present course, it might just as well draft a provision imposing an interpretation of the constitution of federal States in regard to the relations between the central State and the members of the federation.

16. The interpretation entailed by article 36*bis* was confined to the effects which a treaty concluded by an international organization might have for the States members of that organization, but it related both to the constituent instrument of the organization, as provided in paragraph 1, and to the assignment of areas of competence between the organization and its member States, as provided in paragraph 2. In his view, those two matters were both governed solely by the internal order of the organization. Furthermore, article 36*bis* referred not so much to treaties concluded between States and international organizations or between international organizations, as to agreements constituting international organizations. It had, however, been firmly established, for example, at the United Nations Conference on International Organization (San Francisco), that, where the Charter of the United Nations had to be interpreted, only a unanimous interpretation by a United Nations organ would be authentic. Legal theory was equally categorical on that point.

17. Even if there were contradictions in a treaty to which both an organization and its member States were parties—for example, in regard to any reservations which might have been formulated—it was not for the Commission to lay down rules to settle questions which arose within the internal order of the organization. Consequently, he was entirely opposed to article 36*bis*.

18. Mr. TABIBI agreed with Mr. Ushakov that there would be cases in which it would be very difficult to apply the rules laid down in article 36*bis*, for the situation with regard to the effects, for their member States, of treaties concluded by international organizations was very complex and constantly evolving. The nature, membership and constituent instruments of international organizations varied widely, and so did their practice in regard to treaties. Even where an organization's constituent instrument clearly gave it treaty-making power, there could be grey areas in which its competence was uncertain or the implementation of a treaty required special arrangements with individual countries. Notwithstanding those complications, there was a need for rules of the type laid down in article 36*bis*, for the conclusion of treaties by international organizations was an important part of current international life. Moreover, since the Commission had already accepted articles 35 and 36, it needed to add to them the safeguard provided in article 36*bis*.

19. In the operation of the type of treaty the Commission was now studying, the principle of good faith was naturally of great importance for all concerned: the international organization and its member States and, above all,

the organization's co-contractor. It was, therefore, essential to provide machinery for the settlement of disputes in the event of a breach of that principle.

20. Mr. DADZIE said he fully associated himself with Mr. Ushakov's remarks, since the interpretation of the constituent instrument of an international organization and the assignment of areas of competence between the organization and its member States were clearly matters for them, not the Commission, to settle. If the Commission decided to retain article 36*bis*, he would prefer it to provide for some more specific method of determining a State's acceptance of rights than that set out in paragraph 2 (i).

21. Mr. QUENTIN-BAXTER thanked the Special Rapporteur for his very full commentary to article 36*bis*, which he had found particularly illuminating and helpful. The article could be viewed in two quite different lights: either as providing for a very special case—so special, in fact, that it might more appropriately be dealt with in the commentary than in the body of the draft articles—or as a genuine glimpse of the reality of the future. He inclined towards the latter view.

22. He found it easy to follow the logic of Mr. Ushakov's position when, for instance, he said that the Commission should not go beyond the provisions of the Vienna Convention.⁷ The only response to that point was a pragmatic one; after dispensing with subjects of international law other than States in article 3 of that Convention, the United Nations Conference on the Law of Treaties had no longer felt any need to concern itself with the existence of international organizations, except in regard to the very specific matter of constituent instruments which themselves established such organizations. On the other hand, there were other aspects of Mr. Ushakov's position which he had greater difficulty in understanding.

23. The Commission had only two basic insights to guide it in its deliberations on the subject. The first was the fact, which had emerged clearly from its discussion of the question of reservations, that an international organization party to a treaty involving States could have one of two entirely different roles. An international organization might have a special role quite different from that of any State participating in the treaty. Such would be the position of the Authority which it was proposed to establish under the future convention on the law of the sea. Although such a case might give rise to technical problems, it fitted within the concept which had marked the starting-point of the Commission's work, namely, that international organizations were the creatures or servants of States. It was also necessary, however, to provide for the case in which an international organization participated in the negotiation of a treaty on a footing not radically different from that of States and had the same interest as States. In such a case, if States and international organizations tackled the same problems, negotiated with each other and recognized each other as subjects of international law, where could the difference between States and international organizations be said to reside? To say that States were sovereign whereas inter-

⁷ See 1429th meeting, foot-note 4.

national organizations were not was a somewhat unhelpful generalization, and the concept of "sovereignty" had many imprecise overtones. In his view—and that was the second of the two insights to which he had referred—such organizations could be said to differ from States in their capacity to undertake and to fulfil obligations.

24. It surely followed from that conclusion that, in examining a provision such as article 36*bis*, the Commission could not draw an analogy between the constitution of a State and the constituent instrument of an international organization. A State was presumed to have full capacity to enter into obligations, and any defect of its legislation which impaired that capacity was a problem for the State itself to solve. In the case of an international organization, the reverse situation obtained; such an organization might be said to bring its constitution with it as part of its credentials for taking part in negotiations. Thus, even when international organizations and States represented the same kind of interest and had the same sort of stake in the outcome of negotiations, their basic capacity to enter into such negotiations was different. That difference had caused the Commission some difficulty in its consideration of article 36*bis* and of preceding articles. In the case of article 27, for instance, it had been thought necessary to establish a rule for international organizations parallel to the rule laid down for States, so that neither States nor international organizations could invoke weaknesses of their internal law or their internal rules, respectively, to excuse their failure to comply with treaty obligations. Thus, while the capacity of an international organization to enter into treaty commitments was limited by its constituent instrument or internal rules, a State was entitled to expect that the organization would not invoke that instrument or those rules to justify its failure to perform an obligation. There was thus a fine balance to be struck.

25. In the case of article 36*bis*, it was necessary to bear in mind that there already existed international organizations which acted in place of States and had the same interests as States in particular contexts. The most striking example was, of course, EEC, whose members were quite deliberately transferring elements of their sovereignty to a supranational body. The Community was enough of a reality to make it necessary for most non-EEC States to accredit diplomatic missions to the headquarters of the Community itself, in addition to being represented in the individual States members of the Community. In many cases, negotiations with non-EEC States were conducted both by the Community as such and by the individual member States. The case of EEC raised another aspect of the question of capacity, namely, the ability to fulfil obligations. In the case of EEC as in that of customs unions, there was a division between legislative power and the power to discharge obligations.

26. Considering that reality, which was reflected in a practical and reasonable form in draft article 36*bis*, he believed that the Commission had a duty to facilitate the dialogue between States and international organizations in circumstances of that kind. He also believed that it was right, instead of placing general reliance on "the rules of the organization", to refer more strictly to the constituent instrument of the organization and to the express

provisions of that instrument. Where such provisions were complied with and the organization presented its constituent instrument as part of its credentials, he saw no reason why negotiations for a treaty should not take place and why the resultant treaty should not be applied. In other cases where the indications were not so clear, the broader rule set out in paragraph 2 would apply, reference being made to the nature of the subject-matter and the understandings on the basis of which the parties to a treaty had contracted. While he could appreciate that the matter under discussion raised far-reaching theoretical and technical problems, he believed that the Commission would be right to take account of actual situations and to reflect them in its draft articles, so as to encourage the formulation of rules that would facilitate dealings between States and international organizations in the future.

27. Mr. CALLE Y CALLE said that he regarded article 36*bis* as a keystone of the draft. The case of a treaty to which an international organization was a party raised a technical problem regarding the effects of that treaty with respect to States members of the organization concerned. Those member States were not individual parties to the treaty; at the same time, however, they were not third States for, if they were, it would be necessary for them to consent to the assumption of obligations or rights on an individual basis and in the specific form provided for in articles 34, 35 and 36. In such a case, a State member of the organization concerned could not be regarded as alien to a treaty concluded by the organization in the exercise of the functions pertaining to its composite personality, especially when, by virtue of the constituent instrument of the organization, member States gave their prior consent to be bound by the treaties it concluded. It could thus be said that member States were collectively parties to the treaty.

28. As he saw it, article 36*bis* followed naturally from article 26, which laid down the *pacta sunt servanda* rule. When a party to a treaty was a State, that treaty, through the mechanism of internal law, was binding on all the inhabitants of the State and in respect of its entire territory. When a party to a treaty was an international organization, that treaty bound the organization, its organs and its member States. At the same time, article 36*bis* complemented articles 35 and 36, which dealt with the question how non-party States or international organizations could assume obligations or acquire rights under a treaty. It was necessary to include an article dealing with States which were vested with obligations and rights under a treaty by reason of their membership in an international organization. That was the purpose of article 36*bis*, paragraph 1 of which dealt with the case in which States members of an organization consented in advance to such rights and obligations through an express provision embodied in the constituent instrument of the organization, while paragraph 2 dealt with rights which member States were presumed to accept in the absence of any indication to the contrary and with obligations they accepted, even implicitly. That provision raised the problem whether States members of an international organization could be held directly responsible for obligations arising from a treaty concluded by the collective entity of which they formed part. In such a case,

could the other contracting party to the treaty make a claim against the individual members of the organization concerned? Although that point provided food for thought, he considered that, in certain cases at least, the States members of an organization would have a clear responsibility to fulfil obligations assumed by it. If, for instance, a sum of money was lent to the Andean Group⁸ and the latter was subsequently dissolved, its individual member States would have a responsibility to discharge the debt.

29. It did not seem to him that it would constitute undue interference in the internal affairs of an international organization to refer to the constituent instrument of that organization. It was necessary to know the true limits of the capacity of the organization to contract. In other articles, the Commission had referred to the relevant rules of international organizations as being a factor governing their capacity to enter into treaty commitments. Moreover, when the Commission came to take up the draft article corresponding to article 46 of the Vienna Convention, it would be dealing with cases in which a manifest violation of such internal rules constituted grounds for invalidating a treaty. Finally, the constituent instrument of an international organization imposed general obligations on its members, from which further specific obligations might derive; if, for instance, an organ of the organization took a decision within its competence, its action produced effects for all members of the organization.

30. To sum up, he believed that article 36*bis* regulated satisfactorily, and without undue interference in the internal affairs of international organizations, the rights and obligations arising for States members of an organization from a treaty concluded by it. The effects of such a treaty could not be strictly confined to the organization itself but had implications for its individual members, who would ultimately have to bear all the financial obligations of the organization and enable it to carry out its commitments under the treaty.

31. Mr. TSURUOKA said he was inclined to the view that article 36*bis* was useful and should, in the main, be retained. But he did not think the article was absolutely necessary for, as some members of the Commission had pointed out, other articles in the draft had the same effects. He noted, however, that the situations contemplated in article 36*bis* were becoming increasingly frequent in the modern world and that the rules which governed them in practice were constantly evolving. It was therefore necessary to state a general rule which would make it easier to solve the problems that arose. However, as the situation was relatively fluid and constantly evolving, care must also be taken not to hinder the natural development of international organizations.

32. Consequently, he thought article 36*bis* should remain very general; first, because it was difficult to go into details and, second, because, if the Commission took up questions which were too specific, it would be obliged to lay down fairly rigid rules. The Special Rapporteur had therefore been right in adopting the principle of con-

sensus, for that made it possible to lay down a rule which would be sufficiently flexible not to obstruct the free development of international activities, which were becoming increasingly necessary to meet the new needs of the contemporary world.

33. With regard to article 36*bis*, paragraph 1, he thought the Special Rapporteur had been right to refer to the constituent instrument of an international organization, for that instrument was the source of an international organization's capacity to conclude treaties, recognition of which was the starting point for the draft articles. The use of the word "expressly" safeguarded the principle of consensus, for it showed that an organization's constituent instrument would give effects to a treaty with respect to States members of the organization only when none of them was opposed to those effects.

34. In paragraph 2, however, the Special Rapporteur had introduced an exception to the principle of consensus by limiting it, in subparagraph (i), by the words "is presumed to accept" and, in subparagraph (ii), by the words "even implicitly".

35. He would prefer the article to adhere more closely to the principle of consensus and to remain general, without going into too much detail.

36. Mr. SCHWEBEL said that article 36*bis* dealt with an exceptional case in a largely unexceptionable manner. It seemed to him to be perfectly appropriate to recognize the terms of a treaty concluded by an international organization and to give effect to the intention of the parties to such a treaty. Any State not wishing to become a member of an advanced international organization of the kind dealt with in article 36*bis* need not do so, though it was perhaps interesting to note that the major organization of that kind was not lacking in applicants for membership. Similarly, any State not wishing to conclude treaties with such organizations was not bound to do so, but examples of such treaties were multiplying and the third States entering into such treaty relations showed a wide variety of geographical and ideological origins. In cases of that kind, it was in the interests of third States to be able to hold both the organizations and their members responsible for the performance of treaties. In any event, the reservations of certain States concerning the existence or procedures of advanced international organizations should not prevent others from creating and furthering such organizations if they so wished or inhibit the Commission from drawing up appropriate provisions recognizing that fact of international law and international life.

37. Contrary to what had been suggested at the present meeting, he did not believe that it was so extraordinary for international instruments to refer to the treaty-making capacity of federal States, and it would seem no more objectionable to refer to the treaty-making capacity of international organizations of the kind under discussion. The emergence of EEC represented one of the most positive developments of the period following the Second World War. Even if one held a contrary opinion, it was necessary to recognize the existence of such an international organization. Moreover, as Mr. Calle y Calle had observed, there were other international organizations having the authority, if not to conclude treaties which

⁸ Established by the signatories of the Cartagena Agreement (Andean Pact), signed on 26 May 1969.

bound their members, then at any rate to take decisions which had such binding effects. He could see no objection to taking account of developments which had actually occurred.

38. The CHAIRMAN, speaking as a member of the Commission, said that he had no contention with the substance of article 36*bis*. With all due respect to the arguments put forward by Mr. Ushakov, he did not see how, in the light of article 2, paragraph 1 (g), States members of international organizations which entered into treaties with other States or other international organizations could be regarded otherwise than as third parties in relation to those treaties. He considered that it was appropriate to keep article 36*bis* in its present position and not to place it among the general provisions of the draft.

39. The cases dealt with in paragraphs 1 and 2 corresponded to actual situations, several of which had been referred to by the Special Rapporteur in his very rich commentary. In paragraph (14) of that commentary (A/CN.4/298), it was stated that the over-all aim of article 36*bis*, as proposed, was to take some account of the situation as it existed, without sacrificing principles. He concurred with that approach. He did, however, have some misgivings about the principle embodied in paragraph 2 (ii), which seemed to him to constitute a departure from previous provisions of the draft articles, including article 35. In his view, it would be better to stipulate that a member State must expressly accept obligations.

40. Mr. USHAKOV said that the example of EEC was valid only within certain limits, for that body sometimes gave the impression of being not an international but a supranational organization. The same was true, in certain respects, of other organizations which had been mentioned. It was difficult to place those two notions on the same footing, and he therefore thought it preferable to consider only international organizations proper.

The meeting rose at 1.0 p.m.

1442nd MEETING

Thursday, 16 June 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov.

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/285,¹ A/CN.4/290 and Add.1,² A/CN.4/298)

[Item 4 of the agenda]

¹ Yearbook ... 1975, vol. II, p. 25.

² Yearbook ... 1976, vol. II (Part One), p. 137.

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (concluded)

ARTICLE 36*bis* (Effects of a treaty to which an international organization is party with respect to States members of that organization)³ (concluded)

1. Mr. REUTER (Special Rapporteur) said that, whereas two members of the Commission had declared themselves firmly opposed to article 36*bis*, others had all felt that the question raised by the article was a fundamental one which must be answered. That common feeling notwithstanding, numerous approaches had been suggested. Some speakers had asked what place an article of that kind should occupy in the draft, while others had questioned the need for the two provisions the article contained, either because they felt that the one or the other was superfluous or because, although they accepted the principle each laid down, they preferred that it should simply be mentioned in the commentary.

2. Some members of the Commission had questioned the legal basis of the two paragraphs of the article. He had tried to keep to the principle of consensus, which governed the entire Vienna Convention⁴ and which, he thought, should also govern the present set of articles, but it had been asked whether there was not an element of the theory of estoppel in certain of those articles.

3. Doubts had also been expressed about the wording of paragraph 2; some speakers had suggested that the two subparagraphs it contained should be merged or that the effect of the proposals they contained should be restricted inasmuch as they seemed to diverge from the principle of consensus by introducing the idea of presumed or implicit consent.

4. Finally, the criticism had been made that, both in his commentary and in his oral explanations, he had cited too frequently the example of EEC. He entirely accepted that criticism and felt that the Commission would be wrong to attach too much importance to an example which he had mentioned only for purposes of illustration. After all, EEC was not the only economic grouping which could be mentioned: in article 12 of the Charter of Economic Rights and Duties of States,⁵ which it had adopted in its resolution 3281 (XXIX), the General Assembly had expressed the concern of all the third world countries to unite in order to establish a more constructive dialogue with the major Powers. Paragraph 2 of that article stated:

In the case of groupings to which the States concerned have transferred or may transfer certain competences as regards matters that come within the scope of the present Charter, its provisions shall also apply to those groupings in regard to such matters, consistent with the responsibilities of such States as members of such groupings.

5. The debate showed that, with the exception of two of their number, members of the Commission had not rejected article 36*bis* out of hand, but had expressed a desire to reflect on it at greater length. He therefore proposed that the article be referred to the Drafting

³ For text, see 1440th meeting, para. 31.

⁴ See 1429th meeting, foot-note 4.

⁵ General Assembly resolution 3281 (XXIX).

Committee with the request that the Committee take it up as late as possible. He would like the Commission to refer in its report to the problem raised by article 36*bis* with regard to other articles and to state that it had not yet decided how the problem should be solved. He would also like the Commission, when it came to study article 37, to pass rapidly over paragraphs 5 and 6, whose justification depended on article 36*bis*.

6. Finally, he would like to come back to one of the objections which had been raised with respect to article 36*bis* and which seemed to him fundamental, since it related to the fact that the article, in mentioning in paragraph 1 the constituent instrument of an international organization and in paragraph 2 the assignment of areas of competence between the organization and its member States, appeared to be trespassing on matters which were the internal affair of an international organization. Now it was quite inadmissible that States should be able to intervene in the internal affairs of an international organization.

7. That the problem existed was a fact, but the conclusions to be drawn from it should not be as harsh as those which had been expressed, since the objection was valid with respect not only to international organizations but also to federations and confederations of States. As Mr. Calle y Calle had said,⁶ the objection raised in advance the problem the Commission would have to solve in article 46 for, as the Chairman had pointed out, it would be very difficult to draft an article corresponding to article 46 of the Vienna Convention. Nevertheless, those difficulties must be overcome for the ultimate consequence of failure in that respect would be that States would be unable to conclude treaties with international organizations, since they would not know in what fields the organizations were competent or even who was competent to give them that information. It was, naturally, for the organization concerned, and not third States, to say when it was competent and who could conclude a treaty on its behalf. It was for the organization alone to say whether the object of the treaty encroached on areas of competence assigned to itself or to its member States. Procedures for solving such problems must exist in practice since the number of treaties concluded by international organizations already ran into thousands.

8. A parallel had been drawn in that respect between international organizations and federations or confederations of States. He did not dispute that there was a parallel but it should not be carried too far. When, in its draft articles on the Law of Treaties, the Commission had taken up the question of capacity to conclude treaties, it had envisaged referring in the same article to States, federations and confederations of States and international organizations. It had very quickly dropped international organizations, but had persisted with the States members of a federal union right up to the end.⁷ When the United Nations Conference on the Law of Treaties had studied the question at its first session in

1968, it had not ruled out the idea of including provisions relating to federations and confederations of States; it was not until its second session in 1969 that it had given up the idea for political reasons. The Commission should therefore not underestimate the difficulty of the problem.

9. The CHAIRMAN said it seemed to him that, notwithstanding the substantive objections to article 36*bis* raised by two members of the Commission, the best course of action would be to refer the article to the Drafting Committee on the understanding that that Committee might come to the conclusion that it should not be retained. In making that suggestion, he had in mind, in particular, two considerations: first, that those members of the Commission who were unavoidably absent should be given the opportunity to consider the issues raised by article 36*bis* and, if they so desired, to comment on it; second, that at the present early stage of the Commission's deliberations on the subject, it was useful to retain provisions such as article 36*bis* in the draft so that the views of Governments could be ascertained.

10. Mr. USHAKOV said that the developing countries were at present very jealous of their sovereignty and were unwilling to delegate it to certain groupings for the purpose of the conclusion of treaties. He did not think, therefore, that the provisions of the Charter of Economic Rights and Duties of States could be interpreted as providing for such a possibility.

11. Mr. DADZIE said that he had no objection whatsoever to article 36*bis* being referred to the Drafting Committee, which often succeeded in allaying the misgivings of members of the Commission concerning particular provisions. He was full of admiration for the ingenious way in which the Special Rapporteur had formulated the text of article 36*bis*. Though he had not agreed with that text initially, that did not mean that he was not disposed to reconsider his position when it was referred back to the Commission by the Drafting Committee.

12. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer article 36*bis* to the Drafting Committee.

It was so agreed.

ARTICLE 37 (Revocation or modification of obligations or rights of non-party States or international organizations)

13. The CHAIRMAN invited the Special Rapporteur to introduce article 37, which read:

Article 37. Revocation or modification of obligations or rights of non-party States or international organizations

1. When an obligation has arisen for a State not a party to a treaty in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the non-party State, unless it is established that they had otherwise agreed.

2. When an obligation has arisen for an international organization not a party to a treaty in conformity with article 35, the obligation may be revoked or modified with the consent of the parties to the treaty, except if it is established that the obligation was intended not to be revocable or subject to modification without the consent of the organization.

⁶ 1441st meeting, para. 29.

⁷ *Yearbook ... 1966*, vol. II, pp. 191-192, document A/6309/Rev.1, part II, chap. II, draft articles on the law of treaties, art. 5, paras. 2-3 of the commentary.

3. When a right has arisen for a State not a party to a treaty in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the State not a party to the treaty.

4. When a right has arisen for an international organization not a party to a treaty in conformity with article 36, the right may be revoked or modified by the parties except if it is established that the right was intended not to be revocable or subject to modification without the consent of the international organization.

5. An obligation or a right which has arisen for States members of an international organization under the conditions laid down in paragraph 1 of article 36*bis* may be revoked or modified only with the consent of the parties to the treaty unless the constituent instrument of the organization provides otherwise or unless it is established that the parties to the treaty had agreed otherwise.

6. An obligation or a right which has arisen for States members of an international organization under the conditions laid down in paragraph 2 of article 36*bis* may be revoked or modified only with the consent of the parties to the treaty and of the State member of the organization, unless it is established that they had agreed otherwise.

14. Mr. REUTER (Special Rapporteur) said that article 37 of the Vienna Convention distinguished between obligations and rights. In the case of obligations, it followed closely the consensus rule. Thus, where an obligation arose for a third State, it did so by virtue of a collateral agreement; such an obligation could therefore be revoked or modified only by agreement, unless agreed otherwise.

15. In the case of rights, the United Nations Conference on the Law of Treaties had adopted another approach; a collateral agreement did not prevent revocation or modification of a right since it had to be established that such a right "was intended not to be revocable or subject to modification without the consent of the third State".

16. Draft article 37 drew a distinction with regard to rights and obligations between States and international organizations. Thus, in the first four paragraphs, it dealt in turn with the rights and obligations of States on the one hand, and the rights and obligations of international organizations on the other. It would be better if paragraphs 5 and 6 were not considered for the time being since they related to article 36*bis*, on which the Commission had not yet taken a decision.

17. With regard to States, he had seen no reason to modify the solution proposed by the Vienna Convention; paragraphs 1 and 3 therefore followed the provisions of that Convention.

18. With regard to international organizations, however, which were dealt with in paragraphs 2 and 4, and specifically in the case where an obligation or right was incumbent upon an international organization by virtue of a collateral agreement to which it was a party, he had adopted an approach which would introduce far greater stability into the agreement. It was based on an idea which he had stressed in his sixth report (A/CN.4/298) and which Mr. Verosta had underlined during the discussion on the articles relating to reservations,⁸ namely, that international organizations were wholly subject to the service of a function as internationally defined in relation to States, which was the justification for their

competence. Consequently, if it was accepted that the role of an international organization was to serve, it must also be accepted that, where States parties to a treaty had imposed an obligation on an international organization, that obligation could be revoked or modified unless it could be established that the States parties intended otherwise, on the understanding that such modification could not increase the obligation but only diminish it, as pointed out in paragraph 3 of his commentary.

19. Similarly, in the case of rights conferred on an international organization by States parties to a treaty—and, as he had pointed out, rights and obligations were often linked—it was not easy to accept the view that such States had sought to create acquired rights in favour of an organization.

20. Mr. USHAKOV said that he was totally opposed to paragraphs 5 and 6 of article 37 since he was totally opposed to article 36*bis*, to which those paragraphs related.

21. In his view, paragraphs 2 and 4 of article 37 gave rise to the same problem as the previous articles. According to those paragraphs, if an international organization had decided, by virtue of its constituent instrument, to conclude a treaty, it was no longer free, even in the case of a collateral treaty, to take another decision under its rules because it was bound by its first decision. In his opinion, however, if an organization had the discretionary power to take a decision regarding the conclusion of a treaty, it must also be able, if so authorized by its rules, to take another decision which ran counter to the first, regarding the treaty it had concluded. That possibility was available, in particular, to international organizations of a universal character such as the United Nations. States which concluded a treaty with an international organization must be aware that the organization might sometimes take a contrary decision which would affect the treaty.

22. Mr. CALLE Y CALLE said that article 37 was a necessary accompaniment to articles 35 and 36, relating to the assumption of obligations and rights by States or international organizations not parties to a treaty. Article 37 referred to the revocation or modification of such obligations or rights. In paragraphs 1 and 2, the Special Rapporteur had, correctly in his opinion, differentiated between the rule to be applied to States and the rule to be applied to international organizations in regard to the revocation or modification of obligations. In the case of States, the Special Rapporteur had kept to the rule laid down in the Vienna Convention, which provided that the revocation or modification of such obligations required not only the consent of the parties to the treaty but also that of the non-party State. In the case of international organizations, on the other hand, the obligation could be revoked or modified only with the consent of the parties to the treaty, unless it was established that the obligation had not been intended to be revocable or subject to modification without the consent of the organization. A similar distinction between the régime applicable to States and that applicable to international organizations in regard to the revocation or modification of rights was laid down in paragraphs 3 and 4.

⁸ 1434th meeting, para. 45.

23. Paragraphs 5 and 6 referred back to article 36*bis*. If it was accepted that a treaty concluded by an international organization gave rise to rights and obligations for its member States, it was logical to stipulate the form in which such rights or obligations could be modified or revoked. Paragraph 5 dealt with obligations and rights devolving upon States members of an international organization by virtue of an express provision contained in the constituent instrument of the organization. It was appropriate that States in those circumstances should have no say in the modification or revocation of an obligation or a right, since the effects of the organization's treaties with regard to its members States derived from that instrument. Paragraph 6 dealt with the case in which no such provision was made in the constituent instrument of the organization concerned and rights and obligations were assumed with the tacit or express consent of its member States. It was logical, in such a case, to provide for the individual consent of the member States.

24. He found article 37 clear and cogent and would have no difficulty in accepting any of its provisions, including paragraphs 5 and 6. Of course, if article 36*bis* was substantially modified when it was considered by the Drafting Committee, paragraphs 5 and 6 would have to be changed accordingly.

25. Mr. FRANCIS said he endorsed the general theme of the comments of Mr. Calle y Calle. As for the text of article 37, he would suggest that the words "except if" in paragraphs 2 and 4 be replaced by the word "unless".

26. Mr. DADZIE said that, subject to his comments on article 36,⁹ which had been largely of a drafting nature, he had no difficulty in accepting paragraphs 1 to 4 of article 37. However, he wished to reserve his position regarding paragraphs 5 and 6 until article 36*bis* had been considered by the Drafting Committee.

27. Mr. ŠAHOVIĆ said that article 37 was necessary and he was in favour of its being referred to the Drafting Committee.

28. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer article 37 to the Drafting Committee.

It was so agreed.

ARTICLE 38 (Rules in a treaty becoming binding on non-party States or international organizations through international custom)

29. The CHAIRMAN invited the Special Rapporteur to introduce article 38, which read:

Article 38. Rules in a treaty becoming binding on non-party States or international organizations through international custom

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a State or an organization not a party to that treaty as a customary rule of international law, recognized as such.

30. Mr. REUTER (Special Rapporteur) said that, apart from minor changes of a drafting nature, article 38 corresponded to article 38 of the Vienna Convention,

which had never given rise to any difficulty, either in the Commission or at the United Nations Conference on the Law of Treaties. In his opinion, it could be said, without being obliged to take a position on the nature of a customary rule and the manner in which such a rule was created or established, that a customary rule could become binding on an international organization, particularly when it was embodied in a treaty.

31. He had not given any examples in his commentary, but one was the rules governing forces employed for United Nations peace-keeping operations, which provided that such forces should be subject to the general customary rules regarding the use of armed force.

32. There was nothing to prevent an international organization from becoming a party to general treaties, and a number of provisions already adopted tentatively had been drawn up on that understanding. That was an exceptional situation, however, save possibly in the case of certain regional organizations having a limited objective. It was therefore desirable that customary rules should be extended to international organizations.

33. Moreover, a procedure existed whereby an international organization could be made subject to rules without becoming party to a treaty; that was the procedure adopted in the Convention on International Liability for Damage caused by Space Objects,¹⁰ which provided that rules laid down in a treaty could become binding on an international organization if the latter made a declaration that it agreed that those rules should be applicable to it.

34. There was no need to consider the precise legal source—bilateral instrument or simple collateral agreement—of the obligation of the international organization. What mattered was that article 38 was of great importance to international organizations, even more so than to States.

35. Mr. USHAKOV said he was anxious to know what was a customary rule in the case of an international organization. The customary rules established by State practice were largely defined in texts such as the Statute and the advisory opinions of the International Court of Justice. However, in the case of international organizations, it was hard to see how customary rules could be established: were they established by practice or by resolutions of international organizations? The commentary should indicate what such rules consisted of. In his opinion, conventional and customary rules, as well as the rules of *jus cogens* applicable to States, were also applicable to international organizations and other subjects of international law.

36. The CHAIRMAN said that, although he was sure that, for the purposes of its consideration of article 38, the Commission needed to resolve the very fundamental point raised by Mr. Ushakov, it would be helpful to hear first the views of the Special Rapporteur.

37. Mr. REUTER (Special Rapporteur) said that Mr. Ushakov had raised an important question which should be mentioned in the commentary with a note that the Commission had not taken any decision in the matter.

⁹ 1440th meeting, para. 23.

¹⁰ General Assembly resolution 2777 (XXVI), annex.

38. The real problem was what part an international organization could play in the emergence of a customary rule. It might be argued that international organizations did not play any part, at least so far as rules of general international law were concerned, since the general customary rules applicable to an international organization were recognized by all member States. It might also be argued that, in the process of developing a rule of general customary law, an international organization, as a subject of international law, was entitled to establish by its behaviour that it considered that that rule existed so far as it was concerned.

39. Along with customary rules of general international law, however, it was also possible to envisage customary rules which concerned only international organizations. That was a highly theoretical hypothesis since it presupposed the existence of a customary international law of international organizations, and the least that could be said was that such a law, if it did exist, was of very meagre content.

40. With regard to customary rules of regional international law, the same reasoning could be applied as for customary rules of general international law, with the difference that, according to the decision of the International Court of Justice in the *Asylum* case,¹¹ the creation of regional customary law required a commitment on the part of all States in the region. The hypothesis of a regional customary law would therefore involve special considerations.

41. Consequently, the Commission should confine itself in the commentary to underlining the extremely modest character of the rule laid down in article 38 and to pointing out that it did not commit the international organization. The United Nations Conference on the Law of Treaties had not sought to commit States on the question of custom, and the Commission itself had always hesitated to tackle the question.

42. Mr. ŠAHOVIĆ said that, so far as he was concerned, the question of the nature of customary rules of general international law did not arise. Article 38 was important because it reflected the solution already adopted by the Vienna Convention in the case of treaties concluded between States, and he proposed that the article be referred to the Drafting Committee.

43. The CHAIRMAN, speaking as a member of the Commission, said he agreed that the question of the method of establishment of rules of customary law for international organizations was extremely interesting and important, but, as had already been said, it had not been found necessary to set out in the Vienna Convention the method by which customary rules of international law were established. Admittedly, something close to a description of that method was to be found in article 53 of the Convention, but it was only part of the definition of *ius cogens*.

44. Consequently, he felt that it was not incumbent on the Commission to set out, for the purposes of the present draft articles, the process by which rules of customary law were established for international organizations. What

the Commission was saying in article 38 was that such of those rules as existed—and it was not admitting that any did exist—would apply. His own view was that such rules did exist, and that among them were those of *pacta sunt servanda* and the prohibition of aggression.

45. Speaking as Chairman, he said that, if he heard no objection, he would take it that the Commission agreed to refer article 38 to the Drafting Committee, thereby concluding its study of the reports submitted by the Special Rapporteur.

It was so agreed.

Organization of work

46. The CHAIRMAN suggested that, in view of the stage the Commission had reached in its study of the question of treaties concluded between States and international organizations or between two or more international organizations and of the fact that the Drafting Committee, despite having made considerable progress in that field, was not yet ready to make its report, the meeting of the Commission scheduled for the following day should be replaced by a meeting of the Drafting Committee.

It was so agreed.

47. The CHAIRMAN said that the Special Rapporteur for the question of succession of States in respect of matters other than treaties would be available on 20 and 21 June and that the Commission would therefore devote its meeting on those days to the continued study of that topic.

The meeting rose at 12.15 p.m.

1443rd MEETING

Monday, 20 June 1977, at 3.05 p.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Succession of States in respect of matters other than treaties (*continued*)* (A/CN.4/301 and Add.1)

[Item 3 of the agenda]

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

NEW ARTICLE (Newly independent States)

1. The CHAIRMAN invited the Special Rapporteur

¹¹ *I.C.J. Reports*, p. 266.

* Resumed from the 1428th meeting.

to introduce Chapter V of his ninth report (Succession to debts in the case of newly independent States) (A/CN.4/301 and Add.1), as well as his new article to replace articles F, G and H, which read:

Newly independent States

When the successor State is a newly independent State:

1. The debts of the predecessor State to the dependent territory are payable to the newly independent State.

2. The newly independent State shall not assume debts contracted on its behalf or for its account by the predecessor State, unless it is established that the corresponding expenditures actually benefited the formerly dependent territory.

3. In this case, the debts in question shall pass to the newly independent State in an equitable proportion, taking into account the relation between those debts and the property, rights and interests passing to the newly independent State.

4. The provisions of paragraphs 1 and 2 above shall also apply to cases in which the newly independent State is formed from two or more dependent territories, or becomes part of the territory of a State other than the State which was responsible for its international relations.

5. The succession of States does not as such affect the guarantee given by the predecessor State for a debt assumed by the formerly dependent territory.

6. Agreements concluded between the predecessor State and the newly independent State to determine succession to the debts in question, otherwise than by the application of paragraphs 2 and 3 above, shall not have the effect of gravely compromising the economy of the newly independent State or retarding its progress, of infringing the right of its people to dispose of their own means of subsistence, or of limiting their right to self-determination and to dispose freely of their natural resources.

2. Mr. BEDJAoui (Special Rapporteur) said that the new article which he proposed concerned the fate of State debts in the event of State succession involving a newly independent State, in other words, in the event of succession resulting from decolonization.

3. It was first necessary to clarify what was meant by "State debts" in that kind of succession. Prior to attaining independence, a dependent territory was not a State or at any rate was not yet regarded as such. Consequently, it might be expected that the debts which concerned such a territory were mainly its own debts, so-called localized debts. It was necessary to refer to the predecessor State, which in such cases was the administering Power, to ascertain whether the debts it had assumed had been incurred for the needs of the dependent territory or for those of the metropolitan country. In the former case, a number of difficulties generally arose and it was often hard to decide whether the debts belonged to the predecessor State or to the dependent territory. That situation was explained in the section of his ninth report relating to the example of Cuba (A/CN.4/301 and Add.1, paragraph 290).

4. The debt problem which had to be considered for purposes of State succession was complicated for a variety of reasons.

5. In the first place, the dependent territory usually enjoyed a certain financial autonomy, which suggested that it could itself contract loans. The extent of that autonomy, however, and the legal restraints to which it

was subject, varied considerably. The autonomy of the will of a dependent territory was not so extensive that the territory's debts could be considered as having been contracted of its own free will. Judicially, the intervention of the political organs of the administering Power could take many forms, including particularly parliamentary authorization.

6. Moreover, under colonial law, executive organs of the dependent territory were regarded as acting on its behalf and within the context of its financial autonomy, whereas in fact they represented the metropolitan Power. Consequently, the question arose whether the debts assumed were debts of the dependent territory or of the predecessor State.

7. Lastly, there was the problem of the status of the dependent territory prior to independence. Sometimes, the political, legal or territorial affiliation of the dependent territory to the metropolitan country had been carried very far, as in the case of the French overseas territories. On the other hand, in a protectorate, the representative of the metropolitan Power was regarded as the minister of foreign affairs of the protectorate. As a consequence, the financial autonomy of the protectorate appeared to be far greater.

8. In many cases, it had been difficult to distinguish between localized debts proper to a dependent territory and State debts assumed by the administering Power. In the case of Cuba, in 1898, it had been necessary to decide whether debts were debts of the colony or of the metropolitan country, or even debts of the metropolitan country contracted for the benefit of the colony. In the case of Madagascar, certain debts had been made subject to a legal régime involving the intervention of the French Parliament, with the result that those debts had been regarded as proper to France. In the case of the Belgian Congo, a distinction had been made between external debt guaranteed or assigned by Belgium and external debt not guaranteed by Belgium.

9. State practice thus showed how difficult it was to make a distinction between the debts of a dependent territory and those of the administering Power. On the one hand, there were the debts contracted by the administering Power through its own central organs, on behalf and for the account of the dependent territory, and, on the other hand, the debts proper to the dependent territory, contracted by a local organ of the territory. Between those two extremes, however, there ranged many forms of intervention by the administering Power. A debt might be contracted by virtue of the parliamentary authorization of the metropolitan country, in which case the dependent territory should not be regarded as the debtor. The same applied when the debt was assumed by the dependent territory but with the guarantee of the administering Power. Thus, where a dependent territory contracted a loan with IBRD, the administering Power, which was bound by a guarantee agreement, was regarded as a principal debtor and not merely as a surety.

10. In short, it was rare for a debt to be contracted by a dependent territory. Even if the decision-making process originated in a dependent territory, it culminated only within the framework of the laws and regulations of the central Government of the administering Power. That was

why he suggested that the question of the guarantee should be dealt with in the article relating to newly independent States, since the guarantee was one aspect of intervention by the administering Power and could be taken with other forms of intervention in the debt-creation process. By the same token, the guarantee was one of the factors which rendered the debt chargeable to the administering Power. Furthermore, the guarantee of the administering Power actually became of importance to the creditor only after the dependent territory had attained independence. Since that was the point at which it was of maximum value to creditors, it must not be allowed to disappear.

11. With regard to colonial debts, in accordance with practice, both of colonization and decolonization, such debts included both State debts contracted by the administering Power on behalf and for the account of the colony, as well as debts of the colony contracted with the guarantee, parliamentary intervention or executive authorization of the metropolitan country. Incidentally, in the case of colonization, it was the principle of non-transferability of debts that had generally prevailed, as was clear from his report.¹ Where a colonial successor State assumed certain debts, it did so voluntarily and as an act of grace.

12. He had given a number of earlier examples of decolonization practice in his ninth report. What was particularly striking was the refusal, as a matter of principle, to assume the debts of the colonial Power, as when the United States and Brazil had become independent. It was true that the Spanish colonies of Latin America had assumed some of the administering Power's debts when they became independent but that had been a voluntary unilateral act, the price of friendship and peace with Spain. Subsequently, however, when Cuba achieved its independence, a limit had been set to the extent of voluntary acceptance, and thus the principle of refusal to assume the debts of the colonial Power had been strengthened.

13. Contemporary decolonization practice was not uniform. He had given several examples in his report.² A noteworthy solution was that applied to the problem of the external debt of the Belgian Congo. There, a distinction had been made between, on the one hand, the debt contracted by Belgium with international financial institutions, expressed in foreign currency, and the debt assigned by Belgium, namely, loans contracted by Belgium, the proceeds of which had been applied for the benefit of the Belgian Congo—Belgium had been made responsible for both categories of debt—and, on the other hand, the external debt not guaranteed by Belgium, which arose out of loans contracted by the administering Power in Belgium and elsewhere on behalf of the Congo. Belgium and the Congo had both refused to assume that debt and a joint fund had therefore had to be established, as an international public agency, to handle the debt. Another interesting case was that of Algeria, which had been the subject of a package deal in the Evian Agreements of 1962.³ Algeria had agreed to assume the financial

obligations of France in Algeria in return for certain undertakings by France in regard to independent Algeria. The dispute that had arisen out of that arrangement had been settled by another package deal in 1966.

14. As for the financial burden of newly independent States, he would again refer the Commission to his ninth report,⁴ noting merely that there was no point in preparing a rule which newly independent States would not be in a position to apply by reason of that burden.

15. Of the possible solutions, the simplest would be that adopted by the Allies at the end of the First World War, when the Treaty of Versailles rejected the idea that the colonies of the German Empire should succeed to its debts. Among the reasons taken into account in arriving at that decision was the budgetary weakness of the colonies—a factor traditionally taken into consideration. In addition to the question of financial incapacity, there was the fact that the indigenous population had derived no benefit from investments by Germany, most of which had been made in the exclusive interest of the metropolitan country. That led to the theory of the benefit derived by the colony from such debts in the light of all the special circumstances. That was where the concept of equity came into play in the form of three principles: the proceeds of the debt must have benefited the dependent territory; the newly independent State must have the capacity to pay; and account must be taken of the fact that the formerly colonized peoples were now claiming reparation and compensation for the exploitation they had suffered. The right to development of newly independent States and the duty of the developed countries, including the administering Powers, to assist them were now in fact recognized. The transfer of debts to the successor State would thus be incompatible with those concepts.

16. The first of the three principles of equity could give rise to a lengthy discussion on the question of the benefit that a dependent territory could derive from a debt. It was possible to imagine the case of a colonial loan contracted by France to develop vineyards in Algeria. Since, following Algeria's independence, the vines had had to be uprooted—wine production had exceeded the capacity of the domestic market and it was not easy to find outlets abroad—a debt of that kind could certainly not be regarded as having benefited the population of the former colonial territory. It was quite possible that infrastructures which had been established in a dependent territory with the help of loans and which survived after it had attained independence had been of more significant benefit to the colonizers than to the colonized territory. In some cases, an agricultural or industrial complex had been created for the purpose of binding the economy of the dependent territory to that of the metropolitan country. Loans contracted in such circumstances totally vitiated the idea of benefit. Some industrial or agricultural undertakings had proved extremely difficult to reconvert after a territory had attained independence and had proved more of a burden than a benefit. That was why one should have recourse to principles of equity to clarify the concept of benefit.

¹ See A/CN.4/301 and Add.1, paras. 249 *et seq.*

² *Ibid.*, paras. 295 *et seq.*

³ *Ibid.*, para. 329.

⁴ *Ibid.*, paras. 336-353.

17. State practice and case law both took account in general terms of the capacity to pay, and it was therefore all the more imperative to take account of that factor in the case of newly independent States.

18. The right to reparation and compensation, which the former colonized countries claimed, had been demanded at the First Conference of Heads of State or Government of Non-Aligned Countries, held at Belgrade in 1961, and the demand had been repeated at all subsequent conferences up to the last one held at Colombo in 1976. At its sixth special session, held in 1974, the General Assembly had recognized the right of colonized and exploited countries to restitution and compensation for damages to and pillaging of their resources.⁵ Further, remedying of injustices brought about by force, which deprived a nation of the natural means necessary for its normal development, was one of the 15 fundamental principles which, according to the Charter of Economic Rights and Duties of States,⁶ should govern economic and political relations among States. Article 16 of that Charter provided that States practising domination were responsible to the dependent territories for the restitution of all their natural and other resources and full compensation for the exploitation and depletion of, and damages to, those resources, and that it was the duty of all States to extend assistance to those dependent territories and their populations.

19. With regard to the new article he proposed, paragraph 1 was based on draft article 13.⁷ It was important, in cases of succession, that debts of the predecessor State to the dependent territory, contracted before the attainment of independence, should continue to be payable to the latter. Paragraphs 2 and 3, which were to be read together, embodied the principle of the non-transferability of debts contracted by the predecessor State on behalf and for the account of the dependent territory, unless it was established that the latter had benefited from their proceeds. Paragraph 4 related to the special cases of succession where a newly independent State was formed from two or more dependent territories or became part of the territory of a State other than the State which had been responsible for its international relations; that paragraph was also based on draft article 13. Paragraph 5 dealt with the case of the guarantee given by the administering Power for a debt assumed by the dependent territory. Lastly, paragraph 6 dealt with the capacity to pay of newly independent States, bearing in mind their existing debt situation; that provision, too, followed draft article 13.

20. Mr. DADZIE congratulated the Special Rapporteur on his lucid exposition of chapter V of his ninth report in which he had given the Commission the benefit not only of his theoretical studies but also of his practical experience during his country's struggle for independence.

21. He himself knew what harm colonialism had caused his own country, but he had nevertheless been alarmed by the facts and figures which the Special Rapporteur had given in section F of the chapter in question, for they

showed how common it was for the havoc created in developing countries by their external debts to persist even long after their accession to independence. There was no need to emphasize how intolerable newly independent States, which started their lives with the disadvantage of having been born of a colonial situation and after a long, and sometimes bloody, struggle for independence, found the burden of their inherited debts. The existence of such debts constituted what was termed "neo-colonialism" and represented a diabolical form of economic strangulation of newly independent nations. The Special Rapporteur had been right in saying, in paragraph 365 of his report, that colonialism was:

an "act of exploitation" justifying newly independent States not only in repudiating all the debts of the predecessor State but even in claiming compensation from the administering Power for such exploitation,

and he fully agreed with the conclusion which the Special Rapporteur had drawn in the next paragraph that colonialism should constitute an exception to the theory that the successor State was liable for localized State debts. In a colonial situation, the will of the people of the dependent territory was always subjugated to that of the metropolitan Power; justice therefore demanded that it be in principle that Power which assumed—from the moment of independence—the debts relating to the territory.

22. Subject to drafting comments, he agreed entirely with the text of the new article proposed by the Special Rapporteur, which he considered could be referred to the Drafting Committee forthwith. However, the construction in Mozambique of the Cabora Bassa dam and other elements of infrastructure had shown that, in its attempts to strengthen its own position, a metropolitan Power could persist in creating debts in relation to a dependent territory, even when the struggle for the latter's freedom was already under way. It would be unjust to require a newly independent State to succeed to such debts, and he therefore proposed the addition at the end of paragraph 2 of the article of the words "and were also incurred at its request".

23. Moreover, the Special Rapporteur had shown, by examples such as that of the vineyards planted in Algeria, that projects undertaken by a metropolitan Power in a dependent territory were not always of benefit to that territory once it became independent. Indeed, the newly independent State could find itself the owner of a "white elephant", the upkeep of which drained its budget. Consequently, he hoped that the Drafting Committee would also consider the addition to the draft article of a provision to the effect that maintenance charges in respect of such developments should be borne by the metropolitan Power. Finally, some means must be found of ensuring that any agreements of the type referred to in paragraph 6 which might be concluded—and his own feeling was that none should be—would not prove beneficial to the predecessor State.

24. Mr. FRANCIS said that it was clear, after reading the information on the financial burden of former colonial territories that had already attained nationhood, which the Special Rapporteur had given in chapter V, section F, of his report, that, although it was not primarily

⁵ General Assembly resolution 3201 (S-VI), para. 4 (f).

⁶ General Assembly resolution 3281 (XXIX).

⁷ See 1416th meeting, foot-note 2.

responsible for determining the circumstances in which such territories should attain independence, the Commission must ensure, as far as it was able, that those which had yet to gain their freedom were given a better start. It was true that, provided their succession to the debts of the predecessor State was governed by reasonable rules, some of the territories still under colonial domination would have a chance of becoming viable independent entities, owing to their geographical location or natural resources. Others, however, would inevitably join the category of "mini-States", and the Commission would be failing them if it did not lay down ground rules for their accession to independence, free from the type of burdens which had weighed on others. Consequently, he agreed entirely with the proposals made by the Special Rapporteur in his consolidated draft article.

25. However, it might be that even the passage to the newly independent State, in accordance with paragraph 3 of that article, of debts which, as stated in paragraph 2, had "actually benefited the formerly dependent territory" would not constitute an equitable solution. Account must in fact also be taken of the newly independent State's capacity to pay. The Special Rapporteur seemed to be of the same opinion for, while he had stated in the second sentence of paragraph 383 of his report that "the ... problem is first to decide whether the newly independent State must be made legally responsible for ... a debt before deciding whether it can assume it financially", he had added that "... the two questions must be linked if practical and just solutions are to be found to situations in which prevention is better than cure". Furthermore, he had suggested, in paragraph 384, that "in the case of newly independent States, one might probably go so far as to affirm the existence of an almost undeniable assumption of incapacity to pay", in view of their extremely low *per capita* income. None the less, the article proposed by the Special Rapporteur contained only an oblique reference in paragraph 6 to the financial capacity of the newly independent State. He therefore considered that the criteria for the determination of the "equitable proportion" mentioned in paragraph 3 of the article should be supplemented by an explicit reference in the same paragraph to the capacity of the newly independent State to pay.

26. Mr. QUENTIN-BAXTER said that, although the case of newly independent States presented certain special peculiarities, it also exhibited some important characteristics which were common to the cases of the separation of part or parts of the territory of a State and the dissolution of a State. Consequently, the position which the Commission decided to adopt on the article under consideration would have an immensely important bearing on the whole set of provisions relating to State debts and on the draft articles as a whole.

27. That being the case, he considered it permissible to address himself to the question whether there existed a rule of international law relating to succession to State debts. In raising that basic question, the Special Rapporteur had made reference to the varied and sometimes conflicting opinions of many major authorities. It was true that the provisions which the Commission was envisaging and those which had been tentatively adopted in the case

of succession to State property did have the character of residual rules. The Commission had endeavoured to promote agreement between the parties concerned rather than encourage them to rely on the rules laid down in the draft articles in default of an agreement. If, however, the rules relating to succession of States were eventually adopted at an international conference and subscribed to by States, they would have a considerable normative effect. Thereafter, sovereign States which negotiated concerning the incidents of a succession of States would do so in the knowledge that there was a point of reference. Moreover, the very fact of adopting positive provisions of the kind contemplated would involve taking a position on the basic question raised by the Special Rapporteur and asserting that there were indeed rules of international law relating to succession to State debts. Thus, the course of action upon which the Commission embarked at the present juncture would be a matter of the greatest moment. The rules which it adopted were unlikely to be accepted by the international community unless it could show that they were of unquestionable use in assuring the stability of relationships between States.

28. Although the task ahead was a difficult one, the Commission should nevertheless take heart from the measure of success it had already achieved in evolving rules concerning succession to State property, which displayed a certain degree of parallelism with those pertaining to succession to debts. It was unlikely that general agreement could be obtained for a set of articles which seemingly confirmed and reinforced the rights of States in regard to succession to property if those articles did not also take account of obligations which, in some cases, were correlative to property rights. Moreover, it was a basic proposition that, more often than not, new States needed capital investment, and the Commission must avoid formulating rules which would discourage a metropolitan Power or international organizations of a financial character from making the necessary loans. Both those factors favoured the adoption of a positive set of rules dealing with succession to State debts.

29. He would further maintain that it was possible to draw more positive inferences from the admittedly conflicting State practice in the matter of succession to debts than had been done by the Special Rapporteur. It was of course true that, in the great majority of cases in which succession to debt had been accepted, there had been an element of an act of grace or a general settlement of which the debt agreement formed only one part. It might therefore be argued that such settlements, being non-principled, afforded little basis for the formulation of general rules. Clearly, the rules to be devised by the Commission would contain an element of progressive development which might, in the present instance, outweigh that of codification. It did, however, seem to him that, even if acceptance of succession to debts involved an act of grace or formed part of a non-principled settlement, such settlements, as in the case of the law relating to State responsibility towards aliens, had considerable value as precedents. To draw a parallel from domestic law, the parties to a civil dispute might agree on a settlement without prejudice to their appraisal of the general legal principles involved. However, the very fact that

such settlements existed provided the best possible evidence of a sentiment that the party offering the settlement had a legal duty to fulfil, even though in a particular case that duty might be hard to determine precisely.

30. In the case of newly independent States and other kinds of succession, much of the practice cited by the Special Rapporteur revealed indications of the recognition of a rule, imperfect though it might be, concerning succession to State debts. Naturally, no rules that the Commission might devise could provide automatic solutions to the very complex and specific problems raised by State succession. However, in that field the Commission was following the modern trend, witnessed in other areas of international law, particularly in the practice of the United Nations, of setting legal standards that might provide an element of objectivity and a point of reference which would facilitate the attainment of solutions in complex individual cases.

31. Most of the State practice in the matter related to debts contracted at the level of internal law at a time when the international community had been formed by a limited number of States which, at any rate among themselves, had applied strict rules of responsibility towards aliens. The diffidence of those States in accepting obligations by succession had had something to do with the rigour of the rules relating to State responsibility once those obligations had been accepted. The modern tendency was to view the question of responsibility towards aliens in the light of various other cardinal considerations affecting the sovereignty and viability of States. It was quite proper that the draft articles under consideration, as well as the draft convention on succession of States in respect of treaties, should be governed and inspired by the United Nations doctrine of self-determination. In the case of the draft articles concerning the passing of State property and of the new article, account had also, quite rightly, been taken of the principle of sovereignty over natural resources.

32. As to the text of the proposed new article, paragraph 4 was a natural and proper extension of the provisions relating to succession to State property, applying as it did the rules relating to an ordinary case of self-determination to the case in which two or more dependent territories joined to form a newly independent State.

33. He did, however, have some doubts regarding paragraphs 1 and 5. In neither case did he disagree with the sentiment expressed, but he wondered whether provisions of that kind had a place in the draft articles. The case envisaged in paragraph 1 could in practice take several different forms. The dependent territory might be a separate entity under the internal law of the metropolitan State and might therefore have the capacity, for instance, to purchase bonds issued by that State. To his mind, there could not be the slightest doubt that such bonds, which represented an investment by the dependent territory in its own name and in its own right, should continue to belong to it after the occurrence of the succession of States. In the case of the draft articles on property, the Commission had not thought it necessary to deal with property acquired in the name of the dependent territory prior to the succession of States. It would be unthinkable

that there could be any change of ownership in such circumstances. If any doubt remained that the debts of the predecessor State to the dependent territory were payable to the newly independent State, that doubt might best be dispelled in the commentary rather than in a provision which, in his view, was somewhat out of place in the articles relating to succession to debt,

34. With regard to paragraph 5, it was very important that the question of guarantees should not be treated lightly and the examples of the practice of IBRD cited by the Special Rapporteur were extremely apposite. It might well be a common practice for a creditor to request and to receive from a metropolitan State a guarantee in respect of money advanced primarily or even exclusively for use in a dependent territory of that State. If, however, the Commission was to deal specifically with the question of guarantees, it would be faced with the task of formulating another set of somewhat difficult definitions. A guarantee could involve anything from a collateral obligation, perhaps based more on good faith than on a direct property right, to the assumption of the role of main debtor. If, as the World Bank tended to demand, a predecessor State assumed that role, the Commission would not add to the clarity of the draft articles by suggesting that that State's obligation was in some way affected by the fact that the obligation was in the nature of a guarantee.

35. The rules which the Commission devised regarding the transfer of debts must be self-explanatory. To the extent that, following the act of self-determination, the newly independent State and the predecessor State chose by agreement to vary the arrangements relating to debt, they would, for their own security, need to have the agreement of the creditor to their action. Independently of the draft articles, however, the effect of the draft convention on succession of States in respect of treaties would continue to obtain. There was no reason to suppose that a bilateral treaty between the metropolitan Power and a financial institution would be terminated simply because a succession of States occurred. Any guarantee derived its force from the provisions of the draft convention, which, in the case in point, reflected a rule of customary international law. Thus, it did not seem to him that the very important principle embodied in paragraph 5 gained from being stated in its present context. There again, if any doubt was thought to exist on that point, it could most appropriately be laid to rest in the commentary to the draft articles.

36. In his view, paragraphs 2, 3 and 6 constituted the very heart of the new article envisaged and contained the very essence of the doctrines relating to succession to debt, which the Commission must consider. There could be no doubt that the relation between the debts contracted on behalf of the newly independent State by the predecessor State and the property rights and interests passing to the newly independent State must occupy a prominent place in the formulation finally devised by the Commission. Where property was burdened with an obligation which related directly to the value of the property and to the activity of a State in the territory which formed the subject of the succession of States, there must be at least a *prima facie* presumption that the property

was accompanied by the obligations that were incidental to it.

37. At the same time, he acknowledged the points made by the Special Rapporteur and Mr. Dadzie concerning the question of actual benefit. The Commission should endeavour to formulate a text which would accurately reflect the various considerations involved. It might not even be that a predecessor State acted in an underhand manner or in a way not calculated to advance the welfare of the dependent territory concerned. It might simply be, for instance, that the metropolitan State had adopted an administrative policy not in keeping with the wealth and capacities of the dependent territory or had governed on a scale which was not commensurate with the territory's internal resources. There was no reason why a financial burden assumed in such circumstances should simply be foisted upon a newly independent State. In that case, the question of the actual benefit to the formerly dependent territory of the corresponding expenditures incurred was a matter which should certainly be taken into consideration.

38. As to the concepts embodied in paragraph 6, he had already referred to the question of self-determination and of sovereignty over natural resources. The Special Rapporteur had also spoken about the concept of the capacity of the newly independent State to pay. That was a point which was entirely relevant to succession in general, and not merely to the particular case under consideration. When part of a State separated or a State dissolved into its component parts, there was usually, at the root of the process, a feeling among some of its inhabitants that they were not being treated on an equal footing with the inhabitants of other parts of that State. In such circumstances, questions would invariably arise concerning the extent of the debts owed by the newly independent State.

39. In that regard, he would not place the principle of capacity to pay on a slightly different footing to the factors of the policy of the metropolitan Power and sovereignty over natural resources by relating it only to the conclusion of agreements between the predecessor State and a newly independent State, but would rather suggest that capacity to pay, no less than the actual benefits received or the relationship between property rights and the obligations incidental to them, should be a primary principle in the rules to be adopted by the Commission.

The meeting rose at 6 p.m.

1444th MEETING

Tuesday, 21 June 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/301 and Add.1, A/CN.4/L.254)

[Item 3 of the agenda]

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

NEW ARTICLE (Newly independent States)¹ (*continued*)

1. Mr. CALLE Y CALLE said that, like the Special Rapporteur, he thought that decolonization was not yet a closed book but was still very much of a reality. It emerged clearly from the cases of both early and more recent decolonization which the Special Rapporteur had cited that the basic principle to be applied to debts incurred by a former metropolitan Power was the clean-slate principle. There was no reason for the newly independent State to assume debts contracted on its behalf or for its account by the predecessor State, unless the financing thus obtained had actually benefited the formerly dependent territory. Moreover, certain categories of debts, such as war debts and subjugation debts, were to be repudiated out of hand. The Special Rapporteur had referred, in paragraph 157 of his ninth report (A/CN.4/301 and Add.1), to a statement made in October 1921 by Chicherin, the People's Commissar for Foreign Affairs of Soviet Russia, that no people was obligated to pay the price of the chains it had been forced to bear for centuries. The Special Rapporteur had rightly noted that, although that statement had been made in the special context of the repudiation of "régime debts" following a succession of Governments, it was much more pertinent in the case of the people of one country held in subjugation by the Government of another country. Indeed, it constituted the philosophical and moral basis on which the Commission should approach the question under consideration.

2. The Special Rapporteur had referred in some detail to the case of the former Spanish colonies in Latin America, including the case of Bolivia, which, doubtless in order to conserve the friendship of the metropolitan Power or to obtain credits, had assumed debts of the predecessor State to a surprising extent. A far more typical case, however, was that of Peru, which, on attaining independence, had refused to assume debts contracted for the benefit of the metropolitan Power and had gone to great lengths, including the repulse of a Spanish naval force dispatched to the Pacific in the 1860s, to uphold that principle.

3. Succession to State debts was perhaps the area in which the principle of voluntarism most clearly applied. A party requesting a loan from which it stood to benefit financially manifestly had the will to assume the status of debtor and the obligations accompanying that status. On the other hand, dependent territories, even those enjoying a measure of political and perhaps even financial autonomy, might not always exercise their will. In many cases, as the Special Rapporteur had observed, the effective decision to contract the loan might have been

¹ For text, see 1443rd meeting, para. 1.

taken by the metropolitan Power and not by an autonomous or semi-autonomous organ of the colony.

4. The new text relating to newly independent States proposed by the Special Rapporteur represented a synthesis of the former articles F, G and H, and it was interesting to note that the former article F (A/CN.4/301 and Add.1, para. 364) had been entitled "Non-transferability of debts contracted by the administering Power on behalf and for the account of the dependent territory". That title brought out the basic rule to be applied, namely, that debts were non-transferable unless it was established that the financing thus obtained actually benefited the formerly dependent territory. The concept of "actual benefit" was a complex one; in many cases, investments made in a dependent territory were intended not so much to benefit the people of the territory as to maintain or reinforce the situation of domination. Moreover, such benefits as might accrue to the colony or territory might often be dissipated during the process of decolonization.

5. With regard to paragraph 2 of the new text, it might be more appropriate to refer not to "the corresponding expenditures", a term which might be understood to encompass the investments made in the process of establishing the debt or other collateral expenditures, but to "the application of the debt" or "the allocation of the proceeds of the debt". Such a formulation would bring out more clearly what he believed to be the underlying concept of the provision, namely, that the proceeds of the debt should have been applied to the formerly dependent territory and should therefore have benefited it.

6. Paragraph 3 referred to the need to take account of the relation between the debts passing to the newly independent State and the property, rights and interests passing to that State. He presumed it was intended to refer to the relation between particular debts and the property, rights and interests resulting from those debts rather than the relation between those debts and the property, rights or interests of all kinds passing to the newly independent State. The latter interpretation would mean that the provision would be in contradiction with article 8,² which stated that the passing of State property from the predecessor State to the successor State should take place without compensation unless otherwise agreed or decided.

7. Paragraph 4 of the proposed text merely stated that the provisions of paragraphs 1 and 2 should also apply to cases in which the newly independent State was formed from two or more dependent territories or became part of the territory of a pre-existing State. It thus covered the fairly common phenomenon of annexation.

8. He had no difficulty in accepting paragraph 5, which corresponded to former article G. There was no doubt that, in many cases, a predecessor State which furnished a guarantee acted not merely as surety but as principal debtor. It was appropriate that the guarantees given by a former metropolitan Power in respect of a debt assumed by a formerly dependent territory should be maintained, unless the beneficiary of the guarantee agreed to a change of guarantor.

9. He fully subscribed to the restrictions to which paragraph 6 subjected the conclusion of agreements, namely, the capacity of the newly independent State to pay and its right to dispose of its own means of subsistence, to exercise its right to self-determination, and to dispose freely of its natural resources. However, for the purpose of ensuring consistency with article 13, paragraph 6, and with the provisions of the International Covenant on Economic, Social and Cultural Rights,³ it might be appropriate to insert the words "wealth and" before "natural resources".

10. In conclusion, he said he subscribed to the principle that reparation was payable to peoples who had been subjected to foreign domination. That principle, which was upheld by the non-aligned countries, reflected the ideals of international justice and morality.

11. Mr. SETTE CÂMARA said he agreed with the Special Rapporteur that the Commission should not fail to make specific provision for newly independent States in the part of the draft articles relating to succession to State debts. Provisions relating to such States had already been incorporated in article 13 and in the draft articles on succession of States in respect of treaties.⁴ It was argued by some that, since the decolonization process was in its final stages and there would soon be no more territories acceding to independence, the case of newly independent States was of limited interest. However, the situation of such States could not simply be ignored. It was of special relevance in the case of succession in respect of matters other than treaties, where problems relating to the transfer of property might persist for many years after the attainment of independence. The Special Rapporteur had once cited the case of Chad, which had still been dealing with such problems 15 years after it had become an independent State. Moreover, there were still 25 non-self-governing territories being dealt with by the Special Committee of 24.⁵ While it was true that the area and population of most of those territories were small, the Commission could not simply brush the problem under the carpet.

12. Paragraphs 249 *et seq.* of the Special Rapporteur's report dealt with a matter of purely historical interest since, although the process of decolonization had not been completed, the process of colonization was a thing of the past. In regard to decolonization, the Special Rapporteur had given an erudite and meticulous account of early cases, mainly involving countries in the Americas. Most of those cases revealed a refusal to assume debts contracted by the metropolitan Power. He had been particularly interested by the passage relating to Brazil, which had declined to assume any part of the Portuguese State debt, even though it had agreed to pay 2 million pounds sterling as part of a package deal designed to liquidate reciprocal claims between itself and Portugal. The contemporary cases of decolonization cited by the Special Rapporteur were somewhat more complicated

³ General Assembly resolution 2200 A (XXI).

⁴ See 1416th meeting, foot-note 1.

⁵ Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

² See 1416th meeting, foot-note 2.

and often involved contradictory solutions. The Philippines was one of the rare cases in which debts of the predecessor State had been fully accepted. More often than not, however, formerly dependent territories, such as Indonesia, had initially accepted such debts but had subsequently reviewed and repudiated them.

13. He particularly appreciated section F of chapter V, relating to the financial burden of newly independent States. The Special Rapporteur had provided an up-to-date picture of the appalling situation of developing countries, which had been saddled with a growing burden of external debt. Between 1969 and 1973, that debt had more than doubled to a figure of some \$119 billion. Although it might be argued that there was little that the Commission could or should do about economic problems, the Special Rapporteur's excursus on that point provided an extremely useful and eloquent background to the provisions of paragraph 6 of the new text proposed to the Commission.

14. In general, he subscribed to the wording and underlying principles of that text, which incorporated the substance of former articles F, G and H. He had no dispute with paragraph 1. Paragraph 2 set forth the criterion of utility and had the virtue of shifting the burden of proof to the predecessor State in establishing that expenditures resulting from a debt had actually benefited the formerly dependent territory. It might be appropriate to include a reference in that paragraph to the application of the debt, as proposed by Mr. Calle y Calle.

15. In paragraph 3, the Special Rapporteur had introduced a new criterion to be applied to the transfer of debts. He wondered whether the concept of an equitable relation between the debts and the property, rights and interests passing to the newly independent State would always be in the interest of such States. Previously, the criteria governing the assumption of debts had been subject to very rigid definitions regarding such matters as the categories of debts which were transferable. If it so happened that, in a particular case of succession, a considerable amount of property, rights and interests was transferred, he did not think that that would give the predecessor State any special grounds for claiming that a corresponding amount of debts should likewise pass to the newly independent State. Non-transferable debts, such as odious debts and subjugation debts, might be involved. He would welcome some clarification from the Special Rapporteur on that point.

16. He also had some doubts as to the desirability of including paragraph 4. Although, of course, the provisions of that paragraph were modelled on those of article 13, paragraphs 4 and 5, there had, in the latter case, been a cogent reason for giving special treatment to cases in which the newly independent State was formed from two or more dependent territories or became part of the territory of a State other than the State responsible for its international relations. He was not sure that it was altogether necessary to make similar provision in the present instance. Moreover, the inclusion in that paragraph of a specific reference to paragraphs 1 and 2 would, through the application of the rule *inclusio unius est exclusio alterius*, lead to the conclusion that other paragraphs of the article did not apply to the cases in question.

In his view, such a conclusion would be erroneous. For instance, the provisions of paragraphs 5 and 6 were applicable to succession of any kind.

17. He had no doubt concerning the appropriateness of the rule laid down in paragraph 5. A guarantee could not be affected by the occurrence of a succession of States and the predecessor State remained the major obligor, as had been repeatedly affirmed in the jurisprudence of the World Bank.

18. He regarded paragraph 6 as the key provision of the proposed new article and fully subscribed to its substance. However, he tended to agree with Mr. Dadzie that it would be preferable to use a broader term than "agreements", an expression which restricted the applicability of the paragraph. Moreover, the term "agreement" might be held to cover devolution agreements, which were more in the nature of declarations of intent than of binding treaties.

19. Mr. USHAKOV proposed the following text for the article on newly independent States (A/CN.4/L.254):

"No State debt of the predecessor State shall pass to the newly independent State unless an agreement between the newly independent State and the predecessor State provides otherwise."

20. Mr. TABIBI said that, in his ninth report, the Special Rapporteur had referred to a wealth of precedents and views concerning the very important question of the transferability of various categories of debt. As the Special Rapporteur had rightly observed in paragraph 181 of that report, writers did not spell out their position on each category of debt as clearly as might be wished, and it was apparent that opinion was much divided. However, debts of any type, whether subjugation debts, administrative debts or even debts used for the benefit of the people of a formerly dependent territory, were all subject, in modern times, to the cardinal principle of self-determination, a concept which, as was recognized in the International Covenant on Economic, Social and Cultural Rights, must find an economic as well as a political expression if independence was to have any real meaning. Whatever article the Commission adopted on the subject of succession to debts should meet the test of the principle of self-determination.

21. It was natural that a debt of the predecessor State which had been validly contracted and the proceeds of which had been used for the benefit of the formerly dependent territory should pass to the newly independent State. The Commission must endeavour to protect all the parties concerned, including creditors and predecessor States, which might genuinely have assumed financial obligations for the good of the people of a dependent territory. However, a newly independent State could not be bound by a debt which had not been lawfully contracted or by a debt which, although so contracted, had not benefited the people of the formerly dependent territory. Mr. Dadzie had mentioned at the previous meeting one project which bore out that point. There were many other examples of projects which had been undertaken by colonial Powers, not for the benefit of the people of the dependent territory but for their own glorification or comfort or for the purpose of preserving

colonial rule. For instance, the British in India had built many sumptuous palaces, had incurred the expense of moving their administrative capital to Simla during the summer months, when the temperature had been too high for them to bear, although not for the native Indians, and had built up the defences in the north of the country so as to preserve their dominion over it. Similar examples could be found in the colonial practice of France, Belgium, Portugal and Spain. He fully endorsed the view quoted in paragraph 157 of the Special Rapporteur's report that no people was obligated to pay the price of the chains it had been forced to bear for centuries. That view was also relevant to the situation of newly independent States, which, as Mr. Dadzie and Mr. Francis had observed at the previous meeting, should not be required to assume debts whose purpose or effect had been to keep them under bondage.

22. It was entirely appropriate that specific provision should be made for newly independent States in the matter of succession to debts, since they had already been accorded a separate article (article 13) in relation to succession to property, and been made the subject of a separate part of the draft articles on succession of States in respect of treaties.

23. Paragraph 2 of the proposed new text provided protection for the newly independent State, the predecessor State and creditors alike by laying down the general principle that the newly independent State should not assume debts contracted on its behalf or for its account by the predecessor State, but adding that such debts were to be assumed if it was established that the corresponding expenditures had actually benefited the formerly dependent territory. The balance established in that provision should ensure that prospective creditors exercised great care in determining whether or not to extend a loan and in assessing whether it was to be used for the benefit of the people of a dependent territory.

24. The other essential principle laid down in the proposed new article was that succession to debts should be assessed in relation to the capacity of the newly independent State to pay. To impose a crippling burden of debt on such a State would not only jeopardize its prospects of survival but would be prejudicial to the world economy in general and to the interests of its creditors in particular. The question was a vital and topical one at a time when the developing countries were struggling under an external debt burden of some \$200 billion and the question of third-world indebtedness was a crucial issue at the North-South talks in Paris⁶ and at other international conferences. Indeed, paragraph 6 was so important that it might well be made the subject of a separate article.

25. He had no objection in principle to the draft article on newly independent States proposed by Mr. Ushakov⁷ but wished to reflect further on how it might be combined with the new text proposed by the Special Rapporteur.

26. Mr. EL-ERIAN said he agreed with Mr. Sette Câmara that it was entirely appropriate to include in the draft an article on succession to debts in the case of newly

independent States. Special provision had been made for such States during the Commission's consideration of the topic of the most-favoured-nation clause as well as in the draft on succession of States in respect of treaties, and it would therefore be entirely consistent with the methodology applied by the Commission on previous occasions to make similar provision in the present case. Moreover, Mr. Sette Câmara had eloquently refuted the argument that there was no need to make provision for newly independent States on the ground that the era of decolonization was drawing to a close.

27. The new draft article brought out, perhaps even more forcefully than the previous articles, the need to balance contradictory interests and to reconcile considerations relating to international stability with considerations of justice, and provided an excellent solution to that predicament. The principle of *pacta sunt servanda* was, of course, a pillar of the Commission's work. However, the stability of the international community should also be seen in the light of broader considerations. Article 55 of the Charter of the United Nations provided for the promotion of economic and social progress and development with a view to the creation of conditions of stability and well-being which were necessary for peaceful and friendly relations among nations, based on respect for the principle of equal rights and self-determination of peoples. Thus, the founding fathers of the United Nations had viewed peace as an organic concept involving the creation of conditions conducive to the security and stability of the international community.

28. The preparation of an article on newly independent States was not only consistent with the Commission's previous practice but was consonant with recent efforts to bring about the introduction of a new international economic order and to tackle the problems of development in general. The Commission could not but take cognizance of such developments and reflect them in the legal norms which it was endeavouring to elaborate.

29. The question had been raised whether, in the matter of State succession to debts, there existed positive rules of international law which the Commission could codify or whether it would not, rather, be a matter of progressive development in that area. He agreed that a considerable element of progressive development would be involved in the work of the Commission but, in his opinion, the important question was not so much whether there was an existing body of law but what was the best law that could be applied. One concept of positive international law which already existed in the area of succession of States was that, in the event of a succession involving part of a State, the newly independent State thus formed was accountable only for obligations which had been contracted with particular reference to it or which had conferred particular benefits on it. In the case of newly independent States which had formerly been colonies, another element was involved, namely, the fact that in many cases such States had formerly been mandate or trust territories, the administration of which had been committed by the League of Nations or the United Nations to the administering Power acting on behalf of the international community. That consideration was particularly important in examining the balance which

⁶ Conference on International Economic Co-operation.

⁷ See para. 19 above.

had been struck by the Special Rapporteur in paragraph 3 of his text.

30. Paragraph 6 was, in his view, fully in accordance with Article 103 of the Charter, which stipulated that, in the event of a conflict between the obligations of the Members of the United Nations under that instrument and their obligations under any other international agreement, their obligations under the Charter would prevail. The right of a people to dispose of its own means of subsistence and the right to self-determination were principles embodied in the Charter. Such principles were peremptory norms of international law with which States must comply.

31. The new article proposed by Mr. Ushakov appeared clear, but he had not yet had time to study its implications.

32. Mr. SCHWEBEL said that the central point in chapter V of the Special Rapporteur's last report, namely, that the question of the passage of the debts of a predecessor State to a newly independent State should be governed by equitable considerations, was compelling and one with which all members of the Commission could no doubt agree. It was, indeed, a reflection of the central theme of the preceding articles, and it could therefore be asked whether there was a need for a separate article on newly independent States at the present stage. He was not sure that there was, but he could see the force of the reference by Mr. Sette Câmara and Mr. El-Erian to the fact that newly independent States had been given special attention in other codification drafts and in article 13 of the present set of articles. Members of the Commission would also agree that colonialism was not the way to run the world and was not conducive to either human dignity or self or mutual respect. There was assuredly force in the Special Rapporteur's contention that colonialism had lent itself to economic exploitation, which suggested that the subject of colonial debts should be approached with caution. Mr. Tabibi had already said that each debt would have to be examined individually to see if it was just and should be paid.

33. It could not be said, however, that at all times all colonial situations had been or were economically exploitative. The Special Rapporteur himself had in substance allowed that, as Mr. Quentin-Baxter had also pointed out at the 1443rd meeting, the record of international practice with respect to succession to State debts was very mixed—as indeed was the record of colonialism itself. Consequently, it was difficult to say, as a matter of law, that the colonial relationship was necessarily economically exploitative and that, as had been suggested during the Commission's debate, debts should therefore be repudiated by the successor State or borne by the predecessor State. It was also difficult to maintain that the general rule should be that reparation should be made for relationships under colonialism or indeed that, because of the existence of colonialism, the developed countries had a duty to aid the developing nations. The pattern of historical fact was far subtler than those asseverations suggested.

34. While the United States had never been a colonial power on a large scale, and he neither had the personal experience of colonialism of some members of the Com-

mission nor was a student of colonialism, it seemed to him from the breadth of the Special Rapporteur's report and the tenor of the debate that it could be of help to refer to a somewhat different view of the situation. He had in mind in that respect an article by a current United States Under-Secretary of State for Economic Affairs, which had appeared in a recent issue of the periodical *Foreign Policy*.⁸

35. The author of that article approached the questions of the allegedly exploitative nature of colonialism and of the possible need for reparation, from the viewpoint of an economist, by asking whether the profits which had been made from economic relationships during colonial rule had been normal or abnormal. His conclusion was that:

It is quite possible, ...—indeed, in many cases quite likely—that close contact with former colonial powers, and more generally economic contact with Western countries, has left the former colonies and other dependencies economically better off than they would otherwise be. Existing poverty in Africa, Asia, and Latin America should not blind us to the all but universal poverty that existed in these areas before the European powers established themselves overseas, which in much of Africa was less than a century ago. The introduction of modern legal and commercial systems, of capital, and of modern technology has helped a number of these countries to rise above the grinding poverty of the past. That much poverty remains is not in question. That economic poverty exists, directly or indirectly, *because of past colonial rule* is highly doubtful.

Moreover, in those instances in which living standards seem to have declined, it is usually due to rapid population growth that has worsened the land/man ratio to the point at which subsistence agriculture becomes more difficult. This population growth in turn was due in part to improved health, sanitation, and transportation systems introduced by or with the help of the European powers. The population of the island of Java, for instance, increased by a factor of nearly 14 in the period from 1815 to 1960, from 4.5 million persons to 63 million. (Great Britain's population increased five- to sixfold during the same period.) Actions by Europeans to improve health and food distribution were not at the time and are not today generally regarded as "wrongs" or injustices. Who is responsible for the poverty that results from a larger but healthier population? Is reparation called for? And when population growth is the culprit, will reparation help? Or will it paradoxically only provide the basis for claims to yet larger rectification payments in the future?⁹

36. On the question whether economic exploitation, in the sense of the earning of abnormal profits, had actually occurred, the article continued:

We have many anecdotes, but relatively little systematic information. But what there is at least casts doubt on the generality of economic exploitation either in the colonial past or in the post-colonial present.

The economic difficulties of the British East India Company over the years are well known. It had to be bailed out by the English Government on numerous occasions, and ultimately was taken over. After a careful review of the economic role of Britain and France in sub-Saharan Africa, an area generally subject to strong European influence later than many other parts of the world, D. K. Fieldhouse concludes:

⁸ R. N. Cooper, "A new international economic order for mutual gain", *Foreign Policy* (New York), No. 26 (Spring, 1977), pp. 66-120. (At the time the article was written, the author was Professor of Economics at Yale University.)

⁹ *Ibid.*, pp. 86-87.

"Least impressive is the accusation that, due to favorable conditions produced by colonialism, metropolitan investment in colonial Africa obtained "superprofit". There is insufficient data to prove or disprove this generally; but there is no reason to think that over a long period profits of capital in Africa were higher than those in Europe or elsewhere, though profits in extractive industries (such as wild rubber) might be very large for short periods.¹⁸"

¹⁸ David K. Fieldhouse. "The economic exploitation of Africa: some British and French comparisons", in Professor Gifford and William Roger Louis, eds., *France and Britain in Africa* (New Haven, Yale University Press, 1971), p. 637.

A detailed study of British home and overseas investment in the period from 1870 to 1913 suggests that overseas investment, both debt and equity, yielded about one and one-half percentage points more than home investment, and that differential risk cannot fully account for the gap. But a breakdown of these investments into various categories reveals that *colonial* investment generally yielded about the same as or even less than domestic investment. The higher average for overseas investment is wholly explained by British investment in Latin America and in the United States, especially in railways. Neither of these areas was under British governance, and any line of argument that places Latin America under exploitative domination by Britain must also include the United States or else explain why returns on British investment in the United States were similar to those in Latin America during this period.

There is no doubt that many private fortunes were made in connection with the extension of European imperialism. Less often recorded are the many fortunes that were lost during the same period. We live in an uncertain world that gives rise to many ups and downs, but for the purposes under discussion an overall, summary view is necessary. One plausible view is that many Europeans gained as a result of overseas expansion, but that the expense was borne in large part by other Europeans (including the tax-paying public, which had to finance the armies and navies that were occasionally engaged in the process). Some of the gains represented the social (global) gains from new trading opportunities. But at the present stage of historical knowledge, these must remain open questions.¹⁰

The author's conclusions were tentative, but raised questions which it was not easy to dismiss.

37. On the subject of reparations, the author began by saying that, to be free from "exploitation", economic transactions must be undertaken voluntarily and must not give rise to persistently abnormal profits. He accepted that, if it was established that there had been "exploitation", that might be said to provide the basis for claims to reparation, but the question then arose:

... how far back does one go in history? And for distant past wrongs, who must make the payments and who is entitled to receive them?

In the seventh to tenth centuries the Muslim Arabs conquered and confiscated many Christian (and non-Christian) lands by sword, clearly a non-voluntary or coercive transaction. Does that give rise to a current claim for reparation? In the sixteenth century, Spain plundered the New World, and as a result many Spaniards lived lavishly at home. Members of the same families settled in Central and South America, often being the ancestors of today's leading families there. Does that give rise to a legitimate claim by Latin-American countries on contemporary Spain?

The West African slave trade flourished during the seventeenth and eighteenth centuries. While some of the slaves may have been kidnapped by European slave traders, most were purchased from powerful tribal chieftains, and competition among the European slave buyers was fierce. Is there a basis for rectification claims by

American blacks on contemporary West African countries, where the descendants of those chieftains who enslaved others and received payment for them still reside?¹¹

38. He continued with a final example:

In the late eighteenth century, the powerful Barbary State of Algeria captured American seamen and held them for ransom, clearly an exploitative transaction, since it involved coercion. Should the United States lay a claim for reparations on Algeria? Or is there a moral statute of limitations on claims for rectification, and if so, how far back does it go?

concerning which he added in a foot-note that:

Over protest, the young United States paid Algeria \$624,500 in 1796 to ransom over 100 American seamen who had been captured in the open Atlantic in what was clearly a predatory manner. At a compound rate of interest of 6 per cent, which is what the United States had to pay on foreign loans at that time—including one to help pay the ransom—that sum would amount to \$23 billion in 1976.¹²

Clearly, no such claim was being advanced, but the fact that the calculation could be made—and plausibly so—should induce caution in those who nowadays thought themselves entitled to claim reparation. The subject of claims for reparation was one which did not easily admit of serious analysis or discussion, and still less of rational political and economic settlement.

39. Turning to the Special Rapporteur's ninth report (A/CN.4/301 and Add.1), he said that it was inaccurate, and contrary to a decision of the General Assembly, to refer to Puerto Rico as a still dependent territory, as the Special Rapporteur had done in paragraph 247. The Special Rapporteur had overstated his case in his references, in paragraph 269 and in foot-note 221, to the relationship between the United States and Cuba, for, while it was true that the United States had exercised a measure of domination over Cuba for some years, that could not be equated with Spanish colonial rule over the island. He did not believe that Jefferson would have agreed with the Special Rapporteur's contention, in paragraph 291 of the report, that the real goal of the United States War of Independence had been financial autonomy.

40. With regard to the Special Rapporteur's eloquent discussion of the serious debt burden of newly independent States (*ibid.*, chap. V, sect. F), he found it extraordinary that no mention had been made among the sources of that burden of the policy of the OPEC cartel. In referring, in paragraph 349, to the Programme of Action on the Establishment of a New International Economic Order (General Assembly resolution 3202 (S-VI)), the Special Rapporteur had failed to mention the reservations to that programme entered by many States. Nor, in his references to the Charter of the Economic Rights and Duties of States,¹³ had the Special Rapporteur mentioned that the corresponding General Assembly resolution (resolution 3281 (XXIX)) had been the subject of both negative votes and abstentions. His own view was that, contrary to what the Special Rapporteur had claimed, that Charter did not commit or

¹¹ *Ibid.*, pp. 82-83.

¹² *Ibid.*, p. 83.

¹³ 1443rd meeting, para. 18.

¹⁰ *Ibid.*, pp. 87-89.

engage States which had voted for it or, *a fortiori*, those which had voted against it.

41. In paragraph 353, the Special Rapporteur advanced a vigorous argument in favour of generalized debt relief. There were no doubt arguments both for and against that solution to the debt burdens of the developing countries, but the subject was one for the Conference on International Economic Co-operation and similar bodies rather than the Commission.

42. In view of the comments he had already made and of the doubts expressed by many members of the Commission concerning the subject of odious debts, he was unable to accept the conclusions which the Special Rapporteur drew with regard to that topic in paragraph 366.

43. The Special Rapporteur had been right in citing references to Turkey's financial difficulties in the award of the Permanent Court of Arbitration in the case discussed in paragraph 382, but it might have been helpful if he had indicated that the substantive ruling of the Court had obliged Turkey to make payments.

44. The words which the Special Rapporteur had omitted from his quotation from article 1, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights¹⁴ (*ibid.*, para. 387), namely, "based upon the principle of mutual benefit, and international law", were also pertinent to the work of the Commission and should have been included.

45. The consolidated article proposed by the Special Rapporteur was fundamentally on the right track. He had no problem with paragraph 1. The substance of paragraph 2 was sound, but he would propose that the provision be reworded to read:

"The newly independent State shall assume debts contracted on its behalf or for its account by the predecessor State in so far as the corresponding expenditures actually benefited the formerly dependent territory."

46. He also agreed with the substance of paragraph 3, which he found well drafted and plausible. He shared the opinion of Mr. Sette Câmara¹⁵ that paragraph 4 was acceptable with respect to substance but perhaps unnecessary. He found paragraph 5 perfectly acceptable. He agreed with the substance of paragraph 6, but felt that the text should be redrafted in a simpler fashion to read:

"Agreements concluded between the predecessor State and the newly independent State to determine succession to the debts in question otherwise than by the application of paragraphs 2 and 3 above shall not run counter to equitable considerations."

47. The draft article proposed by Mr. Ushakov¹⁶ certainly had the virtue of simplicity and terseness, but it did not take into account the variety of situations which could exist in real life, such as the possibility, acknowledged by the Special Rapporteur, that debts might well have been incurred for the benefit of the former colonial

territory and should therefore be maintained. There was a need for residual guidance in the absence of the type of agreement to which the article referred. Furthermore, even when such an agreement was in prospect, its conclusion could take time, and it would clearly be of assistance if the rules laid down by the Commission gave guidance for the interim period.

48. Mr. SUCHARITKUL said that, while the substance of the new article proposed by the Special Rapporteur was acceptable to him, it gave rise to several questions.

49. First, its provisions necessarily implied the existence of a decolonization process since there were no longer any *terrae nullius*. It mattered little whether the dependent territory in question had been a mandated or trust territory, or whether it had been a protectorate or colony. In each case, the legal consequences of State succession were the same so far as State debts were concerned. The predecessor State, for its part, was either a colonizing Power or an administering Power or again, under paragraph 4 of the article, the State responsible for the international relations of the dependent territory. He was not entirely convinced that the legal consequences of State succession for State debts were the same in all cases of decolonization. India, for instance, had been recognized as having international legal personality at the League of Nations, while Burma had twice attained independence, once during and once after the Second World War. The effect of the narrow definition of the term "newly independent State", as given in article 3(f), was to exclude from the scope of the draft articles the cases of secondary succession which had occurred in the contemporary world. Examples were the cases of Singapore, which had seceded from Malaysia, Bangladesh, which had seceded from Pakistan, and Viet Nam, which had been unified. Why should the legal consequences of such cases of succession not be the same as those affecting a newly independent State, within the meaning given to that term in the draft?

50. Secondly, he understood the concern that had led the Special Rapporteur to guarantee the protection of newly independent States but, while he endorsed the content of paragraphs 1 and 5, on the one hand, and paragraphs 2 and 3, on the other, he wondered to what extent it was possible to define the scope of that protection. The criteria laid down in paragraphs 2 and 3 were undoubtedly recognized criteria but they were very difficult to apply. Not only the criterion of actual benefit but also that of equitable proportion implied a subjective assessment. In paragraph 6, the Special Rapporteur had sought to introduce peremptory norms that were perhaps closer to *jus cogens*.

51. Thirdly, the protection which the Special Rapporteur sought to provide for newly independent States might sometimes be prejudicial to them. He was thinking of the freedom of the newly independent State and its faculty, as a sovereign State, to express its will freely, particularly when contracting financial obligations, and he wondered whether it was appropriate to restrict that freedom on the ground of protecting the interests of the newly independent State.

52. Lastly, the question arose of the fate of creditor third States and creditor third international organizations.

¹⁴ General Assembly resolution 2200 A (XXI).

¹⁵ See para. 16 above.

¹⁶ See para. 19 above.

Should provision be made for maintaining debts to third parties or for apportioning them equitably between the successor State and the predecessor State?

53. The Drafting Committee should endeavour, bearing those problems in mind, to reconcile all the interests involved, even the most conflicting, and introduce a little flexibility into the text.

54. The article proposed by Mr. Ushakov was acceptable to him, but as a main provision that would in no way affect the more detailed provisions proposed by the Special Rapporteur.

55. Mr. VEROSTA said that two schools of thought had emerged from the discussion, both of them based on the principle of voluntarism. Certain members of the Commission, some of whom had witnessed the fight for freedom from colonialism, had sometimes exaggerated the importance of the protection of newly independent States. Others had taken the view that, while admittedly colonialism was reprehensible, it had none the less had a positive side, and that certain predecessor States now found themselves in the unenviable situation of creditor States who stood to suffer considerable losses. In his view, it was not for the Commission to sit in judgment on the past; its task was to contribute to the progressive development of international law and its codification. As Mr. El-Erian had emphasized,¹⁷ the Commission should concern itself with the stability of international relations and peaceful co-existence among States. The article proposed by Mr. Ushakov was of no real help in that respect since it merely spelt out the clean-state principle. That principle was not unqualified, however, even when a new State came into being, since something of the earlier situation always remained.

56. For that reason, the Special Rapporteur had been right in endeavouring to formulate, if not rules, at least some valuable guidelines for the package deal which generally resulted. It was not possible to develop the clean-slate principle as a principle of general application and to remain silent on the question of the debts of the predecessor State to the dependent territory, to which reference was made in paragraph 1 of the article proposed by the Special Rapporteur. The same applied to the matters dealt with in paragraphs 2 and 3, where guidelines for a package deal were required. Admittedly, it might be difficult to apply those provisions but the twin criteria of actual benefit and equitable proportion should form the basis of any package deal. Since paragraphs 2 and 3 embodied the same idea, the Drafting Committee might consider combining those paragraphs. About paragraph 4 he had the same doubts as had already been expressed by other members of the Commission, particularly Mr. Sette Câmara. Paragraph 5, however, was particularly important for the package deal: the guarantees of the predecessor State should not be disregarded. He also endorsed paragraph 6 in principle, but the Drafting Committee could perhaps shorten it.

The meeting rose at 1 p.m.

1445th MEETING

Wednesday, 22 June 1977, at 10.10 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsu-ruoka, Mr. Ushakov, Mr. Verosta.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/301 and Add.1, A/CN.4/L.254)

[Item 3 of the agenda]

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

NEW ARTICLE (Newly independent States)¹ (*concluded*)

1. Mr. DÍAZ GONZÁLEZ said that those members of the Commission who had followed or been personally involved in the United Nations activities in support of decolonization, which were among the Organization's most positive achievements, could only agree with what the Special Rapporteur had stated in chapter V of his ninth report (A/CN.4/301 and Add.1), including the examples of decolonization he had cited by way of justification for the article he now proposed.

2. It could not be claimed that there were good and bad colonial Powers; wherever it occurred, colonialism was the same and meant exploitation of natural resources, use of a territory for military purposes, or aggression against the local population. The fact that control over a territory passed from one colonial Power to another in no way constituted a guarantee for that territory that it would be more justly ruled, but was simply proof that the second colonial Power was militarily or economically stronger than the first. There was a need for certain States to give real effect to their legislation for, if in their law they proclaimed the principle of equality of all mankind, they practised discrimination within and beyond their frontiers. It was no coincidence that the politically dominant classes in such States were also economically dominant for they had made and continued to make very substantial investments in their country's colonial territories.

3. It had been argued in the Commission that compensation for the effects of colonialism should include payments by the formerly dependent territory to the taxpayers of the colonial Power in respect of the latter's financial contribution in support of their country's policy of oppression; that would be equivalent to applying to the people of the newly independent State the reverse of the Chicherin dictum² by requiring it to pay the price of its

¹⁷ See para. 27 above.

¹ For text, see 1443rd meeting, para. 1.

² See A/CN.4/301 and Add.1, para. 157.

chains. It had also been argued, with regard to the debt burden of newly independent States, that the source of all the evil was the measures adopted by OPEC, which had, in fact, represented the first ever independent expression by weaker nations of their inalienable right freely to dispose of their natural resources. If any mention was to be made of the decisions of OPEC, mention must also be made of the historical background to them, such as the fact that for half a century, during which the price of the foreign manufactures and know-how essential to its development had risen steeply, Venezuela had received only 50 United States cents for each barrel of oil it had exported. He was well aware that the Commission was not the proper forum for attacking colonialism or defending OPEC, but neither was it a suitable place for doing the reverse.

4. To be of value, every legal rule had to have a foundation in reality and take account of the circumstances in which it was intended to be applied. If the function of the Commission was really to develop international law, it must not preserve rules derived from the social context of the colonial era but give newly independent States a chance to defend their interests and ensure their continued harmonious economic and social development. Contemporary international law should be based, like domestic law, on social justice, a justice which would be equal for the major Powers and the small States, for the rich nations and the poor nations.

5. The logical outcome of reasoning in that vein would be acceptance of the draft article proposed by Mr. Ushakov,³ the effect of which would be to apply the clean-slate principle, which had been the position adopted by the Latin American countries when they gained their independence. However, he preferred the consolidated article proposed by the Special Rapporteur, simply because it represented a compromise and a way of advancing gradually. The solution proposed by the Special Rapporteur struck a just mean for it seemed to him that, if a newly independent State had in fact benefited from investment loans contracted on its behalf, it was fair that it should assume an equitable proportion of the corresponding debt of the colonial Power. With that in mind, he considered that it would be appropriate to replace the words "corresponding expenditures" by the words "corresponding investments" in paragraph 2 of the article. Paragraph 6 reflected the philosophy which underlay the whole of the proposal and was itself a reflection of principles which were embodied in the Charter of the United Nations and had become the basis of contemporary international relations. In that paragraph, the word "gravely" should be deleted, since effects in any way detrimental to the economy of a newly independent State would represent an infringement of its sovereignty and were *ipso facto* prohibited.

6. Mr. DADZIE said that colonialism had been condemned by the United Nations and he had been shocked, to say the least, to find that anyone in the present age could hold the views on that evil institution expressed in the article from which Mr. Schwebel had quoted at the previous meeting. He took it that Mr. Schwebel himself

did not share those views. Indeed, he had noted that Mr. Schwebel had admitted that he was not himself a student of colonialism and that he had adopted a more or less positive attitude to the new draft article proposed by the Special Rapporteur.

7. The CHAIRMAN said that statements had been made at the previous and current meetings which, to the extent that they had raised the basic issue of the characterization of colonialism, had been of only indirect relevance to the Commission's task. He felt that the Commission could and should rest for the purposes of its work on the principles which had been well established by General Assembly decisions and United Nations practice with respect to colonialism. It was not for the Commission to form any judgment on the issues underlying that subject.

8. Mr. SCHWEBEL said that he appreciated the remarks made by the Chairman and other members of the Commission, especially Mr. Dadzie. He had opened his statement at the previous meeting by expressing his views on the undesirability of colonialism, which was not, he thought, a matter on which the Commission was divided. As he had understood it, the article he had quoted had not expressed views for or against colonialism. It had not been addressed to what the Chairman had termed the "underlying issues". It had simply endeavoured to examine the question whether colonialism had uniformly or generally resulted in "economic exploitation" in the form of abnormal profits for the metropolitan Power or nationals thereof. That was a legitimate question in itself and one which was pertinent to the Commission's work, in so far as questions of a similar nature had been raised during the debate and, to a very large extent, in the Special Rapporteur's report.

9. Having reflected further on the debate, and especially on the cogent criticism directed against paragraph 6 of the consolidated article proposed by the Special Rapporteur, he wished to withdraw his suggestion for the amendment of that paragraph and recommend instead that it be deleted.

10. The CHAIRMAN, speaking as a member of the Commission, said that most of the comments he had had in mind had already been made by other speakers. He congratulated the Special Rapporteur on the very thorough, extensive and balanced nature of his report and, broadly speaking, of his draft article.

11. Mr. BEDJAOUI (Special Rapporteur), summing up the discussion on his new article relating to newly independent States, said he agreed with Mr. Francis, Mr. Sette Câmara and Mr. El-Erian, who, unlike Mr. Schwebel, considered that the Commission's work of codification in that instance was justified, even though most colonized countries had attained independence. Two considerations militated in favour of such codification. First, there still remained not only small dependent territories, which would perhaps one day become "mini-States", but also more extensive territories, such as the zones under Spanish domination in the northern part of Morocco, Puerto Rico, and Bermuda, as well as large territories such as Namibia, Rhodesia and the Western Sahara. Then, the provisions drafted by the Commission could be useful both in future cases of independence and

³ 1444th meeting, para. 19.

in recent cases of independence, such as Angola, Mozambique and Guinea-Bissau, and even in earlier cases of independence. That was particularly true in the case of State debts. The debt problem, and more particularly debt servicing, which sometimes spanned years or decades, exemplified the type of matter covered by succession which persisted long after the attainment of independence. It was admittedly late in the day to deal with such matters, but not too late. It would have been better to codify the matter in 1960, for example, when General Assembly resolution 1514 (XV), containing the Declaration on the Granting of Independence to Colonial Countries and Peoples, had been adopted.

12. He appealed to members of the Commission to show a spirit of generosity regarding the formulation of the article, even if for the rich countries such generosity no longer amounted to much in practical terms. At a time when an endeavour was being made to create a new international economic order, when a law of development and a right of development were being evolved, when the concept of international solidarity was starting to inject new vigour into public international law, and when aid was gradually coming to be regarded as an international duty, the Commission could not hang back; it must be seen to be generous. As Mr. Quentin-Baxter had observed at the 1443rd meeting, the article must reflect existing United Nations doctrine. In those circumstances, there could be no question of deleting paragraph 6, as Mr. Schwebel proposed. A provision should be drawn up to take account of reality as reflected by the discussions in UNCTAD, the General Assembly and the Conference on International Economic Co-operation, all of which had envisaged the possibility of the cancellation of debts contracted by newly independent States in their sovereign capacity after decolonization. There was therefore, *a fortiori*, no question of requiring newly independent States to be answerable for previous debts which had been contracted during the colonial era and at the behest of the colonial Power and which, moreover, had not always benefited those countries at the time they were colonized.

13. Pending settlement of the third world's debt problem by cancellation of the debt, the rich creditor countries were financing the servicing of that debt by granting loans to some debtors to enable them to repay earlier loans. In short, therefore, it was not even generosity that was needed but a spirit of realism. The staggering increase in the third world's indebtedness was simply the consequence of an unjust world economic system, which, accompanied as it was by deteriorating terms of trade, constituted a new, modern form of slavery. Indeed, the Special Rapporteur had mentioned a French author who had advised the Government of Sri Lanka to refuse to pay its debts because of the scandalously low prices paid for its tea exports. Again, it was at President Pompidou's initiative that the debts of 14 French-speaking African countries to France had been cancelled. They had not been debts of successor States, but their cancellation was none the less indicative of a certain trend.

14. The article was based on two principles: lack of capacity to pay and lack of benefit from the proceeds of the debt. Since it was the colonial Powers themselves which had laid down those principles, and not the newly

independent States, they could not reject them now. In particular, the Allies had upheld those principles in the case of the German colonies, in the Treaty of Versailles in 1919. In regard to incapacity to pay, as stated in paragraph 381 of his report, it was the United States which had set the example after the First World War. The reasoning of the United States Government in the case referred to was entirely in keeping with the spirit of paragraph 6 of his proposed new article. He was therefore surprised that Mr. Schwebel called for the deletion of a provision which referred to principles also upheld by the United States in the Cuba case in 1898.

15. The acute problem of the debt burden for underdeveloped countries had been referred to by Mr. Francis (1443rd meeting), Mr. Calle y Calle, Mr. Sette Câmara and Mr. Tabibi (1444th meeting), who considered that paragraph 6 was of fundamental importance and would even introduce the notion of incapacity to pay not only in paragraph 6, where it was linked to the question of agreements between the predecessor State and the successor State, but throughout the article as a whole and particularly in paragraph 3. Mr. Tabibi considered that the content of paragraph 6 was sufficiently important for it to form a separate article. Other members of the Commission, such as Mr. Quentin-Baxter (1443rd meeting) and Mr. El-Erian (1444th meeting), had pointed out that the ideas underlying paragraph 6 had their origin in United Nations doctrine.

16. The questions of the debt burden and of capacity to pay were related to the general question of development, which, according to article 55 of the United Nations Charter, was an international problem *par excellence*. Development had become a collective responsibility of the entire international community. Moreover, the Charter of Economic Rights and Duties of States⁴ stated that "the responsibility for the development of every country rests primarily upon itself but that concomitant and effective international co-operation is an essential factor for the full achievement of its own development goals". An excessive debt burden would therefore be incompatible with international co-operation for development. Development was the prerequisite for international peace but the arms race was swallowing up vast sums which would certainly be put to better use if they were allocated to peaceful development. That economic aspect of peace had been underlined by the participants at the Fourth Conference of Heads of State or Government of Non-Aligned Countries (Algiers, 1973), who had readily discerned the relationship between their economic backwardness and the political and economic domination from which they suffered. As President Salvador Allende had declared, "The dialectic relationship is all too clear: imperialism exists because underdevelopment exists; underdevelopment exists because imperialism exists". Pope Paul VI had stated in an encyclical that "Development is the new name for peace". Further, at its sixth special session in 1974, the General Assembly had adopted the Declaration on the Establishment of a New International Economic Order,⁵ which, in a manner, was to

⁴ General Assembly resolution 3281 (XXIX).

⁵ General Assembly resolution 3201 (S-VI).

the economic sovereignty of States what the United Nations Charter was to their political sovereignty.

17. As for the principle of the benefit derived by the newly independent State from the allocation of the proceeds of the debt, he would stress the context of colonial exploitation which obtained in the case of certain economic, social and cultural undertakings. Those undertakings had been designed primarily to promote the well-being and prosperity of the colonial Power, thereby undermining the concept of benefit. If the dependent people did benefit from them, it was only indirectly. After independence, some installations had proved difficult to use or reconvert. At the 1443rd meeting, Mr. Quentin-Baxter had mentioned the case where a large amount of property left behind by the colonial Power was of no benefit to the newly independent State, not because of the colonial context but simply because the colonial Power, being richer, owned installations in the colony which represented a level of economic or other power which the newly independent State had not attained. It should certainly not be inferred that decolonization was itself a set-back, since that would be tantamount to saying, as Mr. Schwebel had claimed, that the colonial peoples had enjoyed better living conditions in the time of the administering Power. The fact remained that it was difficult to reconvert certain property, such as military bases or sophisticated launching pads, which the administering Power left behind in the dependent territory. That had been the case with a military base equipped with anti-atomic underground installations and an atomic bomb testing site in Algeria. Clearly, the transfer of such property, if it had been created by debts, should not involve the newly independent State in the assumption of those debts, since it had derived no benefit from them at all.

18. Mr. Quentin-Baxter had said that, while he regarded the principles on which the article was based as relevant, he did not understand their place in that provision. In reply, he would explain that he had referred to principles of equity, bearing in mind three considerations. In its decision in the *North Sea Continental Shelf* case (1969), the International Court of Justice had invited States to interpret the content of equitable principles by reference to the factual situations and considerations applicable in each case.⁶ In the case of newly independent States, those considerations followed a logical sequence. It had first to be shown that the newly independent State had benefited from the proceeds of the debt. If it had so benefited, then it had to be capable of paying off the debt. Even on that assumption, it was then necessary to take account of colonial exploitation; the newly independent countries would only be persuaded to abandon their claim for compensation if they were freed of their colonial debts. The draft article under consideration was based entirely on those three considerations. For an immediate appreciation of its content, the Commission might simply refer to the draft text proposed by Mr. Ushakov,⁷ which was so well phrased and concise that it required no further explanation.

⁶ *I.C.J. Reports 1969*, pp. 46-50.

⁷ 1444th meeting, para. 19.

19. His own view, however, was that it would be advisable to add a paragraph to make it clear that agreements between the newly independent State and the predecessor State must not be leonine. The predecessor State must not take advantage of the weakness of the new State which had just attained independence. The real problem now facing newly independent States was the restrictions which such agreements placed on them. In order to comply with those agreements, many countries were continuing to pay their old debts by incurring new debts. That did not mean, as Mr. Sucharitkul feared,⁸ that the newly independent State should be deprived of its sovereign right to conclude an agreement. On the contrary, it should be protected, bearing in mind that devolution agreements had sometimes been concluded even before the attainment of independence. Further, it was necessary to demythify the concept of the sovereign equality of States, which was just a piece of hypocrisy on the part of international law. Sovereignty, to be complete, must be accompanied by economic independence.

20. Apart from the position taken by Mr. Sucharitkul, there were two trends of opinion among members of the Commission on the question of agreements between the predecessor State and the successor State. On the one hand, Mr. Ushakov had declined to discuss agreements of that kind, either their validity or their possible leonine character; no doubt he considered that the question fell within the law of treaties. But the Vienna Convention⁹ was completed by a declaration on the prohibition of coercion in the conclusion of treaties.¹⁰ Mr. Ushakov's position did not seem to him to be in keeping with draft article 13¹¹ on newly independent States and State property, under which the predecessor State could retain property only with the consent of the successor State. Agreements not concluded in accordance with article 13 would be regarded as void *ab initio*. Under Mr. Ushakov's proposal, on the other hand, the successor State could assume heavy debts or even debts not owed, provided there was an agreement, however dubious. There was thus a lack of symmetry between the two provisions.

21. Mr. Dadzie and Mr. Francis (1443rd meeting) and Mr. Calle y Calle and Mr. Sette Câmara (1444th meeting), on the contrary, considered that the principle of capacity to pay should be reflected in the article as a whole. Some of those members would prefer not to mention the agreement in paragraph 6 so that its provisions would cover all situations, even where there was no agreement, while others would like to see the notion of capacity to pay, if referred to in paragraph 6, introduced in paragraph 3. Mr. Quentin-Baxter had taken an intermediate position (1443rd meeting), underlining the residual nature of the rules being drawn up by the Commission; its task was to encourage the parties to conclude an agreement, failing which they would have to rely on those rules.

⁸ *Ibid.*, para. 51.

⁹ See 1417th meeting, foot-note 4.

¹⁰ *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 285, document A/CONF.39/26, annex.

¹¹ See 1416th meeting, foot-note 2.

In the circumstances, the Commission was promoting agreement between the parties within certain limits only. The free will of the predecessor State and the successor State was subordinate to their respect for an inviolable principle, namely, the self-determination of peoples. It was the same situation as in article 13.

22. Taking the various paragraphs of his proposed new article in turn, he said that all members of the Commission had recognized the principle laid down in paragraph 1 as self-evident. Mr. Quentin-Baxter had even considered that a mention in the commentary would suffice. The principle stated in paragraph 5 had also been regarded as self-evident. Mr. Sette Câmara was of the opinion that the guarantee should be maintained, Mr. Calle y Calle that it was covered by the definition of State debt, which referred to a financial obligation, and Mr. Quentin-Baxter that the guarantee should be mentioned only in the commentary. Paragraphs 2, 3 and 6 were of basic importance and had already been discussed at length. Mr. Calle y Calle had, however, pointed out¹² that paragraph 3 could be interpreted in two ways: as referring either to an over-all balance of general liabilities and general assets, or to a direct relationship between property and a debt resulting directly from the property. If the second interpretation was correct, it came close to conflicting with the articles relating to property, particularly article 8, which stipulated that property passed without compensation. Also, the application of equitable principles precluded any systematic correlation of property and a debt. The first interpretation, which to a certain extent involved a package deal, should therefore apply. Lastly, Mr. Sette Câmara and Mr. Calle y Calle had expressed doubts regarding the application of paragraph 1 to the two cases of succession referred to in paragraph 4. On reflection, he was inclined to share their concern.

23. Mr. Schwebel, while endorsing the broad lines of the proposed draft article, had expressed some strong criticisms about matters that only diverted the Commission from its aims and function.¹³ It was not possible for him (the Special Rapporteur) to remain indifferent to that criticism, since it was tantamount to a justification of colonialism, the consequences of which were still being felt by 2,500 million human beings.

24. In his report, he had refrained from expressing any value judgment that might be offensive to any colonial Power; he had confined himself to stating the facts and drawing the necessary conclusions from the normative point of view. His comments were not intended as a condemnation or a pardon, but as an instructive account of the human adventure which taught a lesson for the present and future. It should not be forgotten that, historically, imperialism was a part of that human adventure and that it was not peculiar to any one country, race or age.

25. In the first place, the acts of piracy on the high seas during the eighteenth and nineteenth centuries, to which Mr. Schwebel had referred, had been perpetrated not by Algerians but by Ottoman imperialism, which had

colonized Algeria and part of the Mediterranean basin; moreover, he would remind the Commission that piracy had existed throughout the ages and had been practised particularly by nationals of the Western countries, whose acts of piracy had been portrayed in many successful American films through the talents of American film actors.

26. He would have hoped that Mr. Schwebel, mindful of the forthcoming anniversary of the independence of the United States, had shown, if not generosity, at least a little more justice towards the colonized peoples, instead of delivering an antiquated and anachronistic eulogy on the benefits of colonialism while sheltering behind the authority of a Yale professor.

27. With regard to the evils of colonialism, of which Mr. Schwebel said he had no direct experience, he would simply quote the historian Ki-Zerbo, President of the Association of African Historians and member of the UNESCO Executive Board, who, to the question "Without colonialism, would you have been a great historian?", had replied: "Who knows? If colonial exploitation had not broken my ancestors and my people, perhaps I would have been not only a historian but the son and grandson of a historian."

28. As the citizen of a freedom-loving nation, Mr. Schwebel should realize that the independence of peoples was not to be measured by the yardstick of economic benefits and was not for sale. It was sought after for its own sake and could not be surrendered in return for a state of well-being which, in any event, the colonial system had never brought about and which, because of its very nature, it never would. That was the nub of the problem. Even if the peoples of the third world, who had been freed from the chains of bondage, were less happy now, they did not regret having broken their chains. And it was absurd to argue that they were less happy because they were independent when it was the iniquitous system of international economic relations that was the cause of all their ills. The mechanisms of the world economy, which until now had been directed not towards but against the third world, would have to be dismantled and analysed. The third world was condemned to hand over an ever-increasing quantity of its production of energy and raw materials in order to obtain from the industrialized countries the same product, manufactured with its own raw materials, its own power and sometimes even its own emigrant labour and its own technicians, who had been trained and had then stayed on in the rich countries which attracted the "brain drain". That new slavery of modern times, in which the third world had to work more and more to buy the same tractor or the same machine, while the developed countries worked less and less to obtain the same quantity of oil or ore, was in fact only the tip of the iceberg. The present pattern of world trade, which was responsible for the widening gap caused by the rise in the price of manufactured goods and the fall in the price of primary products, was a reflection of that aspect of the situation.

29. Apart from that aspect, however, there was the whole question of the existing inequality, which was institutionalized in a law and in international relations that had been so devised and organized over the years as to

¹² 1444th meeting, para. 6.

¹³ 1444th meeting, paras. 32 *et seq.*

make the backwardness of third world States a prerequisite for the progress of the industrialized States. The implacable law of deteriorating terms of trade was the source of the ills of the third world and it was traditional public international law which had permitted and promoted that state of affairs. An international system should therefore be gradually introduced in which the continued enrichment of the rich countries would no longer be paid for by the progressive impoverishment of the poor countries. That was the aim of the new international economic order.

30. With regard to Puerto Rico, it was not he but the international community which had decided to treat Puerto Rico as a dependent territory. He should not therefore be reproved, as Mr. Schwebel had reproved him, for disregarding General Assembly resolution 748 (VIII) of 27 November 1953, which at the time had considered that Puerto Rico had achieved a new constitutional status and that consequently Chapter XI of the United Nations Charter could no longer be applied to it. The blame should rather be laid at the door of the United Nations, which thereafter had repeatedly passed other resolutions to the contrary, demanding Puerto Rico's independence. But to do that, it was necessary to be consistent in one's reasoning. Mr. Schwebel, however, accorded to resolution 748 (VIII) full and unqualified legal force, and then cast doubt on the normative value of General Assembly resolutions by questioning the legal scope of resolution 3281 (XXIX), by which the General Assembly had adopted the Charter of Economic Rights and Duties of States. The resolution on Puerto Rico had been adopted in 1953, at a time when the United Nations did not represent all the peoples of the world, whereas the resolution containing the Charter of Economic Rights and Duties of States, had been adopted in 1974 by a much wider international community. Moreover, in 1953, the United States had enjoyed an automatic majority in the United Nations owing to its amenable clientele; the industrialized world, which had reigned unhindered over the United Nations for nearly two decades, regarded that automatic majority as normal and just because, in its opinion, it was the expression of the same democracy by number which it now rejected.

31. An attitude which consisted of sometimes recognizing and sometimes rejecting the one or the other United Nations resolution was not very logical. To block the democratic machinery of the General Assembly, some countries, having lost their old automatic majority, had recourse to the consensus technique, which enabled them to obtain the maximum number of concessions in compromise texts that diminished the scope and content of the resolutions adopted. Not satisfied with that, they then had recourse to the reservations technique, whereby they could regard themselves as not affected by those resolutions. It was that attitude which prevented the early emergence of a new international legal order. Those tactics were however, doomed to failure because the United Nations Charter, as an organic instrument, had already evolved considerably owing to the glosses put on it. The General Assembly had given it a dynamic and evolving content, in keeping with the needs of the international community, and had made of it a living charter

which matched the aspirations of a world in the throes of change. The repeated resolutions of the United Nations were making the law of tomorrow by a process of accretion, as Professor Verdross had shown in his study *Die Quellen des Völkerrechts*.¹⁴

32. Mr. Schwebel had charged OPEC with contributing to the impoverishment of third world countries. The industrialized countries, however, had never done anything for the most deprived countries. At the Meeting of the Sovereigns and Heads of State of OPEC Member Countries, held at Algiers in March 1975, the OPEC countries had announced in a declaration of solidarity, which had not been reported at all in the Western press, that they were prepared to provide the most deprived countries with oil at cost price on condition that the rich countries, on their side, made the necessary effort to change the international economic order.

33. If the third world invoked the right to reparation, to which Mr. Schwebel had referred, they did so above all to underline the developed countries' duty to aid the poor countries. Indeed, according to Mr. Robert McNamara, a compatriot of Mr. Schwebel, the North/South economic division was a seismic crack, which went deep into the sociological crust of the earth and could cause violent tremors, for, if the rich nations did not manage to fill that crack, nobody would be safe in the end, no matter how large their stockpile of weapons.

34. As a result of the action of the non-aligned countries, the concept of planetary development had assumed added force and relevance. Europe had made history throughout the world for 2,000 years with its soldiers, merchants and missionaries and had dominated the planet in the name of its law, but the time had now come to share out the power and the riches more fairly, within States as well as among them.

35. In the same way as the great majority of countries in the world, international law was also a 'developing' law. Its normative development would probably be more rapid than its institutional development, and the first would perhaps be instrumental in bringing about the second. That law would probably no longer be the reflection of relations based on domination, inequality or hegemony. It would also probably not be a law based on egalitarian relations but rather a body of rules in which an increasingly important place would be reserved for relations based on equity. Equity would increasingly be the guiding principle in the development and observance of norms which would provide for corrective or compensatory inequality to enable the backward States of the third world to catch up with the rest of the world. International law had a new function, described by a compatriot of Mr. Schwebel, Ambassador Arthur Goldberg, as being to help to abolish discrimination, to ensure respect for human rights, to feed the hungry, to teach the ignorant and to free the oppressed. In accordance with the wishes of the developing countries, international law must organize no longer the sharing of the world but a world based on the principle of sharing.

36. Mr. QUENTIN-BAXTER said that the Special Rapporteur's summing up of the discussion had made

¹⁴ Freiburg im Breisgau, Rombach, 1973.

him realize that he might not have made himself entirely clear in his statement on the consolidated draft article relating to newly independent States.¹⁵ He had said that, in his view, paragraphs 2, 3 and 6 and the three principles embodied therein were central to the article. He had also expressed some doubt as to whether the principle laid down in paragraph 6 should be related only to the conclusion of agreements rather than established as a basic principle in its own right.

37. In amplification of that point, he wished to emphasize the breadth of the notion of capacity to pay. In one sense, it was simply a reflection of the basic United Nations principles which should serve as guide-posts in the Commission's work. One such principle was the concept of sovereignty over natural resources, a notion that, at first sight, seemed almost tautological since it amounted to an assertion that a people owned its own property and that sovereign States had sovereignty in their own territory. What, in his view, that principle really entailed could be illustrated by drawing a parallel from domestic law. On the whole, it was believed that an individual should pay his debts but that belief was never carried to the point of insisting that the individual must starve himself to death in order to satisfy his creditors. The first priority was to keep the debtor alive and in reasonably good health. Similarly, the principle of sovereignty over natural resources meant that a State was not to be deprived in a covert manner of its overt authority to order its own affairs by elevating the question of indebtedness to a higher plane than that of the freedom of will of the State itself. However, the principle of capacity to pay could also be said to derive, in the present context, from virtually all State practice in the matter of succession to debts. Authorities such as Professor O'Connell, Professor Feilchenfeld and many others bore out that point. The principle of capacity to pay thus derived from traditional sources and from United Nations practice alike.

38. The other point which he had wished to make was that, in considering the question whether certain expenditures had benefited a dependent territory, it was not necessary to confine oneself to situations in which the colonial Power might be thought to have incurred expenditures in its own interests rather than in those of the territory concerned. It might simply be that the territory did not have resources of its own to maintain the structure of government that even the metropolitan Power thought necessary and appropriate to modern conditions of life. He had had partly in mind the very small States in the Pacific which had formerly been administered by New Zealand and had continued to be associated with it following their attainment of independence, States which had been able to maintain their system of government solely because of the continuation of subventions from New Zealand. A still more striking case was that of Papua New Guinea, a country with an extensive and very difficult terrain, which, after acceding to independence, had been able to sustain its apparatus of government only with massive assistance from Australia, the former metropolitan Power. If the view had

been taken that subventions to Papua New Guinea must stop at the point when it attained independence or, still more, that the structure of government should become a burden on the newly independent State, then even that structure would have been wholly beyond the immediate resources of the new country to support. Consequently, there was a certain degree of overlapping between the two notions of capacity to pay and the benefit to a formerly dependent territory of expenditures incurred by the predecessor State, even though each was a completely valid concept in its own right.

39. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer to the Drafting Committee articles F, G and H,¹⁶ as well as the consolidated text proposed by the Special Rapporteur.¹⁷ Those provisions would be considered by the Drafting Committee in the light of the comments made in the Commission and, in particular, of the text of the article proposed by Mr. Ushakov.¹⁸

*It was so agreed.*¹⁹

The meeting rose at 1 p.m.

¹⁶ A/CN.4/301 and Add.1, chap. V, sect. H.

¹⁷ 1443rd meeting, para. 1.

¹⁸ 1444th meeting, para. 19.

¹⁹ For the consideration of the text proposed by the Drafting Committee, see 1449th meeting, paras. 4-54, and 1450th meeting, paras. 1-6.

1446th MEETING

Friday, 24 June 1977, at 10.10 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (continued)* (A/CN.4/285,¹ A/CN.4/290 and Add.1,² A/CN.4/298, A/CN.4/L.253, A/CN.4/L.255)

[Item 4 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the texts adopted by the Drafting Committee for the first five articles (articles

* Resumed from the 1442nd meeting.

¹ *Yearbook ... 1975*, vol. II, p. 25.

² *Yearbook ... 1976*, vol. II (Part One), p. 137.

¹⁵ 1443rd meeting, paras. 32 *et seq.*

19, 19bis, 19ter, 20 and 20bis) of section 2 (Reservations) of part II of the draft articles on treaties concluded between States and international organizations or between international organizations as well as the title of section 2 (A/CN.4/L.255).

ARTICLE 19 (Formulation of reservations in the case of treaties between several international organizations),

ARTICLE 19bis (Formulation of reservations by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States),

ARTICLE 19ter (Objection to reservations),

ARTICLE 20 (Acceptance of reservations in the case of treaties between several international organizations) and

ARTICLE 20bis³ (Acceptance of reservations in the case of treaties between States and one or more international organizations or between international organizations and one or more States)

2. Mr. TSURUOKA (Chairman of the Drafting Committee) said that the draft articles on reservations, submitted by the Special Rapporteur in his fifth report (A/CN.4/290 and Add.1), had been referred to the Drafting Committee after a long and detailed discussion in the Commission, during which divergent and even contrary views had been expressed. In accordance with the broad mandate given to it to perform its recognized role in conformity with the Commission's current practice and working methods, the Drafting Committee had examined those different views in detail, taking into account the alternatives proposed by the Special Rapporteur and by members of the Committee. The texts of the articles now before the Commission were the result of the Drafting Committee's efforts to find a middle term, in a spirit of compromise designed to reflect the main trend of its discussions.

3. It should be pointed out, however, that, in the opinion of one member of the Committee, the solutions arrived at could not be regarded as a compromise. That member had reserved his position on the texts of the articles adopted by the Drafting Committee and had submitted his own alternative versions (A/CN.4/L.253).

4. The articles adopted by the Drafting Committee read:

Article 19. Formulation of reservations in the case of treaties between several international organizations

An international organization may, when signing, formally confirming, accepting, approving or acceding to a treaty between several international organizations, formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

³ For the consideration of the texts originally submitted by the Special Rapporteur, see 1429th to 1433rd meetings.

Article 19bis. Formulation of reservations by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States

1. A State, when signing, ratifying, accepting, approving or acceding to a treaty between States and one or more international organizations or between international organizations and one or more States, may formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

2. When the participation of an international organization is essential to the object and purpose of a treaty between States and one or more international organizations or between international organizations and one or more States, that organization, when signing, formally confirming, accepting, approving or acceding to that treaty, may formulate a reservation if the reservation is expressly authorized by the treaty or if it is otherwise agreed that the reservation is authorized.

3. In cases not falling under the preceding paragraph, an international organization, when signing, formally confirming, accepting, approving or acceding to a treaty between States and one or more international organizations or between international organizations and one or more States, may formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 19ter. Objection to reservations

1. In the case of a treaty between several international organizations, an international organization may object to a reservation.

2. A State may object to a reservation envisaged in article 19bis, paragraphs 1 and 3.

3. In the case of a treaty between States and one or more international organizations or between international organizations and one or more States, an international organization may object to a reservation formulated by a State or by another organization if:

- (a) the possibility of objecting is expressly granted to it by the treaty or is a necessary consequence of the tasks assigned to the international organization by the treaty; or
- (b) its participation in the treaty is not essential to the object and purpose of the treaty.

Article 20. Acceptance of reservations in the case of treaties between several international organizations

1. A reservation expressly authorized by a treaty between several international organizations does not require any subsequent acceptance by the other contracting organizations unless the treaty so provides.

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

3. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance by another contracting organization of a reservation constitutes the reserving organization a party to the treaty in relation to that other organization if or when the treaty is in force for those organizations:

(b) an objection by another contracting organization to a reservation does not preclude the entry into force of the treaty as between the

objecting and reserving organizations unless a contrary intention is definitely expressed by the objecting organization;

(c) an act expressing the consent of an international organization to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting organization has accepted the reservation.

4. For the purposes of paragraphs 2 and 3 and unless the treaty otherwise provides, a reservation is considered to have been accepted by an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 20bis. Acceptance of reservations in the case of treaties between States and one or more international organizations or between international organizations and one or more States

1. A reservation expressly authorized by a treaty between States and one or more international organizations or between international organizations and one or more States, or otherwise authorized, does not, unless the treaty so provides, require subsequent acceptance by, as the case may be, the other contracting State or States or the other contracting organization or organizations.

2. When it appears from the object and purpose of the treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation formulated by a State or by an international organization requires acceptance by all the parties.

3. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance by a contracting State or organization of a reservation constitutes the reserving State or organization a party to the treaty in relation to the accepting State or organization if or when the treaty is in force for the reserving and for the accepting State or organization;

(b) an objection by a contracting State or organization to a reservation does not preclude the entry into force of the treaty as between the objecting and the reserving State or organization unless a contrary intention is definitely expressed by the objecting State or organization;

(c) an act expressing the consent of a State or an international organization to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State or organization has accepted the reservation.

4. For the purposes of paragraphs 2 and 3 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a contracting State or organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

5. In preparing those five draft articles, the Drafting Committee had preserved the basic distinction made by the Special Rapporteur between two categories of treaties, namely, treaties between international organizations and treaties between States and international organizations. For greater clarity and precision, however, the Drafting Committee had designated the latter category as "treaties between States and one or more international organizations or between international organizations and one or more States". That new and more descriptive formula had been used to avoid giving the impression—which the other, more ambiguous formula might have given—that the articles under consideration covered reservations to bilateral treaties concluded between a State and an international organization. The Drafting Committee had sought to achieve the same result, in regard to treaties

concluded between international organizations, by retaining the word "several" in the English version, which, strictly speaking, meant "three or more".

6. Taking that distinction into account, the Drafting Committee had retained the régime of the Vienna Convention,⁴ in so far as it related to the position of States, for treaties between States and one or more international organizations or between international organizations and one or more States, which might be called "mixed treaties". That régime also applied to international organizations in the case of treaties concluded between international organizations. The position of international organizations in mixed treaties was, however, more restricted than that of States in regard to the formulation of reservations and objection to reservations, when the participation of those organizations was essential to the object and purpose of the treaty. With respect to the formulation of reservations, the position of international organizations was clearly stated in paragraphs 2 and 3 of article 19*bis*; and to make the restricted position of international organizations regarding objection to reservations equally clear, the Drafting Committee had decided to draft a separate article—article 19*ter*—expressly providing for the various cases of objection to reservations formulated by States or international organizations, as the case might be, in regard to the two basic types of treaty considered.

7. The structure of the five draft articles prepared by the Drafting Committee was in conformity with the basic distinction between the two categories of treaties. As the Special Rapporteur had done in his fifth report, the Committee had devoted separate, but parallel, articles to the formulation and acceptance of reservations, one relating to treaties concluded between international organizations and the other to mixed treaties. Since the new article 19*ter* dealt specifically with objection to reservations, the words "and objection to reservations" had been omitted from the titles of draft articles 20 and 20*bis*, which now related only to acceptance of reservations. In accordance with the practice followed for the texts adopted so far, the articles were arranged and numbered for easy reference to the corresponding provisions of the Vienna Convention.

8. The main changes made by the Committee in the title and text of article 19 originally proposed by the Special Rapporteur were the deletion of the word "concluded" in the title, to bring it into line with the body of the article, and the reversal of the order of the clauses in the introductory phrase. The text of article 19*bis* was simply a statement of the decision of principle to place States and international organizations in different positions in regard to the formulation of reservations to mixed treaties. Three possible situations were dealt with in three separate paragraphs. Paragraph 1, worded in terms similar to those of article 19, applied the liberal régime of the Vienna Convention to the formulation of reservations by States. The stricter régime for the formulation of reservations by international organizations corresponded to the general rule laid down in article 19*bis*, paragraph 2, according to which an international

⁴ See 1429th meeting, foot-note 4.

organization could formulate a reservation when its participation was essential to the object and purpose of the treaty, provided that the reservation was expressly authorized by the treaty or if it was otherwise agreed that the reservation was authorized. As an exception to the general restrictive rule stated in paragraph 2, paragraph 3 applied the régime provided for in paragraph 1 to the formulation of reservations by international organizations in the case of mixed treaties, when the participation of those organizations was not essential to the object and purpose of the treaty.

9. Article 19^{ter}, which was a new article, regrouped the provisions concerning objection by a State or an international organization to a reservation in the case of the two types of treaty dealt with in the draft. For both types, paragraph 2 of the article applied the liberal régime of the Vienna Convention applicable to States. The same rule was laid down in paragraph 1 for objections formulated by international organizations in the case of treaties between organizations. Paragraph 3 stated the more restrictive rule adopted for international organizations, corresponding to the provisions of paragraphs 2 and 3 of article 19^{bis}, namely, that an international organization could object to a reservation in the case of a mixed treaty only if its participation in the treaty was not essential to the object and purpose of that treaty (subparagraph (b)), or if the possibility of objecting was expressly granted to it by the treaty or was a necessary consequence of the tasks assigned to it by the treaty (subparagraph (a)). The latter provision took account of the importance of the functional aspect of international organizations when it was necessary to differentiate, for the purposes of reservations, between the status of those organizations as parties to a treaty and the status of sovereign States also parties to the same treaty. The word "tasks" had been used in that context in place of "functions" to make it quite clear that the reference was to the particular treaty in question and not to the constituent instrument of an international organization, which defined its "functions".

10. Lastly, articles 20 and 20^{bis}, which dealt with acceptance of reservations to the two types of treaty considered, were symmetrical and their wording was similar to that of the corresponding articles proposed by the Special Rapporteur, excepting the slight drafting changes already mentioned.

11. Mr. USHAKOV said he had proposed to the Drafting Committee that it should prepare two different versions of articles 19 to 23 so that States could choose between two possible solutions. As the Committee had preferred to draft only one version, he had decided to submit a second version to the Commission, which appeared in document A/CN.4/L.253. It had been his view that, so far as the formulation of reservations by international organizations was concerned, the Commission was not engaged in the codification but in the progressive development of international law, and that it would necessarily have to adopt an arbitrary approach, which might, consequently, differ from that proposed by the Drafting Committee.

12. In draft articles 19 and 19^{bis}, the Drafting Committee had adopted the principle that an international

organization party to a treaty could make any reservation whatsoever to that treaty, whereas in his draft article 19 he had adopted the principle that an international organization could formulate a reservation to a treaty only "if the reservation is expressly authorized by the treaty or if it is otherwise agreed that the reservation is authorized".

13. He believed that his point of view was justified for several reasons. In the first place, he did not see what reasons international organizations could have for making reservations to treaties between States. In the case of States, vital interests could come into play and a State was sometimes obliged to make reservations to certain clauses in a treaty when those clauses, to which it was opposed, had been adopted by a two-thirds majority at a codification conference at which it had been in the minority. But in the case of international organizations, the interests at stake were not so important as to oblige an organization to make reservations to a treaty between States.

14. Furthermore, he had noted that, although there were rules for treaties between States to which one or more international organizations were parties, those rules mainly concerned States, since the treaties in question came under the Vienna Convention. Consequently, he did not see why an organization party to a treaty of that kind should be able to make reservations to rules concerning States, as provided in the Drafting Committee's text. Nor did he see why, in the case of a treaty between international organizations to which one or more States were also parties, a State party should be able to make reservations to rules concerning relations between international organizations. In his view, contrary to what the Chairman of the Drafting Committee had said, the Committee's text did not maintain the rule of the Vienna Convention and did not safeguard the necessary relationship between that Convention and the draft articles, since it did not provide for relations *inter se* between the States parties to an agreement between States to which one or more international organizations were also parties. His own draft, on the other hand, did preserve the relationship that should exist between the draft articles and the Vienna Convention, since it allowed States to make reservations as between themselves, in accordance with article 3 (c) of that Convention.

15. He also considered that the solution he proposed was justified in so far as the position on reservations which would be adopted in regard to international organizations was bound to be arbitrary because there could be no question of codifying rules generally recognized by State practice in that matter. Moreover, he considered it impossible to place States and international organizations on the same footing, especially where the possibility of making reservations or objections to reservations was concerned.

16. Lastly, with regard to the procedure relating to reservations, he believed that it was for the competent organ of the international organization to decide whether the organization should make reservations or object to reservations, especially in the case of objections to reservations concerning relations between States.

17. He hoped the Commission would accept his proposed version of articles 19 to 23 and submit it to States together with the Drafting Committee's version. If the Commission decided to adopt only the Drafting Committee's text, he would like his own version to be included in the commentary so that States could choose between the two.

18. He had devoted only one article—article 19—to the formulation of reservations, whereas the Drafting Committee had proposed two separate articles on that subject. However, in article 19 he had covered the different categories of treaties which the Drafting Committee had dealt with separately in articles 19 and 19*bis*. Paragraph 1 of his article 19 dealt with treaties between international organizations; paragraphs 2, 3 and 4 with treaties between States and one or more international organizations; and paragraph 5 with treaties between international organizations and one or more States.

19. In the case of a treaty between international organizations, an international organization party to the treaty might formulate a reservation "if the reservation is expressly authorized by the treaty or if it is otherwise agreed that the reservation is authorized" (paragraph 1).

20. In the case of a treaty between States and one or more international organizations—the case covered by article 3 (c) of the Vienna Convention—it was the Vienna Convention rule that applied to States (paragraph 2). For international organizations (paragraph 3), the same rule applied as in the case referred to in paragraph 1. Paragraph 4 dealt with a special case, in which the participation of an international organization in a treaty between States was essential for the object and purpose of the treaty. In that case, States were on the same footing as international organizations and the rule applicable to them was the same as that laid down in paragraphs 1 and 3.

21. In the case of a treaty between international organizations and one or more States, dealt with in paragraph 5, States were also assimilated to international organizations and were subject to the same régime.

22. Mr. REUTER (Special Rapporteur) expressed appreciation of the extremely valuable assistance which Mr. Ushakov had given to the Drafting Committee.

23. The solution proposed by the Drafting Committee in articles 19 and 19*bis* concerning the formulation of reservations was extremely simple. For States, the régime applicable was that of the Vienna Convention: as between themselves, States could formulate all the reservations provided for by that Convention. Thus, he did not agree with Mr. Ushakov on that point.

24. For international organizations, the régime applicable was also that of the Vienna Convention in the case of treaties between international organizations. In the case of treaties between States and one or more international organizations or between international organizations and one or more States, it was the rule of authorization that applied because of the functional character of international organizations. There was one exception to that rule, which applied when the participation of an international organization was not essential to the object and purpose

of the treaty. For in that case, the treaty would still hold good, even if the international organization did not become a party to it, which meant that States had conferred on that organization the faculty of participating in the treaty on the same footing as States. Consequently, international organizations should, in that case, be subject to the same régime as States, namely, that of the Vienna Convention.

25. Under the system proposed by Mr. Ushakov, international organizations could make only authorized reservations, irrespective of the type of treaty. As for States, the rule applicable to them was stricter than that provided for by the Drafting Committee, for in their case Mr. Ushakov had introduced a distinction between treaties between States and one or more international organizations and treaties between international organizations and one or more States; and for the latter type of treaty he had assimilated the position of States to that of international organizations, whereas the Committee had retained that distinction in the title to article 19*bis* purely for reasons of drafting. In Mr. Ushakov's draft, States were also placed on the same footing as international organizations and, like them, could only formulate authorized reservations when the participation of an international organization in a treaty concluded between States and one or more international organizations was essential to the object and purpose of that treaty.

26. Mr. Ushakov considered that it could be decided, at the outset, to deny international organizations any freedom in regard to the formulation of reservations. The Drafting Committee believed, on the contrary, that an international organization should be granted such freedom in two cases: that of a treaty between international organizations, and that of a treaty between States and international organizations when the participation of the organization in the treaty was not essential to its object and purpose.

27. To take an example, the Fifth International Tin Agreement (1975) was open to a certain number of international organizations and one international organization had already become a party to it without making any reservations. It was clear that, under paragraph 3 of Mr. Ushakov's draft article 19, the international organization concerned would not have had the right to formulate reservations, since the treaty did not expressly authorize or prohibit any reservation either for States or for international organizations. Under paragraph 3 of the article 19*bis* proposed by the Drafting Committee, on the other hand, the organization in question could have formulated reservations, for clearly its participation in the treaty was not essential to the object and purpose of that treaty and it was therefore in the same position as States. Where the participation of an international organization was no more necessary to the object and purpose of the treaty than the participation of any State, that organization should indeed be able to make reservations to the treaty under the same conditions as a State.

28. It would obviously not be acceptable for an international organization to be able to make reservations concerning relations between States parties to a treaty. But the definition of the word "reservation", adopted in

article 2 (d),⁵ should alleviate the concern expressed by Mr. Ushakov in that regard.

29. From the technical point of view, he was not sure whether it was possible to establish two separate régimes applicable to reservations for the two subcategories of treaties between which Mr. Ushakov had made a distinction—treaties concluded between States with the participation of one or more international organizations and treaties concluded between international organizations with the participation of one or more States—since that distinction was based on purely quantitative data.

30. A problem clearly arose when the number of States and organizations parties to the treaty was the same, since the treaty then fell into both categories. However, even where the number of States and the number of organizations parties to the treaty were different, it might be questioned whether the treaty should be regarded as belonging to one category rather than to the other. For instance, should a public health agreement concluded between five States and four international organizations be regarded as an agreement between States rather than as an agreement between international organizations? Admittedly, it could be said that some treaties were more in the nature of treaties between States, while others were more in the nature of treaties between international organizations. The Drafting Committee had taken account of that distinction in its draft of article 19*bis*, by providing for the case in which the participation of an international organization was not essential to the object and purpose of the treaty. However, that distinction should not be based on a purely arithmetical criterion. In the sphere of technical assistance, for instance, there were treaties between six or seven international organizations and a single State and treaties between six or seven States and a single international organization, for which there was no fundamental reason to establish different régimes.

31. In that connexion, he stressed that the Drafting Committee's text gave great weight to the object and purpose of the treaty. That criterion, which had been adopted in the Vienna Convention, seemed to be the only reasonable one since the Commission could not possibly make a detailed analysis of the structure of treaties, which would involve it in complicated and arbitrary classifications.

32. Mr. FRANCIS said that, in his view, the use of the word "several" in the title and text of article 19 adopted by the Drafting Committee was misleading and perhaps even dangerous. Treaties concluded between international organizations were a very new phenomenon and could not be treated in every respect like treaties between States. An international organization had no basic interest of its own in the sense that, fundamentally, it represented the interests of the States composing it. It was necessary to bear in mind that an international organization did not negotiate as an abstract institution but through accredited representatives, whose powers were limited. When a treaty was negotiated between two international organizations, unless those representatives were able to formulate reservations at the time when the

treaty was signed, the negotiations would have to be adjourned to enable the representatives to obtain instructions and authorization from their organizations. He feared that the use of the word "several" would prevent a negotiating agent from formulating a reservation to a treaty being negotiated between two international organizations.

33. Mr. REUTER (Special Rapporteur) said that the question was whether the Commission really wished to exclude reservations to bilateral treaties. That had certainly not been the wish of the United Nations Conference on the Law of Treaties, and the Drafting Committee had followed a course which seemed to preclude such a possibility. If the Commission wished to establish a parallel between the draft articles and the Vienna Convention and not exclude the possibility of making reservations to bilateral treaties, it should revert to the formula "treaties concluded between States and international organizations" and abandon the distinction made, for drafting purposes, between treaties between States and one or more international organizations and treaties between international organizations and one or more States.

34. The CHAIRMAN said that, owing to a meeting of the Planning Group, the Commission would have to break off its discussion of article 19, but members might give some thought to the possibility of simply deleting the word "several" from the title and text of that article. It seemed to him that such a solution would be consistent with article 19 and article 2, paragraph 1 (a), of the Vienna Convention.

The meeting rose at 11.30 a.m.

1447th MEETING

Monday, 27 June 1977, at 3.30 p.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Succession of States in respect of matters other than treaties (*continued*)* (A/CN.4/301 and Add.1, A/CN.4/L.256)

[Item 3 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to examine the text of articles 17 to 21 as well as the titles of part II of the draft articles and of sections 1 and 2 of part II,

⁵ *Ibid.*, foot-note 3.

* Resumed from the 1445th meeting.

as proposed by the Drafting Committee in document A/CN.4/L.256.

2. Mr. TSURUOKA (Chairman of the Drafting Committee) said that articles 17 to 20 were contained in section 1 (“General provisions”) of part II of the draft (Succession to State debts). Article 21 was the first of the articles in section 2 (“Provisions relating to each type of succession of States”). Article 17 was a new article. Article 18 corresponded to draft article 0, article 19 to draft article R and article 20 to draft articles S, T and U, proposed by the Special Rapporteur in his ninth report,¹ while article 21 corresponded to draft article Z/B, proposed by the Special Rapporteur at the 1427th meeting.²

3. The articles proposed by the Drafting Committee read:

Article 17. Scope of the articles in the present Part

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

Article 18. State debt

For the purposes of the articles in the present Part, “State debt” means any [international] financial obligation which, at the date of the succession of States, is chargeable to the State.

Article 19. Obligations of the successor State in respect of State debts passing to it

A succession of States entails the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as pass to the successor State in accordance with the provisions of the articles in the present Part.

Article 20. Effects of the passing of State debts with regard to creditors

1. The succession of States does not as such affect the rights of third-party creditors.

2. Where there is a purported passing of State debts made pursuant to an agreement or other arrangement between predecessor and successor States or, as the case may be, between successor States, it shall not be effective unless:

(a) that agreement or arrangement has been accepted by the creditor third State or international organization [or by the creditor whom a third State represents]; or

(b) the consequences of that agreement or arrangement are in accordance with the other applicable rules contained in Section 2 of Part II of these articles.

Article 21. 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 the State debt of the predecessor State to the successor State is to be settled by agreement between the predecessor and successor States.

2. In the absence of an agreement, an equitable proportion of the State debt of the predecessor State shall pass to the successor State, taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt.

4. He reminded the Commission that, in his ninth report, the Special Rapporteur had also proposed two articles for inclusion in section I, relating to the question of “odious debts”, namely, articles C and D,³ which,

after a full discussion in the Commission,⁴ had likewise been referred to the Drafting Committee for consideration in the light of that discussion.

5. The Drafting Committee had studied the matter and, while recognizing the importance of the issues raised in connexion with the question of “odious debts”, had been of the opinion that it would be best first to examine each particular type of succession, because the rules to be formulated for each type might well cover the issues connected with that question and might obviate the need to draft general provisions on it. It had therefore been generally agreed that it would be neither useful nor timely at that stage to draft articles on “odious debts” for inclusion in the section containing general provisions. It had, of course, been understood that the Commission and the Drafting Committee might wish to revert to the question later, when the draft articles on each type of succession had been formulated.

6. Reviewing the articles adopted by the Drafting Committee, he explained that the Committee had deemed it appropriate to include in part II an article 17 entitled “Scope of the articles in the present Part” in order to maintain the parallelism between the provisions concerning succession to State debts and those relating to succession to State property in part I. Article 17 corresponded to article 4⁵ and reproduced its wording, with the necessary drafting changes to make it refer to State debts. The article made clear that part II of the draft dealt with only one category of public debts, namely, State debts, as defined in the subsequent article.

7. Article 18, which corresponded to Article 0 proposed by the Special Rapporteur, defined “State debt” for the purposes of the articles in part II of the draft. The use of the expression “articles in the present Part” in the text of article 18, instead of “the present articles” as in the Special Rapporteur’s original proposal, conformed to usage throughout the draft and, in particular, to the language of the corresponding provision in part I, namely, article 5. Taking account of the predominant trend which had emerged from the rich debate in the Commission on the question of the definition of a State debt, the Drafting Committee had not retained in its proposed text the expressions “contracted by the central Government of a State” and “chargeable to the treasury of that State”, which had qualified the words “financial obligation” in the original text. The text simply referred to any financial obligation chargeable to the State. As in article 5, specific mention was made of the “date of the succession of States”, a term defined in article 3, which constituted the necessary point of reference for determining the time factor involved. Finally, the Committee had decided to place the word “international” in square brackets because of the difference of opinion among its members regarding the scope to be given to the provision. Members had agreed that the definition covered financial obligations chargeable to the State vis-à-vis another subject of international law, whether a State or an international organization, but did not extend to such obligations when the third-party creditor was an individual who was a national

¹ A/CN.4/301 and Add.1, paras. 63, 102, 108, 112 and 114, respectively.

² 1427th meeting, para. 16.

³ A/CN.4/301 and Add.1, paras. 140 and 173, respectively.

⁴ 1425th to 1427th meetings.

⁵ See 1416th meeting, foot-note 2.

of the debtor State, whether a legal or a natural person. With regard to foreign individual creditors, some members of the Committee considered that their position was adequately safeguarded by the provisions of article 20, paragraph 1. In addition, the word "international" (in square brackets) was intended to convey the idea that the financial obligation must arise at the international level.

8. Article 19 corresponded to article R, proposed by the Special Rapporteur. Apart from using the term "the provisions of the articles in the present Part", as in article 18, the only change made by the Drafting Committee to the article had been the deletion of the opening phrase, namely, "In the relations between the predecessor State and the successor State", in order to make the text of article 19 correspond more exactly to that of article 6 (part I of the draft). The purported effect of that phrase was now safeguarded by the provisions of the redrafted article 20.

9. The new text of article 20 corresponded to draft articles S, T and U, originally proposed by the Special Rapporteur, and formed a complement to article 19. Paragraph 1 of the article laid down the basic principle that a succession of States did not, as such, affect the rights of third-party creditors. The term "creditors" included all kinds of creditors, whether States or international organizations. If the Commission decided that the draft articles should cover private individuals, they would be included under the term "creditors" as well. Paragraph 2 covered the situation in which the predecessor and successor States, or two or more successor States, formally agreed on a passing of State debts. The word "purported", however, indicated that such passing did not occur as a result of that agreement or other arrangement alone. In subparagraph (a), the words "or by the creditor whom a third State represents" had been placed in square brackets because of the different positions taken by the members of the Drafting Committee in regard to the scope of the draft. The Drafting Committee did not wish the inclusion of those words to be understood as referring to the consent of a foreign private creditor given independently of his representation by a third State. The meaning of those words was that, if the private creditor had given his agreement, the third State could not act on behalf of the creditor outside the agreement. In subparagraph (b), the word "consequences" had been used to make it clear that, in that case, the Commission was not dealing with the effect of an inter-State agreement itself, which would be governed by the Vienna Convention.⁶

10. Article 21 corresponded to article Z/B proposed by the Special Rapporteur at the 1427th meeting of the Commission. In the light of the debate in the Commission, the Drafting Committee had opted, with regard to paragraph 2, for the alternative proposed by the Special Rapporteur. Some changes had also been made to that text. First, in both paragraphs, the word "State" had been added before "debt" for the sake of precision. Second, in paragraph 2, the words "*inter alia*" had been added because it might be necessary to take account of

factors other than those enumerated in the article in order to arrive at a determination of what constituted "an equitable proportion" of the State debts concerned. Third, the Committee had slightly revised the last part of paragraph 2 to improve the drafting. It should also be noted that, since a succession of States might not always involve the passing of a State debt, the wording of paragraph 1 could be somewhat ambiguous. The Drafting Committee had decided, however, to recommend to the Commission that that point be dealt with in the commentary, leaving unchanged the original expression "the passing of the State debt", which was in conformity with the corresponding article of part I, namely, article 12.

ARTICLE 17 (Scope of the articles in the present Part) ⁷

11. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to approve the title and text of article 17 proposed by the Drafting Committee.

It was so agreed.

ARTICLE 18 ⁸ (State debt) ⁹

12. Mr. USHAKOV observed that international law was concerned only with international relations; therefore, the term "State debt" should certainly be understood to mean any "international" financial obligation. The reason why the Drafting Committee had placed the word "international" in square brackets was to elicit reactions from Governments.

13. The CHAIRMAN said his understanding was that the Drafting Committee wished the word "international" to remain in the article submitted to the General Assembly, but in square brackets, because it believed that the question whether that word should appear or not required further study. Naturally, the reasons for that situation, including the comments made at the present meeting by the Chairman of the Drafting Committee, would have to be fully reflected in the Commission's report, in accordance with its usual practice in such matters.

14. Mr. USHAKOV said he would like it made clear in the commentary that, in the opinion of one member of the Commission, if the financial obligation chargeable to the State was not qualified as an "international" obligation, it might be an obligation contracted towards any natural or legal person; in particular, it might be a financial obligation contracted by a State towards its own nationals. If the draft articles were to cover the latter category of financial obligations, that would constitute a flagrant interference in the internal affairs of States. He therefore wished his interpretation of the term "any financial obligation", unqualified by the word "international", to be included in the commentary to the article under consideration.

15. Mr. SCHWEBEL said his impression was that the Drafting Committee was not making a recommendation to, but seeking the opinion of, the Commission on the

⁷ For text, see para. 3 above.

⁸ For the consideration of the text originally submitted by the Special Rapporteur, see 1416th to 1418th and 1420th and 1421st meetings.

⁹ For text, see para. 3 above.

⁶ See 1417th meeting, foot-note 4.

use of the word "international". It seemed to him that, since only one member of the Drafting Committee had expressed support for the use of that word, the most appropriate course would be for the Commission to submit to the General Assembly a text in which the word did not appear, and to explain the views of the member concerned in the commentary.

16. Article 0, as proposed by the Special Rapporteur, spoke simply of a "financial obligation", not of an "international financial obligation". The use of the latter phrase in an article would be absolutely contrary to State practice, in which there were thousands of examples of State succession to State debts which had not been debts on an international plane. So far as he was aware, no arguments had been adduced in either the Commission or the Drafting Committee for overturning that vast body of practice. Retention of the phrase would also have the effect of limiting sources of credit to States and international organizations, a restriction which would be contrary to the interests of the international community, and particularly those of the developing countries, which needed to borrow from other institutions. It would suggest to banks and similar bodies that they should not lend to any State likely to be involved in an occurrence of succession, and would therefore be contrary to the aims of the North-South dialogue, which included the widening of access to private capital markets.

17. Mr. SETTE CÂMARA said that, if it was true, as Mr. Schwebel had suggested, that the Drafting Committee was seeking a decision from the Commission on the use of the word "international", that decision would be facilitated if, in accordance with its previous practice, the Commission forwarded the text proposed by the Drafting Committee to Governments so as to obtain their views in time for its second reading of the draft articles. Not being a member of the Drafting Committee, he would be very reluctant to delete the word "international" at the present stage, without having heard the discussion in the Committee.

18. Mr. ŠAHOVIĆ said that the Drafting Committee had placed the word "international" in square brackets to show that there had been different opinions on it in the Commission and in the Drafting Committee. As Mr. Sette Câmara had said, the wording should be retained as it stood so that members of the Sixth Committee of the General Assembly would have an opportunity of stating their views.

19. Mr. QUENTIN-BAXTER observed that the function of article 18 was to provide a definition, and the Commission commonly had problems in deciding whether it should settle definitions before dealing with substance or vice versa. In his view, the article would serve well enough, without the word "international", for dealing with the various types of succession. It was his belief and hope that the definition of a State debt ultimately adopted by the Commission would follow more closely that of State property contained in article 5, for there were very strong technical and commonsense reasons for keeping those definitions in alignment.

20. There was clearly a fundamental difference of opinion among members of the Commission concerning the

use of the word "international" in article 18, and it was a difference which must be resolved if the draft articles as a whole were to be successful. Even disregarding his personal preference, which was that the word should not be used, he would have great difficulty in knowing what legal value should be given to the phrase "international financial obligation" if it was ultimately adopted. The first possibility would be that the phrase was intended to make clear that the Commission was not suggesting in the article that States owed international obligations to their own nationals, but that was an intention which could be reflected in other ways in a manner which would be acceptable to the Commission as a whole. The second possibility would be that the phrase was intended as a reference to cases in which the creditor happened to have international personality, but that would introduce quite a bizarre element into the text, since the application of the articles in cases where a State had issued bonds, for example, would depend entirely on whether the buyer of those bonds was a State or international organization, or merely a private individual. The third and perhaps the most likely possibility would be that the phrase was intended to refer to obligations arising at the level of international law or, in other words, from dealings, such as treaties, between subjects of international law. That would make the text very restrictive indeed by limiting it to borrowing between Governments or between Governments and international organizations, and excluding entirely the equally important aspect of borrowing on free markets. That, he supposed, would make Governments very uncertain whether the scope of the articles was sufficiently broad to justify their adoption.

21. Mr. AGO said he believed that the question of State succession in respect of debts included debts that were not international. He also considered, however, that it would be advisable to leave the word "international" in square brackets, not only because that was the Commission's usual practice but also because there had been differences of opinion in the Commission. In addition, it was necessary to explain why article 20 purported to restrict the notion of a State debt to international debts. For in paragraph 2 (a) of that article, the Drafting Committee had placed the phrase relating to diplomatic protection in square brackets. The more usual case of a debt owed to a creditor not represented by a third State was not considered.

22. Moreover, the commentary to articles 18 and 20 should be drafted with particular care. The differences of opinion that had led the Commission to leave certain words in square brackets should be explained. If Governments did not favour a restrictive definition of a State debt, several provisions in the draft would have to be amended.

23. Mr. BEDJAOUI (Special Rapporteur) endorsed the reasons advanced by the Chairman, Mr. Sette Câmara, Mr. Šahović and Mr. Ago for leaving the word "international" in square brackets. He reminded the Commission that, when summing up the discussion on the text which had become article 18, he had pointed out that it could not conceal the disagreements that had arisen among its members. It would now be advisable to give the Commission time to reflect and to afford Govern-

ments an opportunity of expressing their views on the problem. For his part, he would make sure that the commentary duly reflected the discussions that had taken place in the Commission and in the Drafting Committee.

24. Mr. SCHWEBEL said that, since the majority of the members of the Commission seemed to be in favour of leaving the word "international" in square brackets, he would not press for its deletion. He could see virtue in the Commission's practice, provided that it was consistently and impartially applied, and he wished to endorse Mr. Ago's point that all the opinions expressed during the current debate should be clearly stated in the commentary.

25. The CHAIRMAN observed that, when any member of the Commission believed that a point should be brought to the attention of Governments, the Commission traditionally followed what it considered to be the balanced procedure of recording in its commentary the views of that member as well as the majority opinion.

26. If there was no objection, he would take it that the Commission agreed to approve the title and text of article 18 in the form proposed by the Drafting Committee, on the understanding that the commentary would refer to the present discussion and fully explain why the word "international" had been placed in square brackets.

It was so agreed.

ARTICLE 19¹⁰ (Obligations of the successor State in respect of State debts passing to it)¹¹

27. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to adopt draft article 19 as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 20¹² (Effects of the passing of State debts with regard to creditors)¹³

28. Mr. USHAKOV said he interpreted article 20, paragraph 2, to mean that the agreement concluded between the predecessor State and the successor State on the passing of State debts would be effective only if it was accepted by the creditor third State or the creditor international organization, or even by a third-party private creditor. According to that interpretation, which seemed to him the only one possible, an agreement concluded between two sovereign States would not be valid without the consent of a third State. He was still convinced that such a rule would be entirely contrary to State practice and contemporary international law, in particular the law of treaties as codified by the Vienna Convention. If the Commission adopted paragraph 2 of article 20, he would like his position to be recorded in the commentary to that article.

¹⁰ For the consideration of the text originally submitted by the Special Rapporteur, see 1421st to 1425th meetings.

¹¹ For text, see para. 3 above.

¹² For the consideration of the text originally submitted by the Special Rapporteur, see 1421st to 1425th meetings.

¹³ For text, see para. 3 above.

29. Mr. TABIBI said he had no objection to article 20. Nevertheless, in view of the importance of private creditors for developing countries, he thought the commentary should contain a full explanation of the meaning of the words in square brackets in paragraph 2 (a). Such an explanation would certainly be very helpful to Governments, for which the question of private creditors might be a source of concern.

30. Mr. BEDJAOUI (Special Rapporteur) said that Mr. Ushakov had been right in emphasizing the difficulty of the situation dealt with in article 20, paragraph 2, and in referring, in that connexion, to the law of treaties. However, that paragraph was not intended to prevent the predecessor State and the successor State from agreeing on whatever they wished in regard to the passing of a debt. It was only intended to impose certain limits on what they could decide by agreement where a third party was involved, which might be a State, an international organization or sometimes even a private creditor represented by a third State. For it should not be forgotten, when invoking the law of treaties, that, in the case of a debt contracted by the predecessor State under a bilateral agreement, there was already an international agreement, governed by the law of treaties, which bound the predecessor State to the third State. It might therefore be asked what became of that agreement—to which the Vienna Convention applied—when the predecessor State and the successor State in their turn agreed, by treaty, on the fate of the agreement concluded by the predecessor State with the third State. In that case, as in the succession of States in respect of treaties, there was a triangular relationship between the predecessor State, the successor State and the third State, which the Drafting Committee had taken into account in paragraph 2. That paragraph did not, in fact, provide that the predecessor State and the successor State could not agree on anything whatsoever in regard to the debt, but simply that what they agreed would only be effective with respect to the third State in so far as that State gave its consent.

31. In his opinion, however, the Drafting Committee had gone too far in referring to "the creditor whom a third State represents", since a private creditor should not be able to oppose the will of two sovereign States. It would be better to refer to a "third State representing a creditor".

32. Mr. CALLE Y CALLE said that article 20 combined draft articles S, T and U concerning the problem of third States and, by extension, international organizations and possibly private creditors. He thought the rule laid down in article 20, paragraph 2, was logical and necessary, but in paragraph 2 (a) the words in square brackets should be amended to read "or by a third State representing a private creditor", so that it would be clear that they referred to debts owed to private individuals by States and that only a third State representing a private creditor could consent or object to an agreement between the predecessor and the successor State. That wording would also make it clear that States sometimes provided a kind of "anticipated" diplomatic protection in cases where private creditors were not able to obtain payment of their debts, either by the predecessor State or by the successor State. In no circumstances, however, should a

private creditor be involved in acceptance of a debt agreement because in some cases he might be a national of the predecessor State and then become a national of the successor State, whereas in others he might really be a third party in the sense that he was a national neither of the predecessor State nor of the successor State.

33. Mr. QUENTIN-BAXTER said that, with regard to the use of the word “effective” in paragraph 2, he agreed with the Special Rapporteur that the text of article 20 would not interfere with the law of treaties. What article 20 stated was that a debt was a matter of concern not only to the predecessor State and to the successor State but also to third-party creditors, which must therefore have something to say about the way in which the debt was transmitted. The solution offered in article 20 was simply that, if the passing of a debt between the predecessor State and the successor State was in accordance with the residuary rules contained in the draft articles, the creditor must be content; but, if it was not, the creditor would not be bound by an agreement between the predecessor State and the successor State and would be entitled to protection of his rights and interests. Article 20 was thus an attempt to state that important triangular relationship.

34. Although he agreed with Mr. Calle y Calle’s analysis of the problem posed by article 20, he thought that the words in square brackets in paragraph 2 (a) covered only the case in which a private creditor, acting in internal law, accepted the agreement between the predecessor and successor States. In such a case, the State of which the private creditor was a national would have nothing to say on his behalf. Where the creditor did not accept the agreement between the predecessor and successor States, it would be for the State of which he was a national to decide whether or not to take up his case. If that State subsequently accepted the agreement between the predecessor and successor States, then the creditor, as a private individual, would have nothing more to say because the draft articles operated only at the level of international personality.

35. The text of article 20 or the commentary thereto should indicate that, if a private creditor accepted the agreement between the predecessor and successor States, the State of which he was a national could do nothing more for him; for the effect of the words in square brackets was merely to limit the rights of private creditors, not to give them a status equivalent to that of the State which represented them.

36. Mr. DADZIE said that article 20 did not resolve the difficulties he had encountered when the Commission had discussed articles S, T and U since in paragraph 2 the words “shall not be effective unless” still subjected the debt agreement concluded between the predecessor and successor States to the will or consent of a third party, whether it was a State or a private individual. When a third party was involved in the passing of State debts, its interests should certainly be protected, but problems would arise if an agreement between the predecessor and successor States was subject to the consent of that third party. The Commission should therefore find a solution which would protect the interests of third parties and, at the same time, make the meaning of para-

graph 2 clear; as it stood, it could be invoked by a third party to prevent a succession of States from taking place.

37. Mr. AGO said that, on first reading article 20, paragraph 2, he had had the same doubts as Mr. Ushakov about the words “shall not be effective unless”. He had thought, however, that the intention might have been to make a distinction between the validity of an agreement and its effectiveness. Thus, an agreement concluded between the predecessor State and the successor State on the passing of State debts would be valid but not effective, since it would contain a suspensive condition, which was the consent of the third State.

38. However, his doubts had increased on the second reading of the paragraph, for he had then perceived that it was the Commission itself which, in the case of an agreement between the predecessor State and the successor State, added a suspensive condition to that agreement. If the predecessor State and the successor State provided that the agreement would become effective only when the creditor third State had given its consent, no problem arose and the rule stated in paragraph 2 was superfluous. If, however, the two States provided that the agreement would be effective from the time of its conclusion, was the Commission entitled to say that it would not be effective so long as the third State had not accepted it? It could give directives on the subject to the predecessor State and the successor State, advising them to take the interests of the third State into account and to include a clause to the desired effect in the agreement they concluded, but it could not restrict the freedom of two States which concluded an agreement.

39. It was to be hoped that the predecessor State and the successor State would take the interests of the creditor third State into account in the agreement they concluded; but if they did not, was not the agreement still valid for all that? And if it was valid, how could it be said that it was not effective?

40. Mr. SCHWEBEL said it was reassuring to see that so many members of the Commission supported article 20, paragraph 1. That provision was of fundamental importance because there was no reason why the rights of third-party creditors should be affected by a succession of States.

41. With regard to paragraph 2, in principle, he had no difficulty with the point made by Mr. Ago concerning the drafting of a rule of international law which would restrict the ability of two States to dispose of the property of a third State. Such a rule was a basic principle of municipal law and he did not see why the Commission could not reproduce it, in substance, in international law. He did not think, however, that paragraph 2 was intended to go so far as to invalidate an agreement between two States. The point it made was, rather, that such an agreement would not be effective against interested third parties. In order to make that point clear, it might be advisable to replace the words “it shall not be effective unless” by the words “it shall not be effective against third parties unless”.

42. With regard to the words in square brackets in paragraph 2 (a), his strong view was that any agreement relating to a succession of States in respect of matters

other than treaties must comprehensively embrace actual debt relations, including those in which the creditor was not a State or an international organization. As Mr. Quentin-Baxter had rightly pointed out, however, that was by no means the same thing as saying that a third-party creditor other than a State or an international organization was an international person and could be regarded as an entity operating on the plane of international law. Referring to the examples which Mr. Quentin-Baxter had given of the primacy of the State over its nationals who were creditors, he urged that account should also be taken of the case in which a private creditor's Government rejected a debt settlement before the private creditor had been able to accept it. In such a case, the private creditor would not be entitled to accept the settlement even if he wished to do so.

43. The CHAIRMAN, speaking as a member of the Commission, said that, although he had no basic objection to the substance of article 20, he thought that, even with the inclusion of the words in square brackets in paragraph 2 (a), its meaning was not clear.

44. In referring to paragraph 1, Mr. Schwebel had stressed the importance of protecting the interests of "third-party creditors" but the fact was that those words had not been defined for the purpose of the draft articles. The commentary should explain what the words "third-party creditor" meant in the context of article 20.

45. In paragraph 2, he was not at all satisfied with the word "purported", a word which the Commission had usually tried to avoid. He noted that the words "an agreement providing" had been used in article 8 of the draft articles on succession of States in respect of treaties.¹⁴ That formulation would be better than "purported" because the word "purport" was rather nebulous; he was not even sure that it was a proper juridical term.

46. He also had some difficulties with the words "or other arrangement" in the second line of paragraph 2. Either an agreement existed or it did not. Moreover, the words "or other arrangement" would give rise to problems in the interpretation of article 21, paragraph 2, which began with the words "In the absence of an agreement".

47. He thought that the words "predecessor and successor States" in paragraph 2 should be in the singular because, when a debt passed from one State to another, the relation in question was essentially bilateral, not multilateral. Similarly, the words "State debts" should be amended to read "any State debt" so that the objection of a particular creditor to an agreement would make the agreement ineffective only in relation to the particular debt for which he was a creditor. He therefore proposed that the introductory phrase of paragraph 2 should be amended to read:

Where an agreement between a predecessor State and a successor State or between successor States provides for the passing of any State debt, it shall not be effective for that purpose unless:

48. He had no objection to the substance of paragraph 2 (a) but he thought that, unlike article 3 of the Vienna

Convention, the present wording of that subparagraph would exclude such subjects of international law as the Holy See, which might be a creditor. He therefore suggested that the words "or other subject of international law" should be inserted between the words "international organization" and the words in square brackets. Although he normally found the use of square brackets very unsatisfactory, he thought that in the present case they were justified. If the last words of paragraph 2 (a) were retained in square brackets, their meaning should be made clearer and they should be fully explained in the Commission's commentary.

49. Speaking as Chairman, he suggested that, in view of all the comments which had been made about article 20, the Drafting Committee should take another look at that article and try to improve its wording.

50. Mr. TSURUOKA (Chairman of the Drafting Committee) said that, in the light of the discussion and subject to the agreement of the Special Rapporteur, he accepted the Chairman's suggestion that article 20 should be reconsidered by the Drafting Committee.¹⁵

51. Mr. BEDJAOUI (Special Rapporteur) said he thought the discussion on article 20, paragraph 2, had been based on a misunderstanding. That paragraph was certainly not intended to deny the freedom of the predecessor State and the successor State to conclude an agreement or to make their agreement void in the event of non-acceptance by a third State, but to uphold the existing agreement between the predecessor State and the third State.

The meeting rose at 6.10 p.m.

¹⁵ For the consideration of the revised text proposed by the Drafting Committee, see 1450th meeting, paras. 7-47.

1448th MEETING

Tuesday, 28 June 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (continued)* (A/CN.4/285,¹ A/CN.4/290 and Add.1,² A/CN.4/298, A/CN.4/L.253, A/CN.4/L.255)

[Item 4 of the agenda]

* Resumed from the 1446th meeting.

¹ Yearbook ... 1975, vol. II, p. 25.

² Yearbook ... 1976, vol. II (Part One), p. 137.

¹⁴ See 1416th meeting, foot-note 1.

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

ARTICLE 19 (Formulation of reservations in the case of treaties between several international organizations),

ARTICLE 19*bis* (Formulation of reservations by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States) *and*

ARTICLE 19*ter* (Objection to reservations)³ (*concluded*)

1. The CHAIRMAN invited the Commission to resume its consideration of the texts of articles 19, 19*bis* and 19*ter* proposed by the Drafting Committee and the text of article 19 proposed by Mr. Ushakov (A/CN.4/L.253).

2. Mr. FRANCIS, referring to article 19*bis*, said he had the impression that, when reservations were formulated by international organizations to treaties concluded with States, there were circumstances in which an international organization could be said to be contracting on equal terms with States. If that impression was correct, those circumstances should be taken into account in the article.

3. Where an international organization was contracting with a body of States which was equivalent to its total membership, with a view to doing something that was not provided for in its constituent instrument, the organization could not truly be said to be contracting on terms of equality with those States because they were its masters. But there was an entirely different situation that also had to be taken into account. For instance, the Caribbean Community might be instructed by its executive organ to negotiate a treaty with States which were not members of the Community. In that case, the Community could be said to be contracting on equal terms with those non-member States and it should have the right to formulate reservations to the resultant treaty, even if that right was not expressly provided for in its constituent instrument. That example was particularly important because it related to an organization which was composed of sovereign States and which therefore expressed the sovereign will of those States when it contracted with other States. Under article 19*bis*, paragraph 2, however, such an organization could not formulate reservations unless the treaty so provided. He thought the Commission should give further consideration to that question. The Commission should also consider whether the provisions of article 19*bis*, paragraph 2, were fully consistent with those of article 20*bis*, paragraph 2.

4. In article 19*ter*, paragraph 3 (a), he had some difficulty with the words "the possibility of objecting is expressly granted to it by the treaty". If those words meant that an international organization could not object to a reservation unless the treaty so provided, the organization would be relegated to the status of a nonentity. Indeed, if an organization could formulate a reservation to a treaty, it followed logically that it should also be able to object to a reservation to a treaty. Moreover, an international organization should be able to object to

reservations formulated either by States or by another organization, if those reservations were incompatible with the basic aim or purposes of the organization itself. The Commission should therefore give further consideration to article 19*ter*, paragraph 3 (a), which, as it stood, was too restrictive.

5. The CHAIRMAN said that the draft articles under consideration were designed to take account of the fact that the Commission had not yet been able to decide whether States and international organizations had equal status in the matter of formulating reservations. The comments made by Mr. Francis would be reflected in the Commission's report, and the Commission would be able to revert to that basic problem during the second reading of the draft articles. By that time, it would have received the views and comments of Governments on that matter.

6. Mr. USHAKOV, referring to article 19*bis*, paragraph 2, asked whether the other international organizations parties to a treaty, whose participation was not essential to its object and purpose, were also allowed to formulate reservations.

7. Mr. REUTER (Special Rapporteur) said that article 19*bis*, paragraph 2, dealt with the case in which the various international organizations parties to a treaty were not necessarily in the same position. For instance, in the case of a treaty concluded between IAEA (which would be responsible under the treaty for specific supervisory functions), on the one hand, and a certain number of States, and two operational international organizations, such as Eurochemic and Euratom, on the other hand, there was only one international organization whose participation was essential to the object and purpose of the treaty, namely, IAEA, which, because of the specific functions it was required to perform under the treaty, was not in the same position as States. Thus, it could only make a reservation if that reservation was expressly authorized by the treaty, in accordance with the rule laid down in paragraph 2. As to the other two organizations, it was not paragraph 2 but paragraph 3 which applied to them, since they were in the same position as States. The words "that organization" made it clear that the rule laid down in paragraph 2 did not apply to all the organizations parties to the treaty.

8. Mr. QUENTIN-BAXTER said that, although he had been one of the members of the Commission who had thought that the rules on the formulation of reservations should be stricter for international organizations than for States, he now found it possible to accept draft articles 19 and 19*bis*, as proposed by the Drafting Committee.

9. In the case of article 19, he had shared the concern of some of the other members that the Commission was showing an inclination to assimilate international organizations to States and not taking due account of the limited contractual capacity of international organizations. His doubts had now been dispelled, however, and he was quite satisfied with the balance established by articles 6⁴ and 27. Moreover, article 19, as proposed by the Drafting Committee, contained residual rules which were not compelling and did not set any parameters that

³ For texts, see 1446th meeting, para. 4.

⁴ See 1429th meeting, foot-note 3.

international organizations would feel obliged to follow. In fact, what that article now offered to international organizations was an opportunity to benefit from State practice, whenever they found it convenient to do so.

10. With regard to the much more difficult case of article 19*bis*, he had shared the opinion of some members of the Commission that, in view of the practical problems involved in conferences in which international organizations might participate, the status of organizations could not be equal to that of States. The solution proposed by the Drafting Committee did, however, take ample account of cases in which there would be no point at all in holding a conference unless the organization that was going to be involved was prepared, in principle, to assume the responsibilities placed upon it. He therefore found that article satisfactory.

11. He agreed with the Chairman that the question of the relative status of States and international organizations, to which Mr. Francis had referred, did not have to be settled just then. Indeed, the draft articles under consideration were full of questions that would require further investigation. For the time being, however, the Commission was being very tentative and merely suggesting hypotheses and inviting reactions.

12. With regard to the alternative proposed by Mr. Ushakov (A/CN.4/L.253), which implied that there were two intersecting worlds, namely, the world of States and the world of international organizations, he found that hypothesis harder to accept than the one proposed by the Drafting Committee, in which it was simply admitted that there were cases in which international organizations took part in dealings with States for particular purposes. Those cases were well known and could be provided for. However, it was very possible that there would be other cases in which it would be necessary to bring the status of international organizations more closely into line with that of States. In his view, the Commission's task would be to find a way of taking that possibility into account.

13. Mr. USHAKOV said he assumed, from the Special Rapporteur's explanation regarding article 19*bis*, paragraph 2, that only an international organization whose participation was essential to the object and purpose of the treaty could make reservations and that the other organizations could not.

14. Mr. REUTER (Special Rapporteur) said that that was not the meaning of draft article 19*bis*. Under that article, an international organization party to a treaty fell within the scope of either paragraph 2 or paragraph 3. If the participation of the organization was essential to the object and purpose of the treaty, it could only formulate reservations expressly authorized by the treaty; if the contrary was the case, it could formulate the same reservations as States.

15. The CHAIRMAN, speaking as a member of the Commission, said he agreed with the Special Rapporteur that every case involving an international organization was covered either by paragraph 2 or by paragraph 3 of article 19*bis*.

16. Speaking as Chairman, he invited the Commission to consider the suggestion made by Mr. Francis at the 1430th meeting concerning the deletion of the word

"several" in the title and the first part of the English version of article 19.

17. Mr. SCHWEBEL said that he supported the suggestion by Mr. Francis.

18. Mr. SETTE CÂMARA said that he also supported the suggestion by Mr. Francis.

19. Mr. TSURUOKA said that, if it deleted the word "several" in article 19 and expressly authorized an international organization to make a reservation to a treaty between only two international organizations, the Commission would be authorizing an anomaly. If an international organization made a reservation to a treaty between two international organizations and the other party did not accept the reservation, the treaty must normally fall. If the two parties decided none the less to conclude a treaty, it would of necessity be another treaty, since the formulation of reservations to a bilateral treaty amounted to a proposal to negotiate another treaty. The Commission was free to allow such a possibility if it so wished, but it should appreciate the anomaly involved.

20. Mr. SETTE CÂMARA, referring to the point made by Mr. Tsuruoka, said the problem whether reservations could be formulated to bilateral treaties was complicated and controversial. The Vienna Convention⁵ did not, however, rule out the possibility. The Commission should therefore bear in mind the fact that, if it decided to rule out the possibility of the formulation of reservations to bilateral treaties concluded between two international organizations, it would be going much further than the Vienna Convention.

21. The CHAIRMAN said that he did not think it would make much difference whether or not the Commission decided to delete the word "several", because its discussion of that problem would be reflected in its commentary to article 19.

22. Mr. FRANCIS said that the word "several" had not been used either in article 2, paragraph 1 (a) (ii), or in the heading of document A/CN.4/L.255, which contained the texts of the articles adopted by the Drafting Committee.

23. Mr. USHAKOV suggested that the word "several" be placed between square brackets.

24. The CHAIRMAN said he thought it would be better to avoid the use of square brackets in the present case.

25. Mr. QUENTIN-BAXTER said that the problem whether reservations could be formulated to bilateral treaties arose not only in connexion with article 19, where the words "several international organizations" had been used, but also in connexion with article 19*bis*, which spoke of "one or more international organizations".

26. Mr. TSURUOKA, speaking as Chairman of the Drafting Committee, said that the Committee had decided, after a lengthy discussion, to translate the term *un(e) ou plusieurs* by "one or more", except in article 19, where the word "several" had been retained because it was obviously not possible to use the term "one or more".

27. Mr. DADZIE said that he failed to see the significance of Mr. Francis' suggestion that the word "several"

⁵ See 1429th meeting, foot-note 4.

be deleted in article 19 because the alternative translation of “one or more”, which had been used in article 19*bis*, would pose even greater problems. Since it was clear that article 19 related to cases in which a number of international organizations—obviously more than two—were involved in the conclusion of a treaty, the thrust of the article would be the same whether the word “several” was deleted or not. He therefore suggested that the word “several” be retained.

28. Mr. CALLE Y CALLE said that he too did not think that the use of the word “several” in article 19 could raise any difficulties. Obviously, reservations could not be formulated to treaties concluded between two international organizations only.

29. Mr. ŠAHOVIĆ said that the sensible course would be to approve the Drafting Committee’s proposal and take advantage of the commentary to reflect the doubts of some members regarding the use of the word “several”.

30. With regard to bilateral treaties, in its commentary to future articles 16 and 17 of the Vienna Convention, the Commission had stated:

A reservation to a bilateral treaty presents no problem, because it amounts to a new proposal reopening the negotiations between the two States concerning the terms of the treaty.⁶

31. Mr. FRANCIS suggested that the Commission adopt Mr. Ushakov’s suggestion to place the word “several” in square brackets, thus leaving the issue open for further discussion and avoiding the need to vote on a matter on which opinions differed.

32. Mr. REUTER (Special Rapporteur) said that there had been no difficulties with the Vienna Convention regarding bilateral treaties because it offered drafting possibilities which had obviated the need to decide the point. The same drafting possibility was open to the Commission in the case of article 19, since it could refer there to a treaty “between international organizations”. The problem lay not with article 19 but with article 19*bis*, since the expression “treaty between one or more States and one or more international organizations” would imply that the Commission allowed reservations to a treaty between a State and an international organization—and that was unacceptable to some members of the Commission. He had been unable to find a formula that would retain the required ambiguity in article 19*bis* and was prepared to support Mr. Šahović’s proposal if the Commission could not reach a satisfactory solution.

33. The CHAIRMAN said he thought that, in the present case, the use of square brackets was to be avoided. If there was no objection, he would take it that the Commission approved the title and the text of article 19 as proposed by the Drafting Committee, on the clear understanding that the problems involved in the use of the words “several international organizations” would be fully reflected in the commentary.

It was so agreed.

34. The CHAIRMAN said that, if there was no objection, he would take it that the Commission approved

the title and the text of article 19*bis* as proposed by the Drafting Committee.

It was so agreed.

35. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed that the discussion to which the alternative text of article 19 proposed by Mr. Ushakov had given rise would be fully reflected in the commentary to article 19, and that the alternative text of that article would be reproduced in a foot-note to the commentary.

It was so agreed.

36. Mr. USHAKOV proposed that draft article 19*ter* (Objection to reservations) be reworded to read:

“1. An international organization, when signing, formally confirming, accepting, approving or acceding to a treaty between several international organizations, may object to a reservation formulated by another international organization unless the reservation is authorized by the treaty.

“2. A State, when signing, ratifying, accepting, approving or acceding to a treaty between States and one or more international organizations or between international organizations and one or more States, may object to a reservation formulated by another State or international organization unless the reservation is authorized by the treaty.

“3. An international organization, when signing, formally confirming, accepting, approving or acceding to a treaty between States and one or more international organizations or between international organizations and one or more States, may object to a reservation formulated by a State or another international organization, unless the reservation is authorized by the treaty, if:”

and be followed by paragraphs 3 (a) and (b) of article 19*ter*, as proposed by the Drafting Committee.

37. His proposal, which was designed to promote agreement among members of the Commission, did not affect the substance of the article.

38. The CHAIRMAN said he noted, with regard to the amendment proposed by Mr. Ushakov, that in each paragraph the phrase beginning “when signing, ...” seemed to restrict the making of objections to a particular point in time. That was perhaps not Mr. Ushakov’s intention, but the limitation was one which did not appear in article 19*ter* as proposed by the Drafting Committee, and therefore seemed to be a matter of substance rather than of drafting.

39. Mr. REUTER (Special Rapporteur) said that Mr. Ushakov’s proposal related only to the form of article 19*ter*. It dealt first with treaties between several international organizations and then with treaties between States and one or more international organizations or between international organizations and one or more States, making a distinction between the position of States and that of international organizations.

40. In his view, the proposal looked very like providing the answer to a question on which the Vienna Convention had remained silent: what happened when a State formulated a reservation which, it claimed, was authorized

⁶ *Yearbook ... 1966*, vol. II, p. 203, document A/6309/Rev.1, part II, chap. II, sect. C, draft articles on the law of treaties with commentaries, articles 16 and 17, para. 1 of the commentary.

by the treaty, but which another State considered was not so authorized? The other State certainly had the right to formulate an objection to the reservation and, while the Vienna Convention did not expressly recognize such a right, it did not exclude it. Such cases could, moreover, be expected to occur frequently. For each of the cases covered in Mr. Ushakov's proposal, it was provided that an objection could not be formulated to a reservation authorized by the treaty. If the Commission accepted that proposal, it should at least be made clear in the commentary that the right to object applied not only to reservations which had not been authorized but also to reservations which had been authorized by the treaty; in the latter case, the right to object was confined to the question whether a given reservation fell within the category of authorized reservations. So long as there was any uncertainty as to whether Mr. Ushakov's proposal did or did not exclude the second aspect of that right, his own preference would be for the text proposed by the Drafting Committee since it afforded the possibility of objecting to a reservation which, in the opinion of the objecting party, was not a reservation authorized by the treaty.

41. Mr. USHAKOV said that article 19^{ter}, paragraph 1, as proposed by the Drafting Committee, did not specify at which point an objection to a reservation could be formulated. Article 19 of the Vienna Convention provided that a State could formulate a reservation "when signing, ratifying, accepting, approving or acceding to a treaty". While that Convention did not state expressly when an objection to a reservation could be formulated, it must be at the same time. The point at which a State or international organization could formulate an objection to a reservation should therefore be indicated.

42. Unlike the Special Rapporteur, he did not think that the Vienna Convention allowed a State to object to a reservation expressly authorized by the treaty. A reservation authorized by a treaty was one which the parties to the treaty accepted in advance, as was clear from paragraph 1 of article 20 as proposed by the Drafting Committee, under which "a reservation expressly authorized by a treaty ... does not require any subsequent acceptance". Although there was no stipulation in the Vienna Convention precluding objections to reservations that were expressly authorized, the point should be decided in the draft. If, in the Commission's view, objections to reservations authorized by the treaty were not allowable, the article should be amended accordingly.

43. The CHAIRMAN, with regard to the statement by Mr. Ushakov, said that the Commission should also bear in mind article 20, paragraph 5, of the Vienna Convention, from which it was quite clear that objections could be made at points subsequent to those mentioned in the amendment proposed by Mr. Ushakov.

44. Mr. CALLE Y CALLE said that paragraphs 1 and 2 of article 19^{ter} referred to the making of objections to reservations formulated pursuant to article 19 and article 19^{bis}, paragraph 3. Articles 19 and 19^{bis} made it clear when such reservations could be formulated but, as the Chairman had said, objections did not have to be made at the same fixed time. The possibility of making an objection was dependent on the prior formulation of a reserva-

tion; to limit it to the occasions proposed by Mr. Ushakov would greatly reduce the freedom of parties to a treaty to make objections at all.

45. Mr. REUTER (Special Rapporteur) said that the question of the point at which an objection to a reservation could be formulated was linked with article 20, paragraph 4, which precluded the clarification proposed by Mr. Ushakov.

46. The wording of reservations authorized by the treaty was not normally indicated in the treaty. If a treaty included models of reservations which a State could simply copy when formulating a reservation, the question whether the reservation was authorized by the treaty would not arise. If, however, a treaty simply stated that reservations could be formulated to specific articles, it might happen that a State submitted a reservation which not only related to one of those articles but also affected another provision; in that case, there was a risk of a difference of opinion between the State formulating the reservation and the State raising the objection to it, the former claiming that it was authorized and the latter that it was not. That problem could not be overlooked. The Drafting Committee had taken account of it in article 19^{ter}: Mr. Ushakov's proposed article, however, was based on the premise that objections could not be formulated to reservations authorized by a treaty.

47. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to approve the title and text of article 19^{ter}, as proposed by the Drafting Committee.

It was so agreed.

48. Mr. USHAKOV said that, in his opinion, there would be no point in authorizing reservations to certain articles in a treaty if it was then possible to object to those reservations. For instance, the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character⁷ provided for the possibility of formulating reservations to the article on the settlement of disputes by arbitration; in his view, no State could object to the reservation formulated by the Soviet Union with regard to that article.

ARTICLES 20 (Acceptance of reservations in the case of treaties between several international organizations) and

ARTICLE 20^{bis} (Acceptance of reservations in the case of treaties between States and one or more international organizations or between international organizations and one or more States)⁸ (continued)

49. The CHAIRMAN invited the Commission to consider articles 20 and 20^{bis} as proposed by the Drafting Committee and the alternative text for article 20 proposed by Mr. Ushakov (A/CN.4/L.253).

50. Mr. USHAKOV said that the word "treaty", as used in article 20, paragraphs 2 and 3, referred to a treaty between several international organizations. Consequently, it did not answer the general definition of that word given in article 2, paragraph 1 (a), which covered not only treaties between international organizations but also

⁷ See 1435th meeting, foot-note 10.

⁸ For texts, see 1446th meeting, para. 4.

treaties between one or more States and one or more international organizations. It should therefore be made clear to what kind of treaty paragraphs 2 and 3 referred.

51. In his opinion, the wording of the last part of article 20*bis*, paragraph 1, which read “does not ... require subsequent acceptance by, as the case may be, the other contracting State or States or the other contracting organization or organizations”, was not very satisfactory. If a treaty concluded between States and one or more international organizations was the subject of a reservation formulated by a State, that reservation could be accepted either by another contracting State or by the organization or organizations, but on no account by “the other contracting organization”. If the reservation was formulated by an organization, it could be accepted by a State and not by “the other contracting State”. Either each category of treaty should be dealt with separately, as in his own draft article 20, or the passage in question should be replaced by the words “does not ... require subsequent acceptance by the contracting State or States or by the contracting international organization or international organizations”.

52. The same comment applied to article 20*bis*, paragraphs 2 and 3, as he had made regarding the drafting of the corresponding paragraphs of article 20.

53. Article 20*bis*, paragraph 3 (a), was based on the corresponding provision in article 20, and the words “if ... the treaty is in force” applied to the case where a treaty had entered into force generally and not only for the reserving and accepting parties. In that subparagraph, therefore, the words “for the reserving and for the accepting State or organization” should be replaced by the words “between the reserving State and the accepting organization, between the reserving organization and the accepting State or between the reserving organization and the accepting organization”.

54. In the French version of paragraph 3 (b), he said it should be made clear that the opening words, *l'objection faite à une réserve*, referred to an objection by a State or international organization, in the same way as article 20, paragraph 4 (b), of the Vienna Convention specified that its provisions referred to an objection to a reservation “by another contracting State”.

55. His comments related only to form and were designed to make the Commission's task easier. He would not press them and would not be opposed to the adoption of articles 20 and 20*bis* as proposed by the Drafting Committee.

56. Mr. VEROSTA said that Mr. Ushakov's comments merited consideration. He would, however, point out that the titles of articles 20 and 20*bis* indicated clearly the kind of treaty to which they applied: article 20 was concerned with the treaties referred to in article 2, paragraph 1 (a)(ii), and article 20*bis* with those referred to in paragraph 1 (a)(i) of the same article. In the circumstances, it was perhaps unnecessary to repeat, in articles 20 and 20*bis*, the descriptive formula which appeared in their respective titles. The Commission might also indicate in article 2 that, when it was quite clear from their title, certain articles of the draft related to only one or the other category of treaty.

57. The CHAIRMAN said that the Commission's usual practice was to make the title of a draft article fit the text. It was generally agreed by both the Commission and codification conferences that articles must be sufficiently clear in themselves for there to be no need to rely on their titles for their interpretation.

58. Mr. USHAKOV said he agreed with the Chairman that articles should not be interpreted by reference to their title.

59. Mr. REUTER (Special Rapporteur) said he shared that view and would point out that the Drafting Committee had agreed that the word “treaty”, as used in paragraphs 2 and 3 of articles 20 and 20*bis*, should be understood in the sense given to it in paragraph 1 of those articles. It would be inadvisable to get out of the difficulty by using the demonstrative “this” since it would not be appropriate in article 20*bis*. It would be better to explain in the commentary that the indications given in paragraph 1 also applied to paragraphs 2 and 3.

60. He agreed with Mr. Ushakov that the last part of article 20*bis*, paragraph 1, starting with the words “by, as the case may be”, was not very satisfactory. He would suggest instead the following wording: “by the other contracting parties, State or States, organization or organizations”.

61. The CHAIRMAN suggested that the problem of the identity of the treaty referred to in article 20, paragraph 2, first line, could be resolved if the phrase “of the treaty” were replaced by the phrase “of such a treaty”. The present wording of the first line of paragraph 3, however, once again made the identity of the treaty in question uncertain, for the phrase “In cases not falling under the preceding paragraphs” seemed to exclude the type of treaty referred to in paragraphs 1 and 2.

62. Mr. TSURUOKA, speaking as Chairman of the Drafting Committee, said that a very meticulous legal mind might indeed feel some doubt but a little ordinary common sense, he thought, should dispel it. He was, however, prepared to try to improve the wording, in agreement with the Special Rapporteur and the members of the Drafting Committee.

63. Mr. CALLE Y CALLE said that the first paragraph of both article 20 and article 20*bis* made it perfectly clear to what type of treaty the article referred.

64. Since the phrase “When it appears from the object and purpose of the treaty” was long established and had an accepted meaning, he would prefer to see the amendment to article 20, paragraph 2, suggested by the Chairman introduced at a later stage in that paragraph, so that the beginning would read “When it appears from the object and purpose of the treaty that the application of such a treaty ...”.

65. The CHAIRMAN said he supported the amendment suggested by Mr. Calle y Calle.

66. Mr. REUTER (Special Rapporteur) said that, to meet the Chairman's concern, the last part of the introductory phrase of article 20, paragraph 3, might be redrafted to read “and unless the treaty between international organizations otherwise provides”.

The meeting rose at 1.05 p.m.

1449th MEETING

Wednesday, 29 June 1977, at 10.10 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Succession of States in respect of matters other than treaties (continued)* (A/CN.4/301 and Add.1, A/CN.4/L.254, A/CN.4/L.256 and Add.1, A/CN.4/L.257)

[Item 3 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

ARTICLE 21¹ (Transfer of part of the territory of a State)²

1. Mr. REUTER said that article 21 was acceptable. The arrangements for the passing of the State debt, referred to in paragraph 2, would be dealt with in the final clauses.

2. The CHAIRMAN said that the point raised by Mr. Reuter would be mentioned in the commentary.

3. If there was no objection, he would take it that the Commission approved the title and text of article 21 as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 22³ (Newly independent States)

4. Mr. TSURUOKA (Chairman of the Drafting Committee) said that the Drafting Committee proposed for article 22 the text contained in document A/CN.4/L.256/Add.1, which read:

Article 22. Newly independent States

When the successor State is a newly independent State:

1. No State debt of the predecessor State shall pass to the newly independent State, unless an agreement between the newly independent State and the predecessor State provides otherwise in view of the link between the State debt of the predecessor State connected with its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State.

2. The provisions of the agreement referred to in the preceding paragraph should not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor should their implementation endanger the fundamental economic equilibria of the newly independent State.

* Resumed from the 1447th meeting.

¹ For the consideration of the text originally submitted by the Special Rapporteur, see 1427th and 1428th meetings.

² For text, see 1447th meeting, para. 3.

³ For the consideration of the text originally submitted by the Special Rapporteur, see 1443rd to 1445th meetings.

5. In his ninth report, the Special Rapporteur had proposed three articles concerning newly independent States.⁴ The Commission had, however, considered that subject on the basis of a new article which the Special Rapporteur had introduced to replace the original three articles.⁵ The Drafting Committee had based its work on that consolidated article and on proposals put forward during its discussions by the Special Rapporteur and the members of the Committee, reflecting their various points of view. After a long and detailed debate, the Drafting Committee had decided by seven votes to three to propose the text which was now before the Commission.

6. That text comprised two paragraphs, which, the Committee felt, embodied the basic principles set out in the article proposed by the Special Rapporteur. The Committee had agreed with what had appeared to be the general trend of thought within the Commission, that the article should not be too detailed but should reflect the essential elements, in particular those contained in paragraphs 2, 3 and 6 of the Special Rapporteur's consolidated text.

7. Paragraph 1 stated the basic rule: "No State debt of the predecessor State shall pass to the newly independent State". But it also provided that the predecessor State and the newly independent State might agree otherwise, in view of the link between the State debt of the predecessor State, which was connected with its activity in the territory to which the succession of States related, and the property, rights and interests which passed to the newly independent State. The Commission would note that, in speaking of the predecessor State's activities, the paragraph employed the phrase "connected with its activity in the territory", which was also to be found in article 11 in part I, relating to the passing of debts owed to the State.⁶ In other articles of part I, the Commission had used the phrase "connected with the activity of the predecessor State in respect of the territory".

8. Paragraph 2 was a safeguarding clause establishing the criteria with which the provisions of the agreement between the predecessor State and the newly independent State, referred to in paragraph 1, and their implementation must comply. In some respects, the paragraph had drawn inspiration from article 13, paragraph 6, relating to succession by newly independent States to State property.

9. While the French and Spanish versions of paragraph 2 employed the same tense as had been used in article 13, paragraph 6, the English version used the auxiliary "should", in order better to convey in English the intention behind paragraph 2, which was to provide guidelines in relation to the agreements referred to in paragraph 1. The paragraph did not speak of the agreement itself but rather of its provisions and their implementation.

10. The use of the expression "not infringe the principle of the permanent sovereignty of every people over its

⁴ A/CN.4/301 and Add.1, paras. 364, 374 and 388.

⁵ 1443rd meeting, para. 1.

⁶ See 1416th meeting, foot-note 2.

wealth and natural resources” reproduced language which already appeared in article 13, paragraph 6, and was consistent with United Nations usage in regard to that very important principle. The expression “endanger the fundamental economic equilibria of the newly independent State” had been used in place of the expressions “gravely compromising the economy” of that State or “retarding its progress”, which had been suggested in the consolidated article proposed by the Special Rapporteur, because it was felt that it reflected more fully the idea that was intended.

11. Mr. SCHWEBEL said that the alternative version of the article which he had introduced in the Drafting Committee the previous day and which was now before the Commission in document A/CN.4/L.257, drew heavily both on the consolidated article which had been proposed by the Special Rapporteur, particularly its second and third paragraphs, and on terminology which had been suggested by other members of the Commission in the Drafting Committee.

12. The main difference between paragraph 1 of his text and that of the Drafting Committee was that his proposal did not absolutely exclude the passing of a State debt from a predecessor State to a newly independent State otherwise than by agreement between them. While in practice a State debt might pass between such States only by agreement, it seemed to him preferable, as a matter of principle, to admit the possibility that it could be transferred in some other way, although it should be noted that his article very severely limited such transfer to the type of debt and the proportion mentioned in the second half of paragraph 1. There was in that respect much common ground between his proposal and that of the Drafting Committee.

13. Paragraph 2 of his proposal differed only slightly from the corresponding paragraph of the Drafting Committee’s text. One difference between the two provisions lay in the way they referred to permanent sovereignty over natural wealth and resources. The terminology of his proposal (sovereignty over its natural wealth and resources) was in line with that of two international treaties, namely, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights,⁷ the wide support for which was still increasing, and of General Assembly resolution 1803 (XVII); the terminology of the Drafting Committee’s proposal (sovereignty over its wealth and natural resources) was in line with that of more recent resolutions, such as the Charter of Economic Rights and Duties of States.⁸ While the Commission had already decided, with regard to article 13, to follow the latest formulations of the General Assembly, he felt it worthwhile to raise anew the question of an alternative wording, not only because he felt that treaties in force should be given their full weight by comparison with texts, such as the Charter of Economic Rights and Duties of States, which did not enjoy universal support, but also because it did not make sense to him to speak of the “permanent sovereignty” of a people over its “wealth”, for that wealth

would include, for example, manufactures which the people produced for export.

14. For those reasons, and because the Drafting Committee’s text could have the effect of discouraging loans to the remaining colonial territories, he preferred his own version of the article. The impression he had gained from the Drafting Committee’s discussions the previous day was that some members shared in whole or in part his doubts concerning certain aspects of the Drafting Committee’s text, and thus his preference. He hoped those points and his text would be appropriately recorded in the Commission’s report.

15. Mr. ŠAHOVIĆ said that he had not participated in the discussion on the draft article submitted by the Special Rapporteur on newly independent States because his impression had been that the Commission as a whole agreed with the Special Rapporteur’s views and conclusions, which were based on a detailed analysis of succession to State debts within the context of the decolonization process. But the fact that Mr. Schwebel had now proposed an article, in addition to the article proposed by the Drafting Committee, indicated that there was now a considerable divergence of views.

16. For his part, he fully supported the text adopted by the Drafting Committee in the light of the explanations provided by its Chairman. It not only accorded with the Special Rapporteur’s views, but was also in keeping with both past and existing practice in regard to State debts. It was incumbent on the Commission to draw up rules that would reflect existing law and contribute to the solution of future problems.

17. The rule laid down in paragraph 1 summarized general practice and took due account of the existing needs of newly independent States. The principle of the non-transferability of the State debts of the predecessor State to the newly independent State had rightly been taken as the starting point. By underlining the part played by an agreement between the newly independent State and the predecessor State in the settlement of questions relating to State debts, the Drafting Committee had opted for the solution which should constitute the basis for the settlement of all social, economic and political problems between newly independent States and predecessor States. In so doing, the Drafting Committee had affirmed the sovereign right of newly independent States to contribute to the solution of those problems.

18. For that reason, he preferred article 22 as proposed by the Drafting Committee. Article 22 as proposed by Mr. Schwebel he found unacceptable because, unlike the Drafting Committee’s text, it did not rest on the principles of the non-transferability of debts and agreement between the States concerned. The basis of paragraph 1 of Mr. Schwebel’s text seemed to be somewhat mechanical in that it did not take account of the vital interests of the successor State.

19. The Drafting Committee’s wording could probably be improved but, for first reading, it was only required to prepare a text that was generally acceptable.

20. Mr. REUTER said that article 22 as proposed by the Drafting Committee was quite unacceptable. Its main defect was perhaps that it was an amalgam of the

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

⁸ General Assembly resolution 3281 (XXIX).

provisions originally proposed by the Special Rapporteur. In the Drafting Committee, he had asked a question to which he had still not received a satisfactory answer: why should a newly independent State be asked to sign an agreement with the predecessor State? In his opinion, there were only two possible answers: either there was a total misunderstanding of its interests on the part of the State or it was not entirely its own master and had to be protected against pressure. In his view, the question was whether there was the slightest legal ground for signing an agreement, the slightest obligation. The Drafting Committee seemed to have denied the existence of any such obligation. It followed that the article 22 which it now proposed was much stricter than one which simply provided that no State debt of the predecessor State should pass to the newly independent State. In paragraph 2 of the article, a provision had been added which was designed to limit the scope of the agreement which the predecessor State might sign.

21. He would have liked to see an article that stated a number of genuine legal rules. There seemed to be general agreement on the need to lay down, first, the principle that no State debt of a predecessor State passed to the newly independent State. But equity required that, in certain cases, an exception, no matter how limited, should be made to that principle. In those cases, the passing of the State debt was effected in accordance with the procedure normally adopted when two States were faced with a difficulty, namely, by agreement. From that standpoint, the two conditions laid down in paragraph 2 of the article were justified; the agreement must not infringe the principle of permanent sovereignty, and the implementation of the agreement must not endanger the fundamental economic equilibria of the newly independent State. An article drafted on those lines he could accept, even if the exception was couched in extremely restrictive terms. But the Drafting Committee's text did not allow for even the smallest exception and, what was more, it mixed questions of principle with questions relating to the settlement of disputes, and gave pride of place to the latter.

22. Mr. SUCHARITKUL said the Drafting Committee had produced a text which represented a happy compromise between differing views. Paragraph 1 began by endorsing a principle which had been put forward by the Special Rapporteur and Mr. Ushakov, namely, that there should be no passage of the State debt of the predecessor State to the successor State if the latter was newly independent. That principle was, he felt, generally acceptable and was, moreover, subject to the higher principle of the sovereign freedom of States to contract as they saw fit. The "agreement" to which the paragraph referred was an agreement concluded not before but after the emergence of the newly independent State as a sovereign entity. The requirement that account be taken of "the link between the State debt of the predecessor State connected with its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State" would protect the newly independent State by ensuring that the debt only passed in the "equitable proportion" which was directly mentioned in paragraph 1 of Mr.

Schwebel's alternative text. As to the question what happened to the debt if there was no agreement between the newly independent State and the predecessor State, he had no doubt that the debt would remain with the latter, which was, after all, the entity which had contracted it.

23. Paragraph 2 of the Drafting Committee's text provided further safeguards which, although they would presumably be applicable to all newly independent States, were in all probability designed to protect the least developed countries in particular. Those safeguards were couched in terms which were less absolute than those employed in the Special Rapporteur's consolidated article, but were none the less very persuasive. No one could quarrel with the statement that the provisions of the type of agreement referred to in paragraph 1 of the article "should not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources" or that the implementation of such an agreement should not "endanger the fundamental economic equilibria of the newly independent State". He was very satisfied with those safeguards, which met contemporary requirements. In fact, not only must the developing countries, which had very different opinions about their economic needs and priorities, be allowed to determine themselves what constituted their "fundamental economic equilibria", but there was also an essential need in general to promote their economic development and maintain their creditworthiness, which could not be divorced from their capacity to repay their debts.

24. The text proposed by Mr. Schwebel was a very encouraging effort. Its first paragraph differed very little from paragraph 1 of the Drafting Committee's article, except for the absence of any allusion to the freedom of States to contract according to their sovereign will. The incorporation of such an allusion in the Drafting Committee's article represented a better means of expressing the principle of self-determination than the direct reference thereto, which had been made in paragraph 6 of the Special Rapporteur's consolidated text. Paragraph 2 of the Drafting Committee's article was preferable to the corresponding provision of Mr. Schwebel's draft in that it retained from the Special Rapporteur's proposal both the notion of sovereignty over natural resources and the caveat concerning the effects of an agreement between the predecessor and successor States. He would accept the text proposed by the Drafting Committee.

25. Mr. FRANCIS said that, although he was grateful for the Drafting Committee's efforts and recognized that members of the Commission must accept the harmonization of their views, he was disturbed by the fact that the article proposed by the Committee failed to contain certain fundamental principles which were of importance to metropolitan countries and even more so to developing countries, including those yet to become independent. The Drafting Committee's text should be viewed against the background of, on the one hand, the fact that current practice was for a successor State to assume the localized State debt of the predecessor State which related to its own territory and, on the other hand, the fact that there was now in progress, both within and outside the United Nations system, a continuous dialogue

between the developed and developing countries, with the latter calling for the liquidation of debts with which they were overburdened, including those whose fate the Commission was now trying to settle. It could thus be seen what the proposed article lacked: an explicit statement of the principle of equity; an explicit reference to the capacity of the newly independent State to pay any debts transferred to it; and a reference to the guarantee given by the predecessor State, all of which were essential elements and had appeared in the consolidated article proposed by the Special Rapporteur.

26. The extent to which that made the article defective could be judged from the fact that, even when the passage of State debt from the predecessor to the successor State was governed by an agreement between them, the content, if not the form, of that agreement would have been settled prior to the independence of the successor State so that the parties would not have contracted on equal terms. Furthermore, while paragraph 2 of the text stated that the implementation of such an agreement should not “endanger the fundamental economic equilibria of the newly independent State”, it contained no such requirement with regard to the content of the agreement. Consequently, while the manner in which the agreement was implemented might be equitable, the agreement itself would not necessarily be so. The paragraph ought to state that any agreement of the type referred to in paragraph 1 should conform to equitable principles, taking into account, *inter alia*, the capacity of the newly independent State to pay the debt in question.

27. His point was well illustrated by the situation of certain countries in his own region which were associate States of the United Kingdom but which already required subsidies from that country in order to remain viable. Some of those States were shortly to become independent; would the Commission, through a rigid application of the principle of derived benefit, wish to transfer to them certain debts of the predecessor State, even though it was already perfectly clear that they would be unable to pay?

28. With regard to the text proposed by Mr. Schwebel (A/CN.4/L.257), he noticed that paragraph 1 lacked any reference to the essential element of the existence of an agreement between the newly independent State and the predecessor State. His misgivings in that respect had not been dispelled either by Mr. Schwebel’s oral introduction of the article or by the presence in paragraph 2 of a reference to “any agreement” between those States, for that left open the possibility that there might not be such an agreement. Mr. Schwebel’s text also lacked a reference to equitable considerations in relation to the newly independent State’s capacity to pay, although it was less deficient in that respect than the article proposed by the Drafting Committee.

29. Since the Commission was now only at the stage of the first reading of the draft articles, he would be prepared to vote, if necessary, for the Drafting Committee’s text. He would, however, spare no effort to ensure that the omissions to which he had referred were remedied in the provision finally adopted.

30. Mr. DADZIE said that, if Mr. Schwebel’s article had simply stated that “No debt contracted by the prede-

cessor State on behalf or for the account of a territory which has become a newly independent State shall pass to the newly independent State”, or the article proposed by the Drafting Committee had read only “When the successor State is a newly independent State, no State debt of the predecessor State shall pass to the newly independent State”, he would have been able to accept either.

31. As matters stood, it would seem that Mr. Schwebel did not appreciate that their debt burden led to the economic strangulation of present-day newly independent States and deprived their political independence of part or all of its meaning. He subscribed entirely to the reasons for rejecting Mr. Schwebel’s article, advanced by Mr. Šahović. In addition, it might be asked who was to determine the alleged benefits to the newly independent State to which reference was made in paragraph 1 of the article. In his opinion, the activities of a metropolitan Power in a colonial territory could not be considered as having been exercised in any interests other than its own, and he therefore rejected the notion of any possible benefit to the entity which became the successor State. It might also be asked who would determine the “equitable proportion” mentioned in paragraph 1. He had already pointed out that property left by a predecessor to a successor State was often of more academic than real benefit to the latter, which found itself with something it could not use or, in some cases, even afford to maintain.

32. The Drafting Committee’s text showed the results of the careful analysis which the Commission had made of the Special Rapporteur’s consolidated article and which had led to the establishment of general rules supported by the majority of its members. With regard to the fact that the article permitted the passing of State debt from the predecessor to the successor State if those States agreed to such passage, he recalled that he had always been opposed to the conclusion of any agreement between the predecessor State and a successor State for any purpose whatsoever; more often than not the successor State was in a position of disadvantage when negotiating such an agreement and was therefore likely to find itself compelled to accept even unfavourable terms. However, after careful study of the provision and in a spirit of compromise, he was willing to accept the article proposed by the Drafting Committee, provided the agreement to which it referred was freely concluded.

33. He had been concerned for some time at the fact that the Drafting Committee submitted to the Commission proposals containing ideas which the Commission had not discussed. It seemed to him that the Committee should confine itself to couching in acceptable language the views arrived at after deliberation in the Commission, and that any member of the Commission who wished to raise a point at variance with a text which the majority were willing to send to the Drafting Committee should do so in the Commission itself.

34. The CHAIRMAN said that the Drafting Committee had traditionally been given a greater degree of latitude than, for example, the drafting committee of a conference. He was sure that virtually all members of the Commission would deplore any change in that practice. If, rather than

enjoying its present measure of flexibility, the Drafting Committee had had to work only on the basis of precise instructions from the Commission, the whole of the Commission's work would have been stultified and it would have been impossible for the Commission to achieve the results it had to date.

35. Mr. DÍAZ GONZÁLEZ said that the text of article 22 proposed by the Drafting Committee was a compromise solution designed to take account of the two basic trends that had emerged from the Commission's discussion of the question of the passing of the State debts of the predecessor State to a newly independent State. He fully supported that compromise solution because it established a balance between the position of the members of the Commission who had supported the clean-slate principle and the position of those who had maintained that a newly independent State might, in certain circumstances, be obliged to agree to the passing of the debts of the predecessor State. His only real objection to the text proposed by the Drafting Committee related to the use of the word "fundamental" in paragraph 2. That word should be deleted because it added nothing to the concept of the "economic equilibria of the newly independent State".

36. As he had said in the Drafting Committee, he could not support the text of article 22 proposed by Mr. Schwebel. His first difficulty with that text stemmed from the wording of paragraph 1. Indeed, he was of the opinion that no debt contracted by a predecessor State had ever been contracted on behalf or for the account of a territory which had become a newly independent State. Moreover, it would be impossible to know whether a territory had benefited from property, rights and interests created by a debt contracted by the predecessor State until that territory had become a newly independent State and had assumed sovereignty. That was so because agreements could be concluded only by sovereign States.

37. The words "unless that passage of debt is in equitable proportion to the benefits that the newly independent State has derived or derives from the property, rights and interests in question", in paragraph 1 of Mr. Schwebel's text, were equally unsatisfactory because they failed to take account of the fact that, if it was determined that a newly independent State had derived or would derive benefits from a debt contracted by the predecessor State, it also had to be determined whether, as was likely, the predecessor State had derived benefits from that debt. As the Special Rapporteur had pointed out, what had constituted a benefit for the predecessor State often became a liability for the newly independent State and might even be harmful to its economy. So far, international law had taken account only of the benefits derived by one element of the equation, namely, the territory that became a new State. It should, however, also take account of the incalculable benefits derived by the other element of the equation, namely, the predecessor State that had been a colonial Power. In all fairness, it could be said that the colonial Power had a debt to pay to the newly independent State as compensation for what had, at times, amounted to centuries of slavery.

38. Lastly, he noted that paragraph 2 of the article proposed by Mr. Schwebel provided that any agreement

concluded between the predecessor State and the newly independent State "shall pay due regard to the newly independent State's permanent sovereignty over its natural wealth and resources in accordance with international law". In fact, the contrary was true, for it was contemporary international law that had to conform with the principle of sovereignty and with the inalienable right of every people to dispose of its natural wealth and resources.

39. Mr. USHAKOV said he could accept article 22 as drafted by the Drafting Committee but would have preferred to see it reduced to a single paragraph, reading: "No State debt of the predecessor State shall pass to the newly independent State". He believed that his point of view came very close to Mr. Reuter's.

40. Mr. SETTE CÂMARA said that, as a compromise, the text of article 22 proposed by the Drafting Committee was acceptable. He was not, however, entirely satisfied with it because it did not give clear expression to some of the important elements contained in the article introduced by the Special Rapporteur at the Commission's 1443rd meeting. One of those elements was the criterion of utility, which offered the advantage of placing the burden of proof on the shoulders of the predecessor State when it claimed payment of a debt. Another of those elements was the principle that a succession of States did not as such affect the guarantee given by the predecessor State for a debt assumed by the formerly dependent territory. Moreover, paragraph 6 of the Special Rapporteur's article was much more explicit than the article of the Drafting Committee in stressing the need to defend the economic situation of newly independent States which inherited the debts of a predecessor State.

41. He shared Mr. Dadzie's doubts concerning the inclusion in paragraph 1 of a reference to the concept of an agreement, because even an agreement concluded after the birth of the successor State would always have some of the characteristics of a devolution agreement. On that point, he agreed with Mr. Schwebel that it was better to avoid any reference to the concept of an agreement. He could, however, not support the text of article 22 proposed by Mr. Schwebel because it lacked the essential elements contained in paragraph 6 of the article proposed by the Special Rapporteur.

42. With regard to the wording of article 22 proposed by the Drafting Committee, he thought that, in paragraph 1, the use of the word "link" and of the word "connected" could easily be avoided by replacing the word "connected" by the word "concerning".

43. The CHAIRMAN said that the drafting comment made by Mr. Sette Câmara would be dealt with by the language services with the help of the Drafting Committee.

44. Mr. TABIBI said that he had originally been in favour of the consolidated article which the Special Rapporteur had introduced.⁹ Paragraph 2 of that article had been particularly important because it had laid down the criterion of utility, which made it clear that, although a debt might apparently have been contracted for the benefit of a territory, the people of that territory might

⁹ 1443rd meeting, para. 1.

not in fact have derived any benefit at all from it. Paragraph 6 of that article, which had embodied the principle that account should be taken of the newly independent State's capacity to pay, had also been very important, for one of the most serious problems now faced by the countries of the third world was that their financial capacity was severely limited by the weakness of their economies.

45. He was, however, able to support article 22 as proposed by the Drafting Committee because it was a well-balanced compromise which took account of the elements included by the Special Rapporteur in his article and of the proposal made by Mr. Schwebel (A/CN.4/L.257). His only concern with regard to article 22 as proposed by the Drafting Committee related to the use of the word "fundamental" in paragraph 2, and he agreed with Mr. Díaz González that it should be deleted.

46. Mr. QUENTIN-BAXTER said that, although he shared the Chairman's view concerning the role of the Drafting Committee in dealing with problems which had not been solved during the Commission's discussions, he thought it regrettable that a text such as that of article 22 proposed by the Drafting Committee, which was so different from the previous text, should be dealt with only on the morning when it had been made available.

47. The fundamental principles identified by the Special Rapporteur in his original text had survived in the article proposed by the Drafting Committee, even though they had been tested almost to destruction during the Commission's discussions. Article 22 thus embodied the principle that the debts that passed to the newly independent State had to be related to the property that passed to it, as well as the principle that the measure of the indebtedness of a successor State which had recently become independent should be the actual benefit it had derived from the property that passed to it. The Commission's report to the General Assembly should reflect the Commission's unanimous support of those principles.

48. Although he agreed with Mr. Francis that the wording of paragraph 2 was not entirely satisfactory, he thought it did show that the paragraph was intended to embody the principle that account should be taken of the financial capacity of the newly independent State.

49. The majority of the Commission had been right in assuming that, since the application of the clean-slate principle to the case of newly independent States would be regarded as vitally important by the representatives of at least three quarters of the States Members of the United Nations, it would be advisable to draft a text that did not suggest that that rule was being weakened in any way. They had therefore agreed that the position that it was enough to say that there was no passing of State debts without an agreement between the States concerned would not reflect the general spirit of the draft articles, which were intended to provide rules that States might find useful in solving problems of succession. Nor would such a position be in the interests of newly independent States, particularly since nearly all the remaining dependent territories were very small,

and their possibility of achieving the self-determination that was their right would depend on provisions enabling them to obtain generous assistance. The Commission had thus considered it important to indicate that it did not think that former colonies should be heavily burdened with debts. In his view, the text of article 22 proposed by the Drafting Committee did give such an indication and he would therefore support it.

50. Mr. VEROSTA said it was regrettable that the Drafting Committee had not paid sufficient attention to paragraphs 2 and 3 of the article proposed by the Special Rapporteur. Mr. Schwebel's proposed text simply reproduced those two paragraphs. They had not given rise to any marked opposition on the Commission's part and he (Mr. Verosta) had in fact proposed that they should be combined in a single paragraph.¹⁰

51. As a member of the Drafting Committee, he supported the new text proposed by the Committee but maintained his view, which was identical with that of Mr. Schwebel and Mr. Reuter, and endorsed the reservations expressed by the latter.

52. With regard to the drafting, he wondered whether it was correct to speak, in paragraph 2, of "fundamental economic equilibria", and whether it would not be better to use the singular.

53. The CHAIRMAN suggested that the secretariat be asked to decide whether the word "equilibria" should be in the singular or in the plural in paragraph 2. The discussion of that point and of the point raised by Mr. Díaz González and by Mr. Tabibi concerning the use of the word "fundamental" in the same paragraph would, in any case, be reflected in the commentary.

54. If there was no objection, he would take it that the Commission agreed to approve the title and the text of article 22 as proposed by the Drafting Committee,¹¹ on the understanding that the discussion of the text proposed by Mr. Schwebel (A/CN.4/L.257) would be fully reflected in the commentary and the text reproduced in a foot-note to the commentary.

It was so agreed.

The meeting rose at 1 p.m.

¹⁰ 1444th meeting, para. 56.

¹¹ See para. 4 above.

1450th MEETING

Thursday, 30 June 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Succession of States in respect of matters other than treaties (*concluded*) (A/CN.4/301 and Add.1, A/CN.4/L.254, A/CN.4/L.256 and Add.1 and 2, A/CN.4/L.257)

[Item 3 of the agenda]

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

ARTICLE 22 (Newly independent States)¹ (*concluded*)

1. The CHAIRMAN invited Mr. Schwebel to reply to the comments made on the text he had proposed for article 22 (A/CN.4/L.257).

2. Mr. SCHWEBEL said that, whereas some members of the Commission considered that paragraph 1 of his proposed text was defective because it admitted the possibility of the passing of State debts without agreement, he considered that possibility to be a virtue. Moreover, he could not accept the view that the passing of any debt to a newly independent State would render its independence meaningless or less meaningful, for there had been specific cases in which newly independent countries, such as Singapore, Malaysia, Kuwait and the Ivory Coast, had been able to afford to take over the debts of their predecessor States. He therefore believed that the rules which the Commission was formulating should be flexible enough to take account of the situation of such newly independent States.

3. A second consideration in support of paragraph 1 of his proposed text was that, since the debts with which the Commission was concerned were debts that had been contracted in colonial circumstances, their transfer had rightly been very narrowly confined to the particular circumstances to which he had referred in paragraph 1 of his draft. He had, moreover, given a certain weight to equitable considerations in that paragraph, though he had perhaps not given them sufficient weight, as Mr. Francis had observed.²

4. The third reason why he preferred the substance of paragraph 1 of his draft was that it provided an incentive for the conclusion of agreements by predecessor and successor States. That point, to which Mr. Reuter had referred,³ was one which had not been covered in the text of article 22 approved at the previous meeting. It should, however, be borne in mind that it was desirable to have reciprocal agreements by which States could settle their differences and which would embody rights and obligations for all the parties involved.

5. With regard to paragraph 2 of his text, he noted that Mr. Francis had pointed out that it did not mention the capacity to pay. Although he agreed with Mr. Francis that the importance of capacity to pay was obvious and undeniable, he thought it would be inconceivable for two parties which negotiated an agreement concerning a debt not to take account of that capacity. Consequently, he had not thought it necessary to refer explicitly to the capacity to pay in paragraph 2.

6. That paragraph had also been criticized on the ground that permanent sovereignty was supreme and did not have to be exercised in accordance with international law. However, since the wording of paragraph 2 of his draft was based on that of article 1, paragraph 2, of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights,⁴ it had solid precedents, which, he assumed, no one would challenge. Even more important, however, was the fact that, if international law was to have any meaning or purpose at all, it had to be recognized that it was binding on all States, which could exercise their sovereign rights only in accordance with it.

ARTICLE 20 (Effects of the passing of State debts with regard to creditors) (*concluded*)⁵

7. The CHAIRMAN invited the Commission to consider the title and text of article 20 as proposed by the Drafting Committee (A/CN.4/L.256/Add.2), which read:

Article 20. Effects of the passing of State debts with regard to creditors

1. The succession of States does not as such affect the rights and obligations of creditors.

2. An agreement between predecessor and successor States or, as the case may be, between successor States concerning the passing of the State debts of the predecessor State cannot be invoked by the predecessor or the successor State or States, as the case may be, against a creditor third State or international organization [or against a third State which represents a creditor] unless:

(a) the agreement has been accepted by that third State or international organization; or

(b) the consequences of that agreement are in accordance with the other applicable rules of the articles in the present Part.

8. Mr. TSURUOKA (Chairman of the Drafting Committee) said that, pursuant to the decision taken by the Commission at its 1447th meeting, the Drafting Committee had reviewed the text it had originally submitted to the Commission.⁶

9. The Drafting Committee had tried to take account of the comments made by some members during the consideration of the original text. In paragraph 1, the word "third-party" had been deleted because the Committee had considered that the omission would not alter the meaning of the rule embodied in that paragraph. The words "and obligations" had been added after the word "rights" in order not to leave the rule open to the interpretation that a succession as such could affect the aspect of the debt relationship involving the creditor's obligations arising out of the State debt.

10. The Drafting Committee had decided to redraft the introductory sentence of paragraph 2 in order to avoid any conflicts with the interpretation of the law of treaties, as codified in the Vienna Convention,⁷ and in order to stress the non-opposability against a creditor of an agreement concluded between the predecessor and successor States or, as the case might be, between succes-

¹ For text, see 1449th meeting, para. 4.

² 1449th meeting, para. 28.

³ *Ibid.*, paras. 20-21.

⁴ General Assembly resolution 2200 A (XXI), annex.

⁵ See 1447th meeting, paras. 28-51.

⁶ 1447th meeting, para. 3.

⁷ See 1417th meeting, foot-note 4.

sor States concerning the State debt of the predecessor State. In that connexion, reference might be made to the concept of non-opposability reflected in Article 102 of the Charter of the United Nations. Paragraph 2 now provided that the agreement in question could not be invoked against a creditor unless one or the other of the conditions set out in subparagraphs (a) and (b) was fulfilled. In order not to make the text of paragraph 2 unduly heavy, the Drafting Committee had decided not to add a reference to other subjects of international law after the words “creditor third State or international organization”, on the understanding that the rule embodied in that paragraph did apply to other subjects of international law. That understanding would be fully reflected in the commentary to article 20.

11. In conformity with the Commission’s decision to retain the word “international” in square brackets in article 18, the Drafting Committee had decided that, although the words originally placed in square brackets in subparagraph (a) should be retained, they should be transferred to the introductory part of paragraph 2, which had been redrafted in such a way as to make clear the international character of the relationship involved. The word “creditor” had been deleted from subparagraph (a) in view of the new wording of the introductory part of paragraph 2. The words “or other arrangement” had been deleted from the introductory part of the paragraph and the words “or arrangement” from subparagraphs (a) and (b), in order to make it clear that the passing of State debts to which article 20 referred was that which took place by agreement.

12. Lastly, for the sake of consistency with other articles in the draft, the words “contained in Section 2 of Part II of these articles” in subparagraph (b), had been replaced by the words “of the articles in the present Part”.

13. Mr. USHAKOV said that the new text of article 20 proposed by the Drafting Committee was an improvement on the previous one but still raised difficulties. The question arose, for example, whether the two conditions laid down in paragraph 2 (a) and (b) were cumulative. If they were not, what would happen if only one of them was fulfilled?

14. If the consequences of the agreement between the predecessor State and the successor State were in accordance with the provisions of the articles under consideration, but the agreement had not been accepted by the creditor third State, there were two possible situations: either the refusal of the creditor third State was invalid and the agreement could be invoked, even though the condition laid down in subparagraph (a) had not been fulfilled, or the acceptance of the creditor third State was necessary for fulfilment of the condition laid down in subparagraph (b), in which case the two conditions were cumulative.

15. Conversely, if the agreement had been accepted by the creditor third State, but its consequences were not in accordance with the provisions of the articles under consideration, was the agreement valid? He did not think so for, in his opinion, the creditor third State was required to accept an agreement between the predecessor State and the successor State only if that agreement was

in accordance with the general rules on State succession in respect of debts. If the contrary was true, the agreement could not be invoked against a creditor third State, even if that State had accepted it.

16. He considered that, to solve the problem raised by the twofold condition in paragraph 2, it would be better to use a wording similar to that of article 19 of the Vienna Convention and say:

“An agreement between the predecessor and successor States ... may be invoked ... against a creditor third State or international organization unless:

“(a) the agreement has not been accepted by that creditor third State or international organization; or

“(b) the consequences of the agreement are not in accordance with the provisions of the present articles.”

17. Mr. SETTE CÂMARA said that his doubts about the new text of article 20 proposed by the Drafting Committee were similar to those expressed by Mr. Ushakov. Although paragraph 1 was easier to read now that its wording had been simplified, it was less accurate than the original version, which had referred to “third-party creditors”. Moreover, the reference to the “rights and obligations of creditors” was confusing because it might also apply to the predecessor State or to the successor State.

18. He agreed with Mr. Ushakov that the use of the words “it shall not be effective unless”, in paragraph 2 of the previous text, had been more consistent with the reality of the situations contemplated. The new paragraph 2 stated that an agreement could not be “invoked by the predecessor or the successor State or States ... against a creditor third State or international organization”. If such an agreement could not be invoked by those States, it was because it was not valid.

19. Lastly, for the sake of consistency, the words which had been placed in square brackets in paragraph 2 should be repeated in subparagraph (a).

20. Mr. FRANCIS said that, in his opinion, subparagraphs (a) and (b) could mean that, even if a third State or international organization or a third State representing a creditor did not accept the agreement between the predecessor State and the successor State, that agreement could be invoked against them, thus defeating the purpose of the requirement that the third-party creditor had to accept any agreement between the predecessor State and the successor State. Thus, as it stood, that paragraph implied that, if a creditor third State accepted an agreement which was not in conformity with the basic premises of the draft articles, that agreement was valid. He therefore suggested that, in order to avoid any possible misinterpretation of article 20 and to take account of equitable principles, the Commission should consider whether it might not be advisable for subparagraphs (a) and (b) to have a cumulative effect. To produce that effect, it would be sufficient to replace the word “or” at the end of subparagraph (a) by the word “and”.

21. Mr. SUCHARITKUL said that the basic rule laid down in article 20, paragraph 1, was not only a statement of fact but also a kind of introduction to subsequent rules, providing that the rights and obligations of third-

party creditors would not be affected by a succession of States without their consent. The acceptance of an agreement between predecessor and successor States by a creditor third State or international organization involved a process of novation leading to the creation of rights and obligations, which would be affected by a change of debtor and by differences in the capacity of the States involved to pay.

22. Article 20, paragraph 2, referred to "An agreement between predecessor and successor States or, as the case may be, between successor States". It did not, however, take account of the fact that, in the case of the dissolution or incorporation of a predecessor State, that State would cease to exist. Paragraph 2 (a) referred to the acceptance of such an agreement by a creditor third State or international organization, but did not make it clear how such acceptance should be expressed. He assumed that the Drafting Committee had intended that provision to be flexible so that a third State or international organization could accept an agreement either tacitly or expressly. In adopting such a provision, the Commission would be giving effect to the principle of consensus, which was particularly relevant in the present context since the passing of a State debt could, in any case, take place only with the consent of the creditor third State or international organization.

23. He suggested that, in the second line of paragraph 2, the words "or any part or parts thereof" should be added after the words "the State debts" to show that such debts could pass either *in toto* or, as had been envisaged in earlier drafts, in an equitable proportion. The words in square brackets at the end of paragraph 2 might imply automatic recognition of a process of subrogation, which would take the Commission into an entirely new area of international law, and he suggested that, in order not to prejudge the progressive development of international law in that area, those words should be deleted altogether.

24. Lastly, he suggested that paragraph 1 might be clearer if the words "as such" were placed immediately after the words "The succession of States".

25. Mr. QUENTIN-BAXTER said that, if the rules which the Commission was formulating were obligatory, then the logic of the situation would suggest that the provisions of subparagraphs (a) and (b) should, in fact, be cumulative as Mr. Francis had suggested. However, the Commission was not trying to formulate binding residual rules; it was merely offering some guidelines which might be of assistance to States in solving the very complex problems concerning property, rights and interests that arose in connexion with a succession of States. Consequently, subparagraphs (a) and (b) could not be cumulative in nature; they could only be alternatives from which the States concerned would be free to choose. If they chose to conclude agreements that were in accordance with the residual rules laid down in the draft articles, creditor third States or international organizations could have no objection to such agreements. If, however, the predecessor and successor States chose to conclude agreements which departed from the rules laid down in the draft articles, creditor third States or international organizations could either reject them or accept them,

although they might do so only tacitly, as Mr. Sucharitkul had suggested.

26. In that connexion, he drew the attention of Mr. Sette Câmara and Mr. Ushakov to the fact that article 20, paragraph 2, which provided that an agreement between predecessor and successor States could not be invoked against a creditor third State or international organization which had not accepted it, did not mean that the agreement was not valid. Indeed, States had a perfect right to conclude any agreements they wished but third-party creditors were certainly not required to accept an agreement that departed from the basic principles laid down in the draft articles.

27. He believed that the principles embodied in article 20 were sound and that they were essential to the Commission's purpose of laying down residual rules that applied not only to predecessor and successor States but also to creditors.

28. With regard to Mr. Sucharitkul's suggestion concerning the words "as such" in paragraph 1, the present wording was more or less in keeping with wording used elsewhere in the draft articles so that the change might not be necessary. As to the drafting comment made by Mr. Sette Câmara, it was true that there might be some inconsistency between the introductory part of paragraph 2 and subparagraph (a). That discordance could be avoided by replacing the words "against a creditor third State or international organization", in the introductory part of paragraph 2, by the words "against a third State or international organization which is a creditor". That would make it perfectly clear that the reference to a third State or international organization in the introductory part of paragraph 2 also applied to subparagraph (a).

29. Mr. REUTER said that the new text of article 20 proposed by the Drafting Committee was both clear and reasonable. The French version was clear because the use of the word "*ou*" instead of "*et*" indicated, without any possible ambiguity, that the two conditions laid down in subparagraphs (a) and (b) were not cumulative. The rule stated was reasonable, since subparagraph (a) restated the fundamental principle of the relative effect of treaties while subparagraph (b) provided for an entirely exceptional derogation from that principle. In that connexion, he pointed out that, in stating the rule in paragraph 2, the Commission was recognizing that a treaty between States could produce effects for a third international organization.

30. With regard to the drafting point raised by Mr. Sucharitkul in regard to paragraph 1, he thought that it would be better to leave the expression *en tant que telle* where it stood in the French version.

31. Mr. DADZIE said that the present wording of article 20 was an improvement on the text previously proposed by the Drafting Committee. Up to the end of paragraph 2 (a), the article emphasized acceptance by a creditor third State or international organization of an agreement concluded by the predecessor State and the successor State. It did not say how such acceptance should be indicated or communicated but he assumed that the procedure would be the normal one.

32. His difficulty with the article lay in paragraph 2 (b). It seemed to indicate that that subparagraph would apply automatically if the third State did not accept the agreement between the predecessor State and the successor State. In other words, if the third State did not accept the agreement but the consequences of the agreement were in accordance with the other applicable rules of the draft articles, then the agreement could be invoked against the creditor third State. In his opinion, that provision meant that rules were being imposed on creditor third States, and he did not think that that was what the Commission had intended.
33. He would prefer the main emphasis of article 20 to be placed on the third State's acceptance of the agreement between the predecessor and successor States, for the fact that the consequences of that agreement were not in accordance with the other applicable rules of the articles might be the very reason why the third State had not accepted the agreement in the first place. Thus, the rule stated in article 20 should enable third-party creditors voluntarily to accept a change of debtor. If they did not accept the change, the former debtor would have to assume responsibility for the debt owed to them.
34. Mr. USHAKOV said that in his opinion it was absolutely impossible to invoke against a creditor third State an agreement that was contrary to the rules of international law, since such an agreement would still be unlawful even if the creditor third State accepted it.
35. With regard to the wording of the French version of paragraph 1, he would prefer the expression *n'affecte pas* to be used instead of *ne porte pas atteinte*.
36. Mr. QUENTIN-BAXTER said that the circumstances to which Mr. Ushakov had referred had nothing whatever to do with article 20, which neither permitted predecessor and successor States to conclude agreements that were contrary to the rules of international law nor required third States to accept the consequences of such agreements. That article did not, however, rule out the possibility that an agreement accepted by a third State or international organization might not be in accordance with the residual rules laid down in the draft articles, since the predecessor and successor States were not bound to comply with those rules in concluding an agreement. The main purpose of the article was, nevertheless, to protect the rights of creditor third States and international organizations whose interests might be prejudiced by agreements the consequences of which were not in "accordance with the residual rules laid down in the draft articles.
37. Referring to Mr. Dadzie's comments, which seemed to relate to the question whether the draft articles dealt only with a bilateral relationship or applied also to a triangular relationship, he said he had originally had some doubts about the possibility of a triangular relationship. He had, however, come to believe that the Commission should discuss such a relationship so that the rules it was formulating would be generally valid. The alternative was, as Mr. Dadzie had pointed out, to allow the creditor third State or international organization to accept or reject the agreement between the predecessor and successor States, but such an alternative worked both ways. For example, if, in the case of the dissolution of a State in which the predecessor State ceased to exist, the Commission said that the creditor State was free to accept or reject the agreement concluded by the successor States, that would surely imply that the successor States were also free to accept or repudiate the debt in question. Thus, if it was desired to give creditors the advantage of established rules of succession, they must also be required to accept solutions which were in accordance with those rules.
38. Mr. SCHWEBEL said that the members of the Commission seemed to agree on article 20, paragraph 1, although Mr. Sette Câmara had questioned whether it was clear that the word "creditors" meant "third-party creditors". Since there was no doubt that that was, in fact, what the Commission intended the word "creditors" to mean, that intention should be clearly explained in the commentary.
39. With regard to the questions raised by Mr. Francis and Mr. Dadzie in connexion with paragraph 2, he had found the explanations given by Mr. Quentin-Baxter and Mr. Reuter persuasive. As to the example given by Mr. Ushakov, he thought that it was quite clear that article 20 applied only to agreements relating to the passing of State debts.
40. Mr. Sucharitkul had raised an important point of substance in asking whether the Commission was not entering a new area of international law by retaining the words in square brackets in paragraph 2. He (Mr. Schwebel) believed that it was not, because in that area as much as in any other there were ample precedents. For example, States often represented bond holders. He therefore considered that the words in square brackets in paragraph 2 should be retained.
41. Mr. Sucharitkul had also suggested that the words "or any part or parts thereof" should be added after the words "the State debts" in paragraph 2. That was a valid suggestion but he thought that the Commission could deal with it in a more elliptical way by replacing the words "the State debts" by the words "State debt", which would also provide for the possibility of the passing of only part of a State's debts.
42. In conclusion, he said that, since the words "as the case may be", which appeared twice in paragraph 2, did not make the meaning of that paragraph any clearer, he thought they should be deleted.
43. The CHAIRMAN said he thought that the Commission could easily agree on article 20, paragraph 1. Although he was not sure about Mr. Ushakov's suggestion concerning the French text of that paragraph, he would point out that the English text was based on the precedent of article 11 of the draft articles on succession of States in respect of treaties.⁸
44. Article 20, paragraph 2, had, of course, given rise to discussion of some important substantive issues but he thought that, on the whole, the present text could be considered as a satisfactory result on first reading. All points raised and views expressed in connexion with the article would, in any case, be reflected in the commentary, and the drafting comments that had been made

⁸ See 1416th meeting, foot-note 1.

would be considered again during the second reading of the article.

45. Referring in particular to the comment made by Mr. Francis concerning paragraph 2 (a) and (b), he said that, on balance, he thought those two subparagraphs should continue to be regarded as alternatives because they embodied residual rules, not rules of *jus cogens*. He suspected that Mr. Schwebel's suggestion concerning the deletion of the words "as the case may be", which appeared twice in paragraph 2, would give rise to a lengthy discussion. That suggestion might therefore be considered at a later stage.

46. The Commission might, however, agree to Mr. Schwebel's suggestion that the words "the State debts" in paragraph 2 be replaced by the words "State debt". It might also agree to Mr. Quentin-Baxter's suggestion that the words "against a creditor third State or international organization", in paragraph 2, be replaced by the words "against a third State or international organization which is a creditor".

47. If there was no objection, he would take it that the Commission agreed to adopt the drafting changes he had mentioned and to approve the title and text of article 20 proposed by the Drafting Committee with those amendments.⁹

It was so agreed.

Question of treaties concluded between States and international organizations or between two or more international organizations (continued)* (A/CN.4/285,¹⁰ A/CN.4/290 and Add.1,¹¹ A/CN.4/298, A/CN.4/L.253, A/CN.4/L.255)

[Item 4 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

ARTICLE 20 (Acceptance of reservations in the case of treaties between several international organizations) *and*

ARTICLE 20*bis* (Acceptance of reservations in the case of treaties between States and one or more international organizations or between international organizations and one or more States)¹² (continued)

48. The CHAIRMAN invited the Special Rapporteur to introduce the drafting changes he proposed to make in the Drafting Committee's texts of articles 20 and 20*bis*.

49. Mr. REUTER (Special Rapporteur) said that those changes were the result of the discussion on articles 20 and 20*bis* which had taken place at the 1448th meeting.

50. Members of the Commission had pointed out that the category of treaties to which article 20 applied was indicated only in paragraph 1 and that it would be advisable to specify, at least at the beginning of each

paragraph, that the treaties in question were treaties between several international organizations. In the opening phrase of paragraph 2, the words "of the treaty" should accordingly be replaced by the words "of a treaty between several international organizations"; in the introductory part of paragraph 3, the words "between several international organizations" should be inserted after the words "the treaty"; and in the opening phrase of paragraph 4, the words "between several international organizations" should also be inserted after the words "the treaty".

51. The following changes should be made to article 20*bis*. In view of the difficulties raised by the expression "as the case may be" and the enumeration following it at the end of paragraph 1, the whole of the last part of that paragraph, from the words "as the case may be", should be replaced by the words "the contracting State or States or the contracting international organization or organizations". The formula he had proposed at the 1448th meeting, "the other contracting parties, State or States, organization or organizations", had the disadvantage that the Commission would have been obliged to define the term "contracting party" in addition to the terms "contracting State" and "contracting organization", which were already defined in draft article 2.¹³

52. The first clause of paragraph 2 required the same kind of clarification as the corresponding provision in article 20: the words "the treaty" should be replaced by "a treaty between States and one or more international organizations or between international organizations and one or more States".

53. Paragraph 3 should be replaced by the following text:

"3. In cases not falling under the preceding paragraphs and unless the treaty between States and one or more international organizations or between international organizations and one or more States otherwise provides:

"(a) acceptance of a reservation by a contracting State or a contracting international organization constitutes the reserving State or organization a party to the treaty in relation to the accepting State or organization if or when the treaty is in force between the State and the organization or between the two States or between the two organizations;

"(b) an objection to a reservation by a contracting State or a contracting international organization does not prevent the treaty from entering into force

"between the objecting State and the reserving State,
"between the objecting State and the reserving organization,

"between the objecting organization and the reserving State, or

"between the objecting organization and the reserving organization unless a contrary intention is definitely expressed by the objecting State or organization".

Subparagraph (c) remained unchanged.

54. In the introductory phrase of paragraph 3, the words "between States and one or more international organizations or between international organizations and one or more States" had been inserted after the words

⁹ See para. 7 above.

* Resumed from the 1448th meeting.

¹⁰ Yearbook ... 1975, vol. II, p. 25.

¹¹ Yearbook ... 1976, vol. II (Part One), p. 137.

¹² For texts, see 1446th meeting, para. 4.

¹³ See 1429th meeting, foot-note 3.

“the treaty”. To avoid problems of interpretation, subparagraph (a) had been drafted in terms that were closer to those of the corresponding provision of the Vienna Convention, namely, paragraph 4 (a) of article 20; three cases of the entry into force of treaties were now covered. Subparagraph (b) had also been brought closer into line with the corresponding provision of the Vienna Convention, and four cases were provided for. The new draft of that provision was cumbersome but had the merit of being precise, and it seemed that in that case precision should take precedence over elegance of style.

55. He suggested that, in paragraph 4, the words “a contracting State or organization” should be replaced by the words “a contracting State or a contracting international organization”.

56. Mr. FRANCIS observed that no provision of the kind contained in article 20, paragraph 3, of the Vienna Convention appeared in either article 20*bis* as proposed by the Special Rapporteur in his fifth report (A/CN.4/290 and Add.1) or article 20*bis* as proposed by the Drafting Committee. In the commentary to article 20*bis* in his report, the Special Rapporteur had discussed that omission in the context of the improbability of the formation by two international organizations, in the foreseeable future, of a third international organization of which they themselves would be the sole members. He did not remember whether the Special Rapporteur had also commented at any stage on the possibility of the existence of an international organization comprising States and one international organization; he would be grateful for clarification on that point for it seemed to him that, if such an organization could exist, a provision akin to that of article 20, paragraph 3, of the Vienna Convention should be included in article 20*bis* of the draft.

57. The fact that article 20*bis*, paragraph 2, proposed by the Drafting Committee referred only to the “object and purpose” of a treaty, whereas article 20, paragraph 2, of the Vienna Convention referred to both the “object and purpose” of the treaty and the “limited number” of negotiating entities did not of itself create a problem. There was, however, the problem of determining which of article 20*bis*, paragraph 2, and article 19*bis*, paragraph 2, should prevail over the other, and of reconciling the answer with the dominant provision of article 20*bis*, paragraph 1. For example, it could be argued from article 19*bis*, paragraph 2, that, when the participation of a given international organization in a treaty was essential to that treaty, the organization must have the power to formulate reservations. However, given the fact that the organization’s participation was essential to the treaty, should a reservation entered by the organization be subject to acceptance in accordance with the provisions of article 20*bis*, paragraph 2? If that was indeed the case, article 20*bis*, paragraph 1, would make no sense.

58. Although he was aware that article 20, paragraph 3 (c), and the corresponding provision of article 20*bis* followed, *mutatis mutandis*, the language of article 20, paragraph 4 (c), of the Vienna Convention, he thought that both should be amended since they made no sense as they stood. It was not the “act expressing the consent” of a State or an international organization to be bound by a treaty, subject to a reservation, which was ineffective

until that reservation had been accepted but the consent itself. The act would always have an effect, for it was what moved the existing contracting parties to accept or reject the reservation in question. Consequently, he thought that, in both articles 20 and 20*bis*, the first part of paragraph 3 (c) should be redrafted to read: “the consent of a State or an international organization to be bound by the treaty, subject to a reservation, is effective as soon as ...”.

59. In both articles, he would prefer the revised subparagraph to become the first subparagraph of paragraph 3, the present subparagraphs (a) and (b) becoming subparagraphs (b) and (c) respectively.

The meeting rose at 1 p.m.

1451st MEETING

Friday, 1 July 1977, at 10.10 a.m.

Chairman: Sir Francis VALLAT
later: Mr. José SETTE CÂMARA

Members present: Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/285,¹ A/CN.4/290 and Add.1,² A/CN.4/298, A/CN.4/L.253, A/CN.4/L.255 and Add.1)

[Item 4 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

ARTICLE 20 (Acceptance of reservations in the case of treaties between several international organizations) *and*

ARTICLE 20*bis* (Acceptance of reservations in the case of treaties between States and one or more international organizations or between international organizations and one or more States)³ (concluded)

1. The CHAIRMAN said that, if there was no objection, he would take it that the Commission approved the texts of articles 20 and 20*bis* proposed by the Drafting Committee, as orally amended by the Special Rapporteur at the previous meeting.

It was so agreed.

2. Mr. USHAKOV introducing his proposal for an article 20, entitled “Acceptance of reservations and objections to reservations” (A/CN.4/L.253), said that the article

¹ *Yearbook ... 1975*, vol. II, p. 25.

² *Yearbook ... 1976*, vol. II (Part One), p. 137.

³ For texts, see 1446th meeting, para. 4.

like the others he proposed, was based on the principle that an international organization could not enter a reservation to a treaty unless that reservation was expressly authorized by the treaty or it was otherwise agreed that the reservation was authorized.

3. Paragraph 1, which concerned treaties between several international organizations, was intended to replace entirely article 20 as proposed by the Drafting Committee since, under the system he proposed, the questions of acceptance of or objections to the reservations entered by an international organization no longer arose.

4. Paragraph 2 related to reservations expressly authorized by a treaty between States and one or more international organizations or otherwise authorized, while paragraph 3 concerned reservations expressly authorized by a treaty between international organizations and one or more States or otherwise authorized. Both paragraphs were modelled on article 20, paragraph 1, of the Vienna Convention.⁴

5. Paragraph 4 was based directly on article 20, paragraph 2, of the Vienna Convention. It concerned only the relations between States in the case of treaties between States and one or more international organizations. In such a case, the international organizations could enter only reservations which were expressly authorized by the treaty or otherwise authorized, and thus, by analogy with the general rule stated in article 20, paragraph 1, of the Vienna Convention, there was no need for their subsequent acceptance. States could enter other reservations, in which event the rule contained in article 20, paragraph 2, of the Vienna Convention would apply as between them. Consequently, a reservation formulated by a State would require acceptance by all the States parties when it appeared from the limited number of the negotiating States and the object and purpose of a treaty between States and one or more international organizations that the application of the treaty between all the States parties was one of the essential conditions of the consent of each one of them to be bound by the treaty.

6. Paragraph 5 concerned treaties between States and one or more international organizations other than treaties falling under paragraphs 2 and 4, and reproduced without change the provisions of article 20, paragraph 4 (a), (b) and (c) of the Vienna Convention, concerning relations between States. It was important to take account of the provisions of article 3, subparagraph (c), of the Vienna Convention, which reserved the application of that instrument to the relations of States as between themselves under international agreements to which other subjects of international law were also parties.

7. Paragraph 6 was based on article 20, paragraph 5, of the Vienna Convention and referred to treaties between States and one or more international organizations. It concerned only the acceptance by a State of a reservation entered by another State in accordance with paragraphs 4 and 5.

8. With regard to articles 19, 19bis and 19ter as proposed by the Drafting Committee,⁵ he noted that, according

to the Special Rapporteur's interpretation of the Vienna Convention, it was possible to object to reservations expressly authorized by a treaty. However, article 20, paragraph 4 (b) of the Vienna Convention, which concerned objections to reservations, applied "in cases not falling under the preceding paragraphs", among which was paragraph 1 concerning reservations expressly authorized by a treaty. According to the Special Rapporteur, there existed both a right to object to reservations which were authorized by a treaty and a right to object to reservations which were not so authorized, the latter right depending on whether a given reservation fell within the category of authorized reservations. His own view was that what was involved in such a case was not an objection to a reservation but a dispute as to the interpretation of the treaty. Consequently, he was firmly of the opinion that no provision was made in the Vienna Convention for objections to reservations authorized by a treaty.

9. Article 19ter, paragraph 2, provided that "A State may object to a reservation envisaged in article 19bis, paragraphs 1 and 3". The reason why no mention was made of article 19bis, paragraph 2, was precisely because that paragraph concerned reservations authorized by treaty. It was only logical that it should not be possible to object to such reservations. But no such exception to the raising of an objection to a reservation was mentioned in article 19ter, paragraphs 1 and 3. It therefore seemed that there was a contradiction between paragraph 2 and paragraphs 1 and 3 of article 19ter, and that the possibility given to international organizations by paragraphs 1 and 3 of objecting to a reservation which was not authorized by a treaty was entirely contrary to the spirit of the Vienna Convention.

10. Under article 19bis, paragraph 2, when the participation of an international organization was essential to the object and purpose of a treaty, that organization could formulate a reservation only if that reservation was expressly authorized by the treaty or if it was otherwise agreed that the reservation was authorized. It followed that an organization which was party to the same treaty, but whose participation was not essential to the object and purpose of the treaty, could formulate reservations which were not expressly authorized by the treaty. That meant that not all the international organizations parties to the treaty were placed on the same footing whereas, under the Vienna Convention, no distinction was made between States. That novel idea, which the Commission seemed to support, he found disturbing.

11. The CHAIRMAN said that, if there was no objection, he would take it that the Commission wished the title and text of the alternative version of article 20 (A/CN.4/L.253) proposed by Mr. Ushakov to be recorded in a foot-note to its commentary and Mr. Ushakov's comments to be reflected in the commentary.

It was so agreed.

12. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the texts adopted by the Committee for articles 21 to 26 as well as the titles of section 3 of part II, of part III, and of section I thereof (A/CN.4/L.255/Add.1).

⁴ See 1429th meeting, foot-note 4.

⁵ 1446th meeting, para. 4.

13. Mr. TSURUOKA (Chairman of the Drafting Committee) said that in document A/CN.4/L.255/Add.1, the Drafting Committee submitted for the consideration of the Commission the titles and texts of articles 21, 22, 23 and 23*bis*, which completed section 2 (Reservations) of part II (Conclusion and entry into force of treaties); articles 24, 24*bis*, 25 and 25*bis*, which constituted section 3 (Entry into force and provisional application of treaties) of the same part; and article 26, which was the first article of section 1 (Observance of treaties) of part III (Observance, application and interpretation of treaties).

14. In formulating those articles, the Drafting Committee had kept to the basic distinction between two different types of treaties, namely, treaties between international organizations and treaties between States and international organizations, to which he had drawn attention in his introduction of the first articles contained in section 2.⁶ In the articles of section 2 which it now proposed, the Drafting Committee had continued to use the expression "treaties between States and one or more international organizations or between international organizations and one or more States", to refer to the second of those categories of treaties. In the articles of section 3, where the question was no longer one of reservations, the Drafting Committee had reverted to the original terminology, namely, "treaties between one or more States and one or more international organizations".

15. In consequence of the basic distinction between the two types of treaties which he had mentioned, the Drafting Committee had prepared separate but parallel articles when that had seemed necessary for the purposes of clarity and precision, namely, with respect to the procedure regarding reservations (articles 23 and 23*bis*), the entry into force of treaties (articles 24 and 24*bis*), and the provisional application of treaties (articles 25 and 25*bis*). As in the articles which it had already proposed, the Drafting Committee had made specific reference, as appropriate, to the type of treaty envisaged throughout the group of articles which it now put before the Commission. Subject to some drafting changes, such as the specific reference to "a State or States and an international organization or organizations", the text of those articles corresponded to that of the articles on the same subjects proposed by the Special Rapporteur in his fourth (A/CN.4/285) and fifth (A/CN.4/290 and Add.1) reports, and followed as closely as possible that of the related provisions of the Vienna Convention.

ARTICLE 21 (Legal effects of reservations and of objections to reservations),

ARTICLE 22 (Withdrawal of reservations and of objections to reservations),

ARTICLE 23 (Procedure regarding reservations in treaties between several international organizations) and

ARTICLE 23*bis*⁷ (Procedure regarding reservations in treaties between States and one or more international

organizations or between international organizations and one or more States)

16. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to approve the titles and text of articles 21, 22, 23 and 23*bis*, proposed by the Drafting Committee, which read:

Article 21. Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 19*ter*, 20 and 23 in the case of treaties between several international organizations, or in accordance with articles 19*bis*, 19*ter*, 20*bis* and 23*bis* in the case of treaties between States and one or more international organizations or between international organizations and one or more States:

(a) modifies for the reserving party in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving party.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a party objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving party, the provisions to which the reservation relates do not apply as between the two parties to the extent of the reservation.

Article 22. Withdrawal of reservations and of objections to reservations

1. Unless a treaty between several international organizations, between States and one or more international organizations or between international organizations and one or more States otherwise provides, a reservation may be withdrawn at any time and the consent of the State or international organization which has accepted the reservation is not required for its withdrawal.

2. Unless a treaty mentioned in paragraph 1 otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless a treaty between several international organizations otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting organization only when notice of it has been received by that organization;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the international organization which formulated the reservation.

4. Unless a treaty between States and one or more international organizations or between international organizations and one or more States otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to a contracting State or organization only when notice of it has been received by that State or organization;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

Article 23. Procedure regarding reservations in treaties between several international organizations

1. In the case of a treaty between several international organizations, a reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting organizations and other international organizations entitled to become parties to the treaty.

2. If formulated when signing a treaty between several international organizations subject to formal confirmation, acceptance or approval of that treaty, a reservation must be formally confirmed by the

⁶ 1446th meeting, para. 5.

⁷ For the consideration of the texts originally submitted by the Special Rapporteur, see 1434th meeting and 1435th meeting, paras. 1 and 2.

reserving organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

Article 23bis. Procedure regarding reservations in treaties between States and one or more international organizations or between international organizations and one or more States

1. In the case of a treaty between States and one or more international organizations or between international organizations and one or more States, a reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and organizations and other States and international organizations entitled to become parties to the treaty.

2. If formulated by a State when signing subject to ratification, acceptance or approval a treaty mentioned in paragraph 1 or if formulated by an international organization when signing subject to formal confirmation, acceptance or approval a treaty mentioned in paragraph 1, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to a confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

It was so agreed.

17. Mr. USHAKOV, introducing his proposals for articles 21, 22 and 23 (A/CN.4/L.253) said that his article 21 (Legal effects of reservations and of objections to reservations) should cause no problem. The first three paragraphs concerned treaties between several international organizations, treaties between States and one or more international organizations, and treaties between international organizations and one or more States respectively. Paragraph 4 applied to all those categories of treaties. Paragraph 5, which concerned treaties between States and one or more international organizations, stated a rule of the Vienna Convention which applied to relations between States.

18. Paragraph 1 of his proposal for article 22, concerning treaties between several international organizations, provided that a reservation could be withdrawn without the consent of an international organization which had accepted it. Paragraphs 2 and 3, which concerned treaties between States and one or more international organizations and treaties between international organizations and one or more States respectively, also related to the withdrawal of reservations. Paragraph 4 concerned objections to reservations to treaties between States and one or more international organizations. Where that category of treaty was concerned, an objecting State could withdraw its objections at any time. The remaining paragraphs did not call for any comment.

19. Article 23 (Procedure regarding reservations) also distinguished between the three main categories of treat-

ties. With regard to treaties between several organizations, paragraph 1 provided that a reservation and an express acceptance of a reservation must be formulated in writing and communicated to the "other international organizations entitled to become parties to the treaty". Paragraph 2 provided that, in the case of a treaty between States and one or more international organizations, such communication must be made to the contracting States, to the other States entitled to become parties to the treaty, and to the "contracting organizations" only. It was not necessary for notification to be given to the other international organizations entitled to become parties to the treaty since the type of treaty in question normally involved only a small number of organizations, which were invited to participate in its negotiation and became the "contracting organizations". The communications referred to in paragraph 3 had to be made only to the contracting States, since they concerned treaties between international organizations and one or more States, in which a small number of States were invited to participate. Paragraphs 4 to 7 were self-explanatory.

20. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed that Mr. Ushakov's comments on his proposed articles 21, 22 and 23 (A/CN.4/L.253) should be reflected in the commentary and the texts recorded in a foot-note to the commentary.

It was so agreed.

ARTICLE 24⁸ (Entry into force of treaties between international organizations)

21. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to approve the title of section 3 (Entry into force and provisional application of treaties) of part II of the draft articles, and article 24 as proposed by the Drafting Committee, which read:

Article 24. Entry into force of treaties between international organizations

1. A treaty between international organizations enters into force in such manner and upon such date as it may provide or as the negotiating international organizations may agree.

2. Failing any such provision or agreement, a treaty between international organizations enters into force as soon as consent to be bound by the treaty has been established for all the negotiating international organizations.

3. When the consent of an international organization to be bound by a treaty between international organizations is established on a date after the treaty has come into force, the treaty enters into force for that organization on that date, unless the treaty otherwise provides.

4. The provisions of a treaty between international organizations regulating the authentication of its text, the establishment of the consent of international organizations to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

It was so agreed.

⁸ For the consideration of the text originally submitted by the Special Rapporteur, see the 1435th meeting, paras. 3-32.

ARTICLE 24bis⁹ (Entry into force of treaties between one or more States and one or more international organizations)

22. The CHAIRMAN invited the Commission to consider article 24bis as proposed by the Drafting Committee, which read:

Article 24bis, Entry into force of treaties between one or more States and one or more international organizations

1. A treaty between one or more States and one or more international organizations enters into force in such manner and upon such date as it may provide or as the negotiating State or States and international organization or organizations may agree.

2. Failing any such provision or agreement, a treaty between one or more States and one or more international organizations enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States and international organizations.

3. When the consent of a State or an international organization to be bound by a treaty between one or more States and one or more international organizations is established on a date after the treaty has come into force, the treaty enters into force for that State or organization on that date, unless the treaty otherwise provides.

4. The provisions of a treaty between one or more States and one or more international organizations regulating the authentication of its text, the establishment of the consent of the State or States and the international organization or organizations to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

23. Mr. CALLE Y CALLE said it should be made perfectly clear in the commentary that the references in article 24bis to "treaties between one or more States and one or more international organizations" applied to both the categories of treaties involving States with which the Commission had dealt in the earlier articles on reservations, namely, treaties between States and one or more international organizations and treaties between international organizations and one or more States. He was afraid that, unless that clarification was made, the article might be interpreted as applying to only one of those categories of treaties.

24. Mr. USHAKOV said that, in drafting section 2, concerning reservations, the Commission had started from the idea that reservations applied only to multilateral treaties. It had left until later the question of the reservations that an international organization might enter to a bilateral treaty. However, since section 3 concerned the entry into force and the provisional application of treaties, the Commission had decided to return to the general definition of the term "treaty" which appeared in draft article 2¹⁰ and embraced bilateral and multilateral treaties. Consequently, as was apparent from its title, article 24 applied to both multilateral and bilateral treaties concluded by international organizations. And the same was true of article 24bis, as its title indicated.

25. Mr. SCHWEBEL wondered whether the Commission really needed so to complicate the language of the

present and other articles as to exclude all possibility of their referring to bilateral treaties in section 2 on reservations. He raised that question, on the one hand, because he was not convinced that there could not be reservations to a bilateral treaty—although he recognized that cases might be exceptional—and, on the other, because he considered that the Commission might well be able either to find language which did not prejudice that point or to decide the point and cover it in a definitions article which would apply to the entire convention, thereby eliminating the circumlocutions and duplication which were to be found in section 2. It would be very useful if the Special Rapporteur and the Secretariat would reflect on the problem and suggest ways in which the draft might be simplified.

26. Mr. USHAKOV said that the Commission had left in abeyance the question of bilateral treaties concluded between international organizations or between a State and an international organization. If the phrase "treaties between one or more States and one or more international organizations", which included bilateral treaties, had been used in the articles on reservations, the wording would have been extremely complicated; each article would have had to be supplemented by a special paragraph concerning bilateral treaties.

27. Mr. REUTER (Special Rapporteur) said that there seemed to be two aspects to the question raised by Mr. Schwebel, one of terminology and the other of substance. On the one hand, Mr. Schwebel had asked whether it would not be possible to simplify the wording of certain articles by including new definitions in article 2. Personally, he did not rule out that solution, although he felt there was a risk that it would give rise to serious problems. It would be better to wait until Governments had shown by their reactions whether they were satisfied with the detailed text drawn up by the Commission or whether they wanted a simpler article.

28. On the other hand, Mr. Schwebel had said that the idea of reservations to a bilateral treaty was quite acceptable, particularly since the Vienna Convention, unlike section 2 of the present draft, did not relate solely to multilateral treaties. In the draft articles which the Commission had prepared for the United Nations Conference on the Law of Treaties,¹¹ the section on reservations had been entitled "Reservations to multilateral treaties". But in its concern to avoid as far as possible making distinctions between the various categories of treaties, the Conference had deleted the reference to multilateral treaties. As Mr. Ushakov had pointed out, the Commission had postponed a decision on the applicability to bilateral treaties of the articles of section 2 of the present draft. Nevertheless, it seemed that most members considered that the extension of those articles to bilateral treaties would give rise to serious difficulties. It was a fact that the machinery of the Vienna Convention was fully intelligible only as it applied to treaties concluded between at least three States. There was, therefore, a sort of contradiction between the formal liberalism of the Convention and the substantive rules it contained. That

⁹ *Idem.*

¹⁰ See 1429th meeting, foot-note 3.

¹¹ *Yearbook ... 1966*, vol. II, pp. 177 *et seq.*, document A/6309/Rev.1, part II, chap. II.

was why the Commission was provisionally limiting itself to reservations to multilateral treaties. In law, and as regards the French version of the articles relating to treaties between international organizations, there were provisions compatible with a reservation to a bilateral treaty by reason of the use of the word *plusieurs*. The reason why the Commission had adopted that position was simply that it wished to learn the reactions of Governments. If a majority of Governments considered that the provisions of the Vienna Convention applied to bilateral as well as to multilateral treaties, the draft articles would have to be revised and, inevitably, made more complex.

29. The CHAIRMAN, speaking as a member of the Commission, said that he had already been troubled, when the Commission had considered the articles on reservations, by the fact that all of them, and especially articles 20, 23 and 23*bis*, contained language which, at least in English, had seemed to him to exclude bilateral treaties from their effects. When that language was compared with the phraseology of article 24*bis*, which clearly did extend to bilateral treaties, it became obvious that the articles on reservations did, as drafted, exclude bilateral treaties. There were two points which were of concern to him in that respect.

30. First, his recollection was that the United Nations Conference on the Law of Treaties had quite clearly decided that the Vienna Convention would not close the door to the possibility of reservations to bilateral treaties. At the 10th plenary meeting of the Conference, the Chairman of the Drafting Committee had referred expressly to that point, and his remarks had not been contested. He had said:

In the title of Section 2, the Drafting Committee had adopted an amendment by Hungary ... to delete the words "to multilateral treaties" after the word "reservations", since the adjective "multilateral" did not modify the noun "treaty" in the definition of a reservation given in article 2, paragraph 1 (*d*); that did not, of course, prejudice the question of reservations to bilateral treaties.¹²

Clearly, therefore, the Chairman of the Drafting Committee of the Conference considered that the provisions of the Vienna Convention did not settle the question of reservations to bilateral treaties.

31. Second, and however unlikely a reservation might be to a bilateral treaty concluded between States, there could be cases in which, because of the nature of the internal machinery of an international organization, the formulation of a reservation would be the only way in which an organization could deal with a situation. For example, it might be that, when the text of a bilateral treaty negotiated between international organizations came before their respective competent organs for approval, one of those organs would find the draft unacceptable on some point and instruct the executive officer of the organization to enter a reservation. In the ordinary course of events, that reservation would be deemed to have been accepted if there was no objection to it within a period of 12 months. There was, to his mind, a very

real possibility that such a situation would arise. He considered the importance of the point in relation to treaties between international organizations to be greater than it had been in relation to treaties between States. Far from closing the door on reservations to bilateral treaties, as the Commission seemed to be doing, the Commission should, without prejudicing the point, leave it a little wider open.

32. At the present stage in its deliberations, the Commission would have to leave the draft articles as they had been proposed by the Drafting Committee, but he felt that it should bring out very clearly and very fully in its report the fact that it was not, as yet, its intention to determine the question of reservations to bilateral treaties.

33. Mr. EL-ERIAN said he agreed with the Chairman's interpretation of the work of the Conference on the Law of Treaties and with his assessment of the relative importance of the question of reservations to bilateral treaties for international organizations and States. However, the traditional view was that reservations as such could be made only to multilateral treaties, and that entering a reservation to a bilateral treaty was equivalent to proposing a new treaty. Was that in fact the case? He also wondered whether the references in article 23 to treaties between "several" international organizations could be interpreted in English as references to bilateral treaties.

34. CALLE Y CALLE said that he subscribed to the explanations given by Mr. Ushakov for the return in the articles of section 3 to the general definition of "treaty", which covered bilateral treaties, and he considered that those explanations should be reflected in the commentary.

35. Mr. USHAKOV said that the question of reservations to bilateral treaties did not arise with respect to the articles he proposed in document A/CN.4/L.253. As he saw it, an international organization could formulate reservations only if they were expressly authorized by a treaty or it was otherwise agreed that reservations were permitted. Consequently, whether a treaty was multilateral or bilateral, a reservation could be entered by an international organization only if it was expressly authorized.

36. In the case of a treaty between a State and an international organization, it was paragraph 4 of his proposed article 19 which would apply: neither the State nor the international organization would be able to formulate a reservation unless that reservation was expressly authorized by the treaty or it was otherwise agreed that the reservation was authorized.

37. Mr. QUENTIN-BAXTER said he associated himself with the Chairman's remarks on the problem of bilateral treaties. Mr. Francis had also made some very pertinent observations concerning that problem as it related to international organizations and their procedures.

38. The Drafting Committee had decided, for linguistic reasons, that the order of the text of the English version of article 23*bis*, paragraph 2, should be slightly different from that of the French original. It had made the necessary change but had omitted to bring the text of the

¹² *Official Records of the United Nations Conference on the Law of Treaties*, 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. 28, 10th meeting, para. 23.

corresponding paragraph of article 23 into line. Consequently, the opening of the English version of article 23, paragraph 2, should be amended to read: "If formulated when signing subject to formal confirmation, acceptance or approval a treaty between several international organizations, a reservation ...".

39. Mr. USHAKOV said he still believed that draft article 7, entitled "Full powers and powers", should be expanded for no one could be considered to represent an international organization for the purpose of formulating a reservation unless he produced powers relating expressly to that function.

Mr. Sette Câmara (first Vice-Chairman) took the Chair.

40. Mr. DADZIE said he agreed with the Special Rapporteur that the Commission should wait for the observations of Governments before taking a decision on the question whether the draft articles should be amended in order to take account of the case of bilateral treaties.

41. He also agreed with the Chairman's interpretation of the provisions of the Vienna Convention concerning bilateral treaties. In his opinion, bilateral treaties were governed by the express wishes of the parties to the treaties in question so that any rules relating to bilateral treaties which the Commission was considering would be of limited interest. Lastly, he shared Mr. El-Erian's view that, if a reservation was formulated to a bilateral treaty, it would probably lead to the conclusion of a new treaty between the parties. The reservation itself was therefore of limited importance because it merely reflected a change in the attitude of the parties to the treaty in question.

42. Mr. VEROSTA said that he supported the drafting amendment to article 23, paragraph 2, which had been suggested by Mr. Quentin-Baxter.

43. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to the drafting amendment to article 23, paragraph 2, which had been suggested by Mr. Quentin-Baxter and which applied to the English text only.

It was so agreed.

44. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to approve the title and text of article 24bis.

It was so agreed.

ARTICLE 25 (Provisional application of treaties between international organizations) and

ARTICLE 25bis¹³ (Provisional application of treaties between one or more States and one or more international organizations)

45. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to approve the titles and texts of articles 25 and 25bis as proposed by the Drafting Committee, which read:

Article 25. Provisional application of treaties between international organizations

1. A treaty between international organizations or a part of such a treaty is applied provisionally pending its entry into force if:

(a) the treaty itself so provides; or

(b) the negotiating international organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating international organizations have otherwise agreed, the provisional application of a treaty between international organizations or a part of such a treaty with respect to an international organization shall be terminated if that organization notifies the other international organizations between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

Article 25bis. Provisional application of treaties between one or more States and one or more international organizations

1. A treaty between one or more States and one or more international organizations or a part of such a treaty is applied provisionally pending its entry into force if:

(a) the treaty itself so provides; or

(b) the negotiating State or States and international organization or organizations have in some other manner so agreed.

2. Unless a treaty between one or more States and one or more international organizations otherwise provides or the negotiating State or States and international organization or organizations have otherwise agreed:

(a) the provisional application of the treaty or a part of the treaty with respect to a State shall be terminated if that State notifies the other States, the international organization or organizations between which the treaty is being applied provisionally of its intention not to become a party to the treaty;

(b) the provisional application of the treaty or a part of the treaty with respect to an international organization shall be terminated if that organization notifies the other international organizations, the State or States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

It was so agreed.

ARTICLE 26¹⁴ (*Pacta sunt servanda*)

46. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to approve the titles of part III (Observance, application and interpretation of treaties) of the draft articles and of section 1 thereof (Observance of treaties) as well as the text of article 26 as proposed by the Drafting Committee, which read:

Article 26. Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

It was so agreed.

ARTICLE 27¹⁵

47. Mr. REUTER (Special Rapporteur) said that the Drafting Committee had still not taken up article 27

¹⁴ For the consideration of the text originally submitted by the Special Rapporteur, see 1435th meeting, paras. 33-36.

¹⁵ For the consideration of the text originally submitted by the Special Rapporteur, see 1435th meeting, paras. 37-53, and 1436th meeting, paras. 1-40.

¹³ For the consideration of the text originally submitted by the Special Rapporteur, see 1435th meeting, paras. 3-32.

but had decided to examine first articles 28 and 34 and then to revert to article 27, which had given rise to difficulties when it had been discussed in the Commission. The Drafting Committee had endorsed the comments submitted by him on the question of what the future article 27 might comprise and had requested him to inform the members of the Commission accordingly and to seek their advice.

48. With regard first to the wording of the rules laid down in draft article 27, some members of the Commission had asked the Drafting Committee to follow more closely the text of article 27 of the Vienna Convention and to distinguish between the case of States and that of international organizations. Those two suggestions did not give rise to any difficulty, in his view, and the Drafting Committee might therefore wish, in a paragraph 1 based on article 27 of the Vienna Convention, to formulate a provision concerning States along the following lines:

“A State may not invoke the provisions of its internal law as justification for failure to perform a treaty between one or more States and one or more international organizations to which it is a party.”

49. The Drafting Committee could adopt a symmetrical provision for international organizations in paragraph 2, but in that case it would encounter a twofold problem.

50. It had been pointed out that it might be advisable to define what was meant by “the rules of the international organization” and it had been suggested that the definition given in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character¹⁶ should be followed, which stated:

“rules of the organization” means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the Organization.

That definition was sufficiently cautious—and would draw attention to the words “in particular”—and its inclusion in article 2 would not cause any difficulty.

51. The real problem was that certain international organizations—those having the requisite statutory powers—could conclude treaties which were entirely contingent on the execution of an instrument by the organization. That applied to treaties whose sole object was to ensure the execution of an instrument or a resolution of the organization. They were thus treaties which were subordinate to the extent that, as was the case in most States, the executive power was subordinate to the legislative power. That situation had extremely important consequences, since the fact that a Government had taken measures to enforce a law did not deprive the legislator of the right to amend that law and, if the law was repealed, the enforcement measures taken by the Government fell.

52. Consequently, where an international organization concluded a treaty of that kind, if it was clear—without any express indication in the treaty—that the sole object of the treaty was the execution of an instrument of the organization, it was obvious that the organization had not, in concluding the treaty, renounced the right to

amend the instrument and that, if it did amend it, the treaty must disappear.

53. It might be asked whether the same situation also applied to States. It was quite conceivable that, under a unilateral law, a State might provide that aliens should enjoy certain rights, subject to certain conditions, and that, when the law was passed, the Government might conclude agreements with foreign States designed to facilitate the application of the law—for example, agreements laying down the kind of condition which aliens would have to fulfil in order to benefit by the law. In such a case, if the law was repealed, the agreements concluded for its application also fell.

54. If no precedent of that kind was to be found in State practice, it was because the sole object of the agreements in question was to facilitate the application of the law and not to bind absolutely the State which had adopted the law. Such agreements would, moreover, be described as administrative arrangements or agreements rather than as treaties, so that the link of subordination was clearly apparent. Legally, however, the problem was the same.

55. In the case of an agreement between an international organization and a State whose object was to ensure the implementation of a resolution of the international organization, the problem was that of the meaning to be attached to the agreement. Had the international organization intended to bind itself definitively or merely to take implementation measures? There was every reason for believing that it had not intended to bind itself, first of all, because it had not the right to do so. An agreement should be so interpreted as not to conflict with the constituent instrument of the organization.

56. It could be argued that, in the new article 27, which would consist of only two paragraphs, one for States and the other for international organizations, it was not necessary to devote a special provision to such agreements and that a reference in the commentary would suffice.

57. It could also be said that it would suffice to refer to article 46, as in the existing text, with the addition of a reference to article 31 (General rule of interpretation) and to article 6 (Capacity of international organizations to conclude treaties).

58. There was still another solution, which was to state expressly that nothing in the provisions of article 27, relating to the possibility of invoking internal law to prevent performance of a treaty, should affect the obligation to respect the dependence of international treaties on the rules of the international organization as regards their scope and nature, when the sole object of those agreements was to apply an instrument of the international organization. On that point, he would be inclined to assimilate the situation of States to that of international organizations.

59. He would like to hear the views of members of the Commission, now or later, on the comments which he had just made, and to know whether the Commission approved the Drafting Committee's suggestion that it should take up articles 28 to 34 and then return to article 27.

¹⁶ See 1435th meeting, foot-note 10.

60. Mr. USHAKOV said that the question of respect for the performance of treaties by international organizations was crucial and should be treated with the utmost caution. He therefore suggested that article 27 be placed between brackets in order to indicate to Governments that it was only a first draft and to invite their comments on the article.

61. Mr. ŠAHOVIĆ said that the explanations given by the Special Rapporteur would assist the Commission in arriving at a satisfactory solution to the problem posed by article 27, which, as Mr. Ushakov had said, was crucial. The Commission should reflect on the difficulties to which the article gave rise and proceed to consider the subsequent articles, as suggested by the Drafting Committee.

62. Mr. TSURUOKA said that he supported the procedural suggestion made by the Special Rapporteur.

63. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to the suggestion by the Special Rapporteur, which had been supported by Mr. Ushakov, Mr. Šahović and Mr. Tsuruoka, that in view of the crucial importance of article 27, the Commission should not take a decision on it until it had approved articles 28 to 34.

It was so agreed.

The meeting rose at 12.45 p.m.

1452nd MEETING

Monday, 4 July 1977, at 3.10 p.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. El-Erian, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Verosta.

Long-term programme of work

[Item 8 of the agenda]

and

Organization of future work

[Item 9 of the agenda]

PRELIMINARY REPORT ON THE SECOND PART OF THE TOPIC OF RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (A/CN.4/304)

1. The CHAIRMAN invited the Special Rapporteur to introduce his preliminary report on the second part of the topic of relations between States and international organizations (A/CN.4/304).

2. Mr. EL-ERIAN (Special Rapporteur) said that, at its twenty-eight session, the Commission had stated that, in considering the question of diplomatic law in its application to relations between States and international organizations, it had decided first to concentrate on the part relating to the status, privileges and immunities of representatives of States to international organizations and to defer to a later date the consideration of the second part of the topic. It had then requested him to prepare a preliminary report to enable it to take the necessary decisions and to define its course of action on the second part of the topic of relations between States and international organizations, namely, the status, privileges and immunities of international organizations, their officials, experts and other persons engaged in their activities not being representatives of States.¹

3. In preparing the preliminary report, he had endeavoured to reply to five main questions. First, had the legal norms governing that branch of diplomatic law reached a state of evolution that made it ripe for codification? Second, was it necessary and useful to undertake such a task? Third, were the apprehensions which had been expressed in the past on the advisability of such an undertaking still justified? Fourth, was the codification of those norms likely to prejudice in any way existing agreements governing the same subject-matter or to have any adverse effects on the future evolution of those norms? Fifth, what lessons were to be drawn from the work of the Commission on the first part of the topic and from its work on the question of treaties between States and international organizations or between two or more international organizations, in determining the method of work and approach to be followed in the codification of the status, privileges and immunities of international organizations?

4. In attempting to reply to those questions, he had set the following objectives for the preliminary study: first, to trace the evolution of the diplomatic law of international organizations, whether treaty law or customary law, as supplemented by the decisions of courts and by doctrine; second, to analyse the Commission's work on the related subjects which had some bearing on the subject-matter of the preliminary study; and, third, to discuss a number of general questions of a preliminary character with a view to defining and identifying the course to be followed in the work.

5. The report before the Commission consisted of five chapters. Chapter I described the background of the study. Chapter II traced the evolution of the international law relating to the legal status and immunities of international organizations. In that connexion, he noted that, long before the appearance of such general international organizations as the League of Nations and the United Nations, constitutional instruments establishing international river commissions and administrative unions in the second half of the nineteenth century had contained treaty stipulations from which the origin of the privileges and immunities of international bodies could be traced. Examples were to be found in treaties establishing the

¹ *Yearbook ... 1976*, vol. II (Part Two), p. 164, document A/31/10, para. 173.

European Commission for the Control of the Danube, the International Commission for the Navigation of the Congo, as well as the Permanent Court of Arbitration, the proposed International Prize Court and the Judicial Arbitration Court provided for by the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes. However, as Dr. Wilfred Jenks had stated in his work entitled *International Immunities*:

Historically, the present content of international immunities derives from the experience of the League of Nations as developed by the International Labour Organisation when submitted to the test of wartime conditions, reformulated in certain respects in the ILO-Canadian wartime arrangements, and subsequently reviewed by the General Assembly of the United Nations at its First Session in 1946.²

6. With regard to constitutional provisions, article 7, paragraph 4, of the Covenant of the League of Nations had provided that:

Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities.

Article 7, paragraph 5, had provided that:

The buildings and other property occupied by the League or its officials or by Representatives attending its meetings shall be inviolable.

Similarly, article 19 of the Statute of the Permanent Court of International Justice had provided that:

The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

Moreover, detailed arrangements concerning the privileges and immunities of the League of Nations, to which he had referred in paragraph 14 of his report, had been worked out in agreements between the Secretary-General of the League and the Swiss Government.

7. When a nucleus of the staff of the ILO had been transferred from Geneva to Montreal in 1940, an arrangement defining the status of the Office and its staff in Canada had had to be worked out. That arrangement had been embodied in a Canadian Order in Council of 14 August 1941, the provisions of which he had described in paragraph 19 of his report.

8. Constitutional provisions relating to the privileges and immunities of the United Nations and the specialized agencies had been embodied in Article 105 of the Charter of the United Nations and in Article 19 of the Statute of the International Court of Justice. The constitutional instruments of the specialized agencies usually contained stipulations which provided in general terms that the organization in question would enjoy such privileges and immunities as were necessary for the fulfilment of its purposes. Moreover, the Convention on the Privileges and Immunities of the United Nations, adopted on 13 February 1946,³ and the Convention on the Privileges and Immunities of the Specialized Agencies, adopted on 21 November 1947,⁴ contained provisions relating to the immunity of the United Nations and the specialized

agencies, and of their property and assets, from every form of legal process. Those conventions had been supplemented by headquarters agreements between the organizations concerned and the States in whose territory they had their headquarters. The *Repertory of Practice of United Nations Organs* contained a synoptic survey of special agreements on privileges and immunities of the United Nations, which were divided into three main categories, namely, agreements with non-member States, agreements with Member States and agreements concluded with Member or non-member States by United Nations principal or subsidiary organs within the framework of their competence.

9. The constitutional instruments of regional organizations usually contained provisions relating to the privileges and immunities of those organizations. Examples were to be found in article 40 of the Statute of the Council of Europe; article 76 of the Treaty instituting the European Coal and Steel Community; article 218 of the Treaty establishing the European Economic Community; article XIII of the Charter of the Council for Mutual Economic Assistance; article 35 of the Convention establishing the European Free Trade Association; and article XXXI of the Charter of the Organization of African Unity.⁵

10. Chapter III of his preliminary report described recent developments in the field of relations between States and international organizations. Since 1971, when the Commission had adopted the draft articles on the first part of the topic of relations between States and international organizations,⁶ two important developments had occurred which had a bearing on the subject-matter of the study under consideration. First, the Commission had redefined a number of points concerning relations between States and international organizations in the course of its work on the question of treaties concluded between States and international organizations or between two or more international organizations; second, the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character⁷ had been adopted in 1975.

11. In defining the scope of the draft articles on the question of treaties concluded between States and international organizations or between international organizations, the Commission had adopted a different approach from the one it had adopted in its draft articles on the representation of States in their relations with international organizations. The reasons for that difference had been explained in the commentary to article 2 of the draft articles on treaties concluded between States and international organizations or between international organizations.⁸ Article 2, paragraph 1 (i), of those draft articles

⁵ See A/CN.4/304, para. 31.

⁶ *Yearbook ... 1971*, vol. II (Part One), pp. 284 *et seq.*, document A/8410/Rev.1, chap. II, sect. D.

⁷ For the text of the Convention, see the *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. 207. The Convention is hereafter referred to as the 1975 Vienna Convention.

⁸ *Yearbook ... 1974*, vol. II (Part One), p. 296, document A/9610/Rev.1, chap. IV, sect. B, art., 2, paras. 10-13 of the commentary.

² C. W. Jenks, *International Immunities* (London, Stevens, 1961), p. 12.

³ United Nations, *Treaty Series*, vol. I, p. 15.

⁴ *Ibid.*, vol. 33, p. 261.

merely identified an international organization as an intergovernmental organization rather than giving a detailed definition of the meaning of the term "international organization". The Commission had adopted the same type of simplified and pragmatic approach in dealing with the capacity of international organizations to conclude treaties. Thus, article 6 of the same draft provided that:

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

An explanation of the reasons why the Commission had decided in favour of such wording had been provided in paragraphs 2 and 3 of the commentary to article 6.⁹

12. In dealing with the question of the scope of the 1975 Vienna Convention, the United Nations Conference on the Representation of States in their Relations with International Organizations had introduced some refinements in the criteria proposed by the Commission for identifying an international organization of a universal character. The definition proposed by the Commission had provided that:

"international organization of universal character" means an organization whose membership and responsibilities are on a world-wide scale,¹⁰

whereas the corresponding text of the 1975 Vienna Convention stated that:

"international organization of a universal character" means the United Nations, its specialized agencies, the International Atomic Energy Agency and any similar organization whose membership and responsibilities are on a world-wide scale.

Thus, the Conference had limited the scope of the Convention to organizations of a universal character, but it had intimated that the Convention applied mainly to the United Nations and related organizations.

13. The 1975 Vienna Convention did not contain provisions relating to the representatives of entities other than States. The Conference had, however, adopted a resolution relating to the observer status of national liberation movements recognized by OAU or the League of Arab States, the text of which was reproduced in paragraph 56 of his preliminary report. Paragraph 2 of that resolution recommended that the delegations of such national liberation movements should be accorded "the facilities, privileges and immunities necessary for the performance of their tasks". Paragraph 1 requested the General Assembly to examine the question of the participation of those movements as observers in the work of international organizations at its thirtieth regular session, but the Assembly had not yet taken a decision on how such a study should be carried out. He therefore suggested that the Commission should wait and see what the General Assembly intended to do before considering the question of the observer status of national liberation movements.

14. Chapter IV of his report dealt with a number of questions general of a preliminary character. With regard to the place of custom in the law of international immunities, some writers had stated that, in contrast to the immu-

nities of inter-State diplomatic agents, international immunities were almost exclusively created by treaty law, and that international custom had not yet made any appreciable contribution to that branch of law. Other writers, including Preuss, had however acknowledged that "A customary law appeared to be in the process of formation, by virtue of which certain organizations endowed with international personality may claim diplomatic standing for their agents as of right".¹¹ Another writer had summed up the position thus:

"En voie de création est une règle coutumière qui assure aux organisations internationales et à leurs fonctionnaires supérieurs les mêmes privilèges et immunités diplomatiques qu'au personnel diplomatique. Les étapes de ce développement sont constituées par les arrangements conclus entre la Suisse et la Société des Nations en 1921 et en 1926, ainsi que par ceux qui sont intervenus entre la Suisse, d'une part, les Nations Unies et l'Organisation internationale du Travail d'autre part, en 1946."¹²

[A customary rule giving international organizations and their senior officials the same diplomatic privileges and immunities as diplomatic staff is in process of formation. The stages of this process are constituted by the agreements concluded between Switzerland and the League of Nations in 1921 and 1926 and by the agreements concluded between Switzerland, on the one hand, and the United Nations and the International Labour Organisation, on the other, in 1946.] [Translation by the Secretariat.]

15. A parallel development of concepts was to be found, for example, in a diplomatic note by the United States Government dated 16 October 1933, in the British Diplomatic Privileges (Extension) Act, 1944, in a message dated 28 July 1955 from the Swiss Federal Council to the Federal Assembly, in a decision of 28 April 1954 of the Supreme Court of Mexico, relating to the immunities of the United Nations Economic Commission for Latin America, and in article III, section 3, of the Agreement between Egypt and the World Health Organization, to which he had referred in paragraphs 59 to 62 of his report.

16. Another general question dealt with in his preliminary report was the legal capacity of international organizations. In that connexion, it should be noted that Article 104 of the Charter of the United Nations required each Member to accord to the Organization within its territory "such legal capacity as may be necessary for the exercise of its functions". The constituent instruments and conventions on privileges and immunities of the specialized agencies and of a number of regional organizations contained provisions regarding the legal capacity of those organizations, which varied as to wording but were similar in meaning to Article 104 of the Charter of the United Nations and to the 1946 Convention on the Privileges and Immunities of the United Nations.

17. In addition to contractual capacity, the United Nations and the specialized agencies enjoyed certain privileges and immunities laid down in the general conventions, headquarters agreements and other supplementary instruments. Those privileges and immunities included immunity from legal process; inviolability of

¹¹ L. Preuss, "Diplomatic privileges and immunities of agents invested with functions of an international interest", *American Journal of International Law* (Washington, D.C.), vol. 25, No. 4 (October 1931), p. 696.

¹² P. Guggenheim, *Traité de droit international public* (Geneva, Georg, 1953), vol. I, pp. 51-52.

⁹ *Ibid.*, p. 299.

¹⁰ *Yearbook ... 1971*, vol. II (Part One), p. 284, document A/8410/Rev.1, chap. II, sect. D, art. 1, para. 1 (2).

their premises and the exercise of control by them over their premises; immunity of their property and assets from search and from any other form of interference; and privileges and immunities in respect of communications facilities. The privileges and immunities of officials of international organizations included immunity in respect of official acts; exemption from taxation of salaries and emoluments; immunity from national service obligations; immunity from immigration restrictions and alien registration; diplomatic privileges and immunities of executive and other senior officials; and repatriation facilities in times of international crisis. Moreover, experts on missions for, and persons having official business with, international organizations enjoyed privileges and immunities similar to those of officials of international organizations.

18. His report also dealt with the general question of the uniformity or adaptation of international immunities, the régime of which was at present based on a large number of instruments whose diversity caused practical difficulties to States as well as to international organizations. As Wilfred Jenks had pointed out in his work on *International Immunities*, "From the standpoint of an international organisation conducting operations all over the world there is a similar advantage in being entitled to uniform standards of treatment in different countries".¹³ He (the Special Rapporteur) had had personal experience of the practical difficulties involved in the diversity of instruments relating to international immunities when, as legal adviser to the Egyptian Foreign Office, he had been asked to prepare a study on customs privileges for officials assigned to offices of the United Nations and of specialized agencies located in Egypt.

19. In matters of legal status and immunities of international organizations, he had come to the conclusion that there was a substantial body of legal norms. It consisted of an elaborate and varied network of treaty law which required concretization, as well as a wealth of practice which needed consolidation. Codification and development of that branch of diplomatic law would thus complete the *corpus juris* of diplomatic law achieved through the work of the Commission and embodied in the Vienna Convention on Diplomatic Relations of 18 April 1961,¹⁴ the Vienna Convention on Consular Relations of 24 April 1963,¹⁵ the Convention on Special Missions of 8 December 1969¹⁶ and the 1975 Vienna Convention.

20. He had also reached the conclusion that the Commission would be inclined to favour an empirical method and a pragmatic approach in its work on the question of the status, privileges and immunities of international organizations. The Commission had, however, made it clear that, in dealing with the practical aspects of the rules governing relations between States and international organizations, it wished to safeguard the position of internal law and the relevant rules of each organization and, in particular, the general conventions on privileges

and immunities of the United Nations and of the specialized agencies and the headquarters agreements of those organizations. In that connexion, he noted that the implications of the seventh paragraph of the preamble to the 1975 Vienna Convention had been clearly defined in articles 3 and 4 of that Convention. Those articles were of great importance, first, because they were intended to reserve the position of existing international agreements regulating the same subject-matter and were thus without prejudice to different rules which might be laid down in such agreements; and second, because they took account of the fact that situations might arise in future in which States establishing a new international organization would find it necessary to adopt different rules which were more appropriate to that organization. The rules of the 1975 Vienna Convention were thus not intended to preclude any further development of the law in that area.

21. The final conclusion he had reached was that it would be for the Commission to decide whether the document resulting from the study of the second part of the topic of relations between States and international organizations should take the form of an additional protocol to the general conventions, of a code or re-statement, or simply of a declaration.

22. He recommended that the United Nations and the specialized agencies should be requested to provide him with any additional information on the practice they had followed since the preparation of their replies to the questionnaire concerning the first part of the topic under consideration. Such information would be particularly helpful to him in his study of the category of experts on mission for, and persons having official business with, international organizations, and the category of resident representatives and observers who might represent an international organization or be sent by one international organization to another.

23. Mr. SETTE CÂMARA said that the preliminary report (A/CN.4/304) was the kind of work which could only have been produced by someone having the Special Rapporteur's deep knowledge and great experience of the topic of relations between States and international organizations. The Special Rapporteur was thus particularly well qualified to study the question of the status, privileges and immunities of international organizations, their officials, experts and other persons engaged in their activities who were not representatives of States. The report which had just been introduced was much more than a preliminary report because it contained a substantial body of information, based on doctrine and practice, which showed that the subject-matter was ripe for the Commission's consideration and for immediate codification.

24. Although diplomatic activities were as old as society itself, the question of the status, privileges and immunities of international organizations, which came under the heading of multilateral diplomacy, was relatively new in the sense that it had become a matter of concern only in the past 50 or 60 years. Moreover, there had not yet been any attempt to codify the international law relating to the legal status and immunities of international organizations. In undertaking that task of codification, the Commission should not adopt the view that it was

¹³ Jenks, *op. cit.*, p. 149.

¹⁴ United Nations, *Treaty Series*, vol. 500, p. 95.

¹⁵ *Ibid.*, vol. 596, p. 261.

¹⁶ General Assembly resolution 2530 (XXIV), annex.

through the generosity of host Governments that officials of international organizations were entitled to certain privileges and immunities; it should take the view that officials of international organizations needed such privileges and immunities in order to carry out the tasks entrusted to them. Those privileges and immunities had, until now, been governed piecemeal, by agreements whose provisions varied considerably. It would be the Commission's task to organize those provisions in an additional protocol, a code or a declaration so that, although they might constitute residual rules, they would nevertheless be generally applicable to as many international organizations as possible. In attempting to formulate such rules, the Commission should pay particular attention to the provisions of Articles 104 and 105 of the Charter of the United Nations and the corresponding articles of the constituent instruments of the specialized agencies.

25. He had no doubt that the topic of the status, privileges and immunities of international organizations and their officials was ripe for codification. If it was codified, it would become the last in a series of codification instruments relating to diplomatic law, which included the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention. The Commission should therefore request the Special Rapporteur to proceed with his study of the second part of the topic of relations between States and international organizations.

26. Mr. TABIBI congratulated the Special Rapporteur on his excellent and extremely useful report, which contained a wealth of historical and current information on the international law relating to the legal status and immunities of international organizations.

27. As the Special Rapporteur had pointed out, the Commission had decided to deal with the practical aspects of the second part of the topic of relations between States and international organizations because it had believed that its work would serve the interests of international peace and co-operation. The codification and harmonization of the rules relating to the status, privileges and immunities of international organizations were of vital importance, especially as international organizations now had offices throughout the world, which would greatly benefit from a set of rules applicable on a world-wide scale.

28. In its task of codifying the second part of the topic of relations between States and international organizations, the Commission would be able to benefit greatly from the experience it had gained in studying the first part of that topic and the question of treaties concluded between States and international organizations or between two or more international organizations. It would also be able to base its work on the experience gained over the years by the many Governments which were now hosts to international organizations. He believed that the rules to be formulated by the Commission, no matter what form they took, should protect both the interests of host Governments, for which security was of crucial importance, and the interests of international organizations, which should be able to continue their work of promoting international peace and co-operation.

29. He therefore agreed with Mr. Sette Câmara that the Commission should ask the Special Rapporteur to proceed with his study of the second part of the topic of relations between States and international organizations. He also agreed with the Special Rapporteur that the United Nations, specialized agencies and regional offices of international organizations should be requested to provide information on their practice. Since the work of gathering and classifying the information received and of identifying standard practices would be difficult, the United Nations Secretariat might be requested to assist the Special Rapporteur. In addition, it might be advisable to request host Governments, such as those of the United States, France, Italy, Switzerland and Austria, to provide information on the main questions of concern to them in connexion with the topic under consideration. The Policy and Programme Co-ordination Committee of the Economic and Social Council might be requested to suggest that host Governments should provide the Special Rapporteur with information.

30. The CHAIRMAN said that the questions the Special Rapporteur had endeavoured to answer in his preliminary report would certainly be very useful to the Commission as a basis for its discussions of the second part of the topic of relations between States and international organizations. He was not certain, however, whether the Special Rapporteur intended consideration of the second part of the topic to be confined to international organizations of a universal character. Clarification of that point would be useful to the international organizations, specialized agencies and host States which would be requested to provide information on their practice in regard to the status, privileges and immunities of international organizations and their officials.

31. Mr. ŠAHOVIĆ warmly congratulated the Special Rapporteur on his analytical study, which would enable members of the Commission to reflect on the course to be followed in taking up the second part of the topic of relations between States and international organizations. Personally, he agreed in principle with the Special Rapporteur's views.

32. As other members of the Commission had observed, the report under consideration was more than merely a preliminary report. Nevertheless, in his first report, the Special Rapporteur should also endeavour to propose solutions to the problems raised by the codification of legal rules relating to the status, privileges and immunities of international organizations. In his preliminary report, the Special Rapporteur had indicated the general evolution of law on the subject, but he should now proceed to a much more concrete analysis of the situation, taking account of new developments. His first task should be to make sure of the value of the existing conventional rules on which he intended to base his work. To that end, it was important to make a comprehensive study of practice. It was necessary to avoid drafting provisions which duplicated those already embodied in international conventions.

33. With regard to the point raised by the Chairman, he too was not sure to what organizations the rules to be drawn up by the Commission would apply. So far, the Special Rapporteur had relied largely on decisions

taken by the Commission when dealing with the first part of the topic and on the Commission's work on the question of treaties concluded between States and international organizations or between two or more international organizations.

34. While endorsing the broad outline of the preliminary report, he wished to emphasize the need to base future reports on a systematic analysis of existing practice and legal rules. Only thus would it be possible to prepare a draft that would arouse the interest of the international community. Of course, that was no easy task, and he was not unaware of the reasons for which the Commission had previously decided to defer consideration of the subject. In the opinion of the Special Rapporteur, however, most of those reasons no longer existed. He himself believed that there must still be factors which militated against such an undertaking or were, at least, calculated to make the task of the Special Rapporteur and of the Commission very difficult.

35. Mr. EL-ERIAN (Special Rapporteur) said he could assure Mr. Šahović that the future work on the topic would not consist simply of a compilation of existing rules but would also include an analysis of practice. That was why he wished to obtain further information on practice.

36. The Chairman had raised a most important question, which called for very careful consideration. During the Commission's work on the first part of the topic, one member had been opposed to a set of draft articles that dealt exclusively with international organizations of a universal character. Moreover, Mr. Reuter, the Special Rapporteur on the question of treaties concluded between States and international organizations or between two or more international organizations, had advanced good reasons why the draft articles on that subject should be more general in scope and should include all international organizations. Initially, he had been inclined to regard the present subject as an appendix to the first part of the topic and, consequently, to confine any draft articles to international organizations of a universal character. However, he would like to give much more consideration to the problem and would prefer to reply to the Chairman's question at a later stage, perhaps in the course of his summing-up.

37. It was customary in the United Nations to circulate the texts of draft conventions or questionnaires to Governments in the first instance, though the views of specialized agencies were sometimes requested on matters of concern to them. Nevertheless, information could always be sought from other sources, such as regional organizations. At the previous session, comments by EEC on the most-favoured-nation clause had been made available to the Commission, but had not been listed among its official documents. In his personal capacity, he could always contact the legal advisers of regional organizations and elicit information on their practice. In dealing with the first part of the present topic, he had obtained much information from the United Nations and the specialized agencies, some of it of a confidential nature.

38. The CHAIRMAN said that it was one thing for a questionnaire to be sent to, for example, the specialized agencies, but quite another for the Special Rapporteur

to carry out his own research. Unless the Commission decided to limit the research of the Special Rapporteur—a decision that would be almost without precedent—there was nothing to prevent him from obtaining information from organizations outside the United Nations family.

39. Mr. CALLE Y CALLE warmly congratulated the Special Rapporteur on his truly excellent report on the rules governing relations between States and international organizations, in other words, relations between States and the bodies they set up to carry out functions which they could not perform themselves. The subject was unquestionably of great topical importance for, while it was true that, for certain matters, earlier historical precedents could be found, the true point of departure was the Charter signed at San Francisco in 1945. It had been followed, in 1946, by the Convention on the Privileges and Immunities of the United Nations and, in 1947, by the Convention on the Privileges and Immunities of the Specialized Agencies. As the Special Rapporteur had pointed out in his report (A/CN.4/304, para. 26), the 1946 Convention was now in force for 112 States. It could therefore be regarded as truly universal.

40. It might be claimed that it was premature to undertake codification of the rules relating to the status, privileges and immunities of international organizations, their officials, experts and other persons engaged in their activities who were not representatives of States. It could be asserted that the question was already regulated by treaties and, more particularly, by headquarters agreements. However, he believed that the sooner the subject was properly regulated, the greater the benefits would be to both States and international organizations. Thus, from a variety of different conventions, it was necessary to select general rules to fill any existing gaps.

41. As to the question raised by the Chairman, he was inclined to think that the Commission's work should cover all international organizations and not simply the United Nations organizations. The rules to be formulated would certainly be beneficial but it should also be remembered that the Commission's commentaries to sets of draft articles, the importance of which was not always fully understood by the General Assembly, had an enormous influence on foreign ministries, universities and law schools. Those commentaries refined legal thinking. Belief in a world governed by the rule of law called for propaganda in favour of law; in other words, international law had to be "sold" in the same way as a commercial product was sold.

42. Article 2 of the 1975 Vienna Convention specified that the Convention applied to the representation of States "in their relations with any international organization of a universal character" and included a number of safeguard clauses, one of which (paragraph 4) provided that:

Nothing in the present Convention shall preclude the conclusion of agreements between States or between States and international organizations making the Convention applicable in whole or in part to international organizations or conferences other than those referred to in paragraph 1 of this article.

The work of the Special Rapporteur and of the Commission, if it was to take the form of an additional protocol, would complement the provisions of the 1975 Vienna

Convention and would therefore have to include a similar article. The Commission should take a broad view and should not let itself be bogged down by the problem of defining an international organization. It was now proceeding on the basis of the simplest possible definition, namely, that an international organization was an inter-governmental organization. Nor should the Commission go further into the problem of the legal capacity of international organizations, although both those matters were now becoming clearer as a result of decisions by the International Court of Justice and the very existence of international organizations.

43. The main task was to guide the development of the law pertaining to international organizations and to ensure that its development was orderly and harmonious. It was essential to prevent the emergence of strange or hybrid bodies claiming a special status. In short, the Commission should endeavour to channel, plan and organize what was a dynamic branch of present-day law.

44. Mr. DADZIE said that, in his masterly report and oral presentation, the Special Rapporteur had made the Commission fully aware of all the nuances of the present subject. He had been particularly interested to note the Special Rapporteur's comments on experts performing missions for international organizations. As someone who had been the representative of a State and, in recent years, the representative of an international organization to such important bodies as OAU, he fully endorsed the Special Rapporteur's comment that it was essential to study the question of the representation of one international organization in its relations with another.

45. The report clearly established that there was a sufficiently large corpus of rules for the Commission to undertake the work of codification.

46. As to the question raised by the Chairman, he considered that the task of the progressive development of international law demanded that the rules to be formulated by the Commission should apply to all international organizations and not exclusively to those of a universal character.

47. Lastly, he agreed with previous speakers that the Special Rapporteur should be authorized to proceed with the topic and thus enable the Commission to complete yet another aspect of its work on diplomatic or quasi-diplomatic law, which had earned it the greatest credit in the past.

48. Mr. VEROSTA said that, in his excellent report, the Special Rapporteur seemed, for good reason, to be somewhat less optimistic than Mr. Sette Câmara and Mr. Tabibi. At the present stage, the Commission could not be sure of the outcome of the work. It might take the form of a convention, an additional protocol to the 1975 Vienna Convention, or perhaps something of even lesser standing. Mr. Šahović had been right in saying that it was important to examine the actual norms mentioned in the report. Indeed, before proceeding further, the Commission should perhaps press for a decision by the Special Rapporteur on whether the draft articles would be confined to international organizations of a universal character or would also include regional organizations. A number of other regional organizations could be in-

cluded in the list in paragraph 31 of the report, for example, the Organization of the Danube Commission or OPEC. The treaty between the OPEC States was short but the headquarters agreement between OPEC and Austria was quite elaborate.

49. The question arose whether the Commission should codify existing customary international law or formulate residuary rules, as in some of the articles of the 1963 Vienna Convention on Consular Relations. In his opinion, it would be wise, at least at the start, to confine the draft articles to international organizations of a universal character. Nevertheless, he was glad to hear that the Special Rapporteur would attempt to obtain information from the regional organizations, for without such material it would not be possible to enlarge the scope of the articles later, if that course was found advisable. In any event, it would be a mistake to undertake complete codification at the present time, for any rules laid down now or in the near future might well be counter-productive, especially in the case of regional organizations.

50. Mr. SUCHARITKUL said that he fully endorsed the tentative conclusions reached by the Special Rapporteur in his report, in which he had traced the historical development of the subject and analysed the opinions of writers, treaty practice and, to some extent, the internal legal practice of States. The topic was certainly one in studying which consideration must be given to the internal law which constituted State practice.

51. The legal basis for the status of international organizations and the privileges and immunities accorded to such organizations or their officials or to representatives of States attending international conferences was to be found in the various types of conventions of a general character—for instance, the 1946 Convention on the Privileges and Immunities of the United Nations and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies—and also in various bilateral agreements, special agreements and headquarters agreements. In addition, a perusal of the *United Nations Juridical Yearbook*, for example, clearly showed some of the national legislation which gave effect to the various conventions and agreements. The status of an international organization was meaningful only if it was recognized at two levels: international and national. In other words, an international organization had to be given full legal capacity under public international law and it had to be recognized under the internal law of its member countries, especially that of the country in which it had its headquarters. An international organization usually entered into contracts and possessed movable and immovable property; recognition of its status under internal law was thus absolutely vital.

52. The privileges and immunities of an international organization, of whatever type, were necessarily qualified or limited by the functions of the organization and its officials. They were limited because the organization and its officials were not immune from substantive law but only from jurisdiction. He agreed with the Special Rapporteur that the topic was ripe for codification but State practice was not uniform, and it remained to be seen how well the Commission would be able to define

the precise nature and scope of the privileges and immunities of all or some international organizations.

53. He too was inclined to believe that the Commission should consider the privileges and immunities of all international organizations, and not only those of a universal character, even if it found many discrepancies in the practice of States and international organizations. A study of practice would reveal the existence of some rather strange rules. For example, in the case of EEC, the Community's immovable property could be subject to seizure or even a measure of execution.

The meeting rose at 6.05 p.m.

1453rd MEETING

Tuesday, 5 July 1977, at 10.10 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. El-Erian, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Long-term programme of work

[Item 8 of the agenda]

and

Organization of future work (*continued*)

[Item 9 of the agenda]

PRELIMINARY REPORT ON THE SECOND PART OF THE TOPIC OF RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (*continued*) [A/CN.4/304]

1. Mr. SUCHARITKUL, continuing his statement, said it was gratifying to note that the Special Rapporteur had raised the question of the place of custom in the law of international immunities. The Commission was entering a new phase in the progressive development of international law for, in considering custom, it would be examining not only the practice of States but also that of international organizations. In the case of EEC, the question of immunity from seizure, attachment and execution had long been controversial in Belgium. That country was also the host country for NATO, but the Special Rapporteur had rightly left aside the problem of the status of NATO forces and Warsaw Pact forces, for the Commission's task would be amply sufficient if it dealt with civil jurisdiction only.

2. The practice of States was most interesting but also extremely complicated. For instance, in a number of recent cases concerning employees of foreign Governments and of international organizations, the courts in Italy had distinguished between appointments and dismissals according to the terms of the employment con-

tracts, so that *atti di gestione* were subject to the jurisdiction of the Italian courts but other acts of appointment or dismissal were considered as part of the official duties of international organizations. The mixed courts in Egypt, mentioned by the Special Rapporteur, could be said to be among the most advanced in their practice regarding immunities.

3. One of the leading countries in developing a theory that immunities could be restricted was France, which had applied the criterion of the *acte de commerce* as a result of cases in which the representative of a particular Soviet commercial agency in France had been held responsible not only for the commercial activities of the agency in question but also for the commercial activities of other Soviet trading organizations in France. He gave that example only by way of analogy, however. He did not believe that the French courts would hold UNESCO responsible for the activities of other specialized agencies of the United Nations.

4. The Government of Japan had granted certain privileges and immunities to the United Nations University, but the University was what might be termed a lesser organ and its head could not be compared with the Secretary-General of the United Nations; the scope of his immunities was restricted by the nature of his functions. Obviously, the practice of States was of great significance. National courts sometimes applied the principles relating to immunities as principles of international law, though the courts in the United Kingdom regarded those principles as being already incorporated into internal law. The difficult practice in the United States, resulting from the recent legislation concerning suits against foreign Governments, would probably have some effect on suits against international organizations.

5. The ASEAN group of States had come to adopt what the Special Rapporteur had aptly termed 'customary practice. ASEAN meetings at various levels had been granted the traditional or customary privileges and immunities accorded to "similar organizations", though exactly what was meant by that expression was doubtless open to different interpretations. His own country, Thailand, afforded an example of a particularly rich experience in State practice, as was shown by the arrangements made for ESCAP, the Southeast Asian Ministers of Education Secretariat and SEATO (an organization which had recently been dissolved but nonetheless, for the purpose of legal studies, gave a complete picture of the formation of headquarters agreements and bilateral arrangements).

6. At the present time, there were a number of conflicting tendencies. One was to expand the number of beneficiaries of privileges and immunities because of the proliferation of international organizations, while another was to restrict such privileges and immunities to the barest minimum. It should be possible to establish a uniform minimum standard necessary for the performance of the official functions of international organizations. Those organizations did not regard themselves as sovereign and their immunities were not based on sovereignty. However, a close examination of the problem would reveal two analogies: the immunities accorded to an organization and its officials might be compared to State or sovereign immunities, whereas the immunities granted

to permanent representatives were more in the nature of inter-State diplomatic immunities.

7. The test for arriving at such a conclusion was the test of waiver. If the immunities of the international organization or its officials were involved, they clearly belonged to the international organization whereas, if the immunities of the permanent representatives or representatives of member States were involved, they belonged mainly to the individual sending State. In the case of a breach of international obligations, there would be two co-plaintiffs: the international organization and the sending State. Waiver was a very convenient institution which would help to solve a large number of problems. Mr. Tabibi had been right to point out in the previous meeting the difficulties faced by host Governments, particularly those of developing countries. Many practical measures would have to be devised in order to give effect to the minimum requirements for immunities.

8. Mr. REUTER said he associated himself with the congratulations addressed to the Special Rapporteur on his work, which, like its author, was characterized by knowledge, wisdom and modesty. As the Special Rapporteur responsible for another topic, he had more than once benefited from the advice, information and encouragement of Mr. El-Erian, who had always carried out his duties as Special Rapporteur to the best of his ability, even in the most difficult circumstances.

9. As to the substantive matters discussed in the report, he had full confidence in the Special Rapporteur and agreed with him that the subject under study had nothing in common with that of treaties concluded between States and international organizations or between two or more international organizations. The drafting of articles relating to treaties to which international organizations were parties must necessarily remain within the sphere of general public international law. For such treaties did exist, and they were subject to rules which could not be the rules of any international organization; an international organization, by definition, would not agree to conclude a treaty with another international organization if it had to submit to the rules of that other organization. The 1975 Vienna Convention¹ had an entirely different object. In that sphere, special rules of international law existed for each organization, so that it had not been a matter of drafting rules which had originally been rules of general international law but of unifying rules of special international law. For the second time, the Commission was preparing to undertake such work for the unification of public international law, the results of which would correspond to the unification of private international law.

10. In those circumstances, he would be inclined to answer the Chairman's question² by saying that the wider the circle of international organizations covered, the greater the number of special laws unified and, consequently, the more complete the Commission's work. From the point of view of the unification of law alone, such should indeed be the Commission's object but, on the other hand, it must show moderation and reason. It

could not expect at the outset to unify the law of every individual international organization in existence. It was, of course, desirable that it should succeed in doing so but that seemed unlikely. It might be that conclusions similar to those which the Commission had been obliged to accent in its earlier work and at the United Nations Conference on the Representation of States in their Relations with International Organizations (Vienna, 1975) would again be unavoidable.

11. Moreover, it was not so much between the universal or regional character of international organizations that it was necessary to distinguish as between the major administrative and political organizations, such as the United Nations and its specialized agencies and the ever-increasing number of organizations of a more or less operational character which performed banking or commercial functions. As Special Rapporteur responsible for the study of treaties to which international organizations were parties, he had examined the five UNCTAD volumes on economic co-operation and integration among the developing countries.³ He had noted that the question of the privileges and immunities of the bodies concerned was discussed there, and that certain analogies could be drawn with the main specialized agencies, though at first sight the position of an organization such as WHO was not at all the same as that of a body such as the African Development Bank. That was why it was important not to set limits to the Special Rapporteur's work. It might, however, be considered advisable, at least to start with, to confine that work to organizations in the United Nations system since the Commission itself was one of them. Admittedly, the United Nations had set up regional organizations which carried out certain operational activities, but it was for the Special Rapporteur to delimit the scope of his subject.

12. Other limitations would probably be necessary, as was clear from the questions reviewed by the Special Rapporteur in his preliminary report. As to the so-called customary rules, he had the most serious reservations. As Mr. Sucharitkul had pointed out, it was not unusual for agreements relating to organizations, particularly those of an economic nature, to be signed in haste and to contain a general reference to the "customary privileges and immunities" which those bodies would enjoy. But it was not unusual for it to be stipulated that that question would be the subject of an additional agreement, so that not much was really gained. An illustration was provided by the privileges of an international official, the granting of which depended upon the functions of the international organization. A customary rule could be considered to exist according to which the privileges and immunities of an international official were based on, and limited by, the requirements of his functions. That was a very general rule, however, and it was necessary to ascertain, for example, whether the organization was obliged to suspend those privileges and immunities when the functions were not being exercised. If so, by what criterion could it be determined that the functions were no longer involved? There was a wealth of jurisprudence on the liability of

¹ See 1452nd meeting, foot-note 7.

² *Ibid.*, para. 30.

³ "Economic co-operation and integration among developing countries: Compilation of the principal legal instruments" (TD/B/609/Add.1).

international officials in case of traffic accidents and the Commission's work would only be useful if it managed to work out rather more specific formulae than those generally used.

13. The question of the privileges and immunities of an international organization was linked with that of the privileges and immunities of an international official, but the latter raised delicate problems, including tax problems, which States were loath to discuss. Indeed, some States refused their own nationals who were officials of international organizations the privileges and immunities they granted to international officials of other nationalities. That situation had led to many compromises in the United Nations. He therefore considered that a few problems should be selected for consideration at the first stage, such as those concerning international organizations, and that the much more delicate problems, such as those relating to international officials, should be left till later. It was true, in regard to the latter, that a work of co-ordination was going on within the United Nations, as Mr. Tabibi had said at the previous meeting, but it did not seem possible or desirable to draw up unified rules on the matter which would be applicable to a very wide circle of international organizations. The topic, like that of State succession, covered a vast area and the Special Rapporteur should be given wide discretion so that he could start with the most tractable problems.

14. Mr. FRANCIS said that the Special Rapporteur's highly instructive report had usefully traced the historical background to the emergence of the status of international organizations and their privileges and immunities. It was difficult to see how the Commission could avoid, or be made to avoid, proceeding further with the present topic, which brought into sharp focus the need to complement other branches of law already codified by it. The growth of the legal status of international organizations and the privileges and immunities granted to them and to their officials resulted from the enlightened interplay of the foreseeable requirements of international organizations and the fundamental requirements of the internal law of States.

15. Over the years, a wide range of customary rules had emerged and no one could deny that, at the present time, a large body of such rules was applicable to international organizations and to their accredited officials. Some years ago, when he had been the legal adviser of the Ministry of Foreign Affairs in his country, a representative of OAS had arrived in Jamaica to establish a regional office. At that time, there had been no question but that, even in the absence of an agreement, the representative of the organization was entitled to certain basic privileges. Customary law unquestionably played an important role in the present topic and it had been dealt with most constructively by the Special Rapporteur.

16. Again, the report mentioned the lack of uniformity in the treatment not only of experts on missions for international organizations but also of persons having official business with international organizations, who were generally granted the right of transit. In that connexion, the important question was whether, in view of the functional needs of international organizations, the right of transit was sufficient. In his opinion, persons in

such a position should be afforded a measure of protection that went beyond the right of transit.

17. As to the diversity of practice, the Special Rapporteur had emphasized the need to consolidate the situation and had mentioned that the 1975 Vienna Convention was confined to international organizations of a universal character. In dealing with the present subject, the Commission should use a blend of caution and realistic imagination. Clearly, there was a lack of uniformity among existing international organizations regarding the application of privileges and immunities, and the Commission would try to establish a body of rules applicable to all organizations. But it should at the same time cast a wider net that would take in regional organizations, and determine whether matters of general significance could not also find a place in a draft convention. For example, the role of experts was now very different from that envisaged in 1946 or 1947.

18. The Special Rapporteur had pointed out that it would be useful to obtain more complete and up-to-date information from the specialized agencies. Almost certainly, it would be possible in the end to arrive at conclusions acceptable to all the members of the Commission, which would go to make up a body of rules that were not confined entirely to international organizations of a universal character.

19. Mr. SCHWEBEL said that, coming as he did from a country which was host to a large number of international organizations, he had been particularly interested in the excellent report under discussion. Everybody agreed that international organizations must have the functional privileges and immunities necessary for the performance of their tasks. Yet, as Mr. Sucharitkul and Mr. Reuter had wisely cautioned, a reasonable balance should be struck between the privileges and immunities of international organizations and the jurisdiction of host States

20. It was particularly important to bear in mind the limited character of privileges and immunities because of the popular reaction to what was often considered an undue extension of them. The popular press often drew attention to what were, in fact, trivialities but none the less aroused unjust animosity towards international organizations and, indeed, towards international co-operation in general. The real problem, of course, related to diplomatic privileges and immunities, not to those accorded to the secretariats of international organizations.

21. Reference had rightly been made to road traffic accidents. Few things aroused such interest as traffic accidents involving diplomats or officials of international organizations who pleaded immunity. Clearly, a balance had to be struck, not only for reasons of equity but also in order to improve the popular image of international organizations—a matter which could not be lightly discounted.

22. Consideration must, naturally, also be given to the jurisdiction of the host State, for it would be pointless to prepare a draft treaty which Governments would not ratify. Like all the members of the Commission, he had the greatest confidence in the scholarship of the Special Rapporteur and in his objectivity in carrying out his task.

23. Mr. QUENTIN-BAXTER expressed his gratitude for the information supplied in what was modestly described as a preliminary report and for the much-needed reassurance given to the Commission by the Special Rapporteur when it was taking up such an amorphous subject. Indeed, each of the subjects listed in chapter IV of the report was one that might challenge the collective wisdom of the members of the Commission.

24. At the doctrinal level, the nature of custom in its application to international organizations was clearly a matter of great difficulty and complexity. At the level of common sense, however, it was plain that States had developed some customary rules or common conceptions in their approach to international organizations and officials. Mr. Sucharitkul, drawing upon a prodigious knowledge of the question of privileges and immunities, had revealed the immensity of some of the problems that might arise. It would be wise for the Commission to move tentatively, allowing time for State practice to develop, and to preserve a sense of priorities which would rank sovereign immunities above the equally difficult problems concerning the immunities of officials of international organizations. The Special Rapporteur had emphasized that the Commission preferred to follow an empirical method and to deal with problems which were of immediate practical interest to States and for which there was at least a reasonable possibility of an agreed solution. The present topic was pre-eminently one which called for such a low-key approach and the Special Rapporteur was pre-eminently the man to guide the Commission in its endeavours.

25. The subject had been rightly described as one which fell within the field of diplomatic law and did not raise the enormous theoretical problems that surrounded the question of the personality, capacity and role of international organizations. It was too early to establish the definitive scope of further work on the subject, and he fully shared the view that the Commission should begin by considering organizations in the United Nations system. Nevertheless, he believed that the value of the draft would greatly depend on whether other smaller, regional organizations could relate it to their own circumstances—in other words, on whether it was a draft which would help them to understand the essential laws of their own existence and of their relationship to States.

26. At the same time, it was his impression that the Commission, in reporting to the General Assembly, sometimes failed to stress the organizational implications of its work. Not infrequently, the Sixth Committee decided to embark on major projects that made great demands on the resources of the Codification Division, on which the Commission itself was also heavily dependent. Consequently, if the Sixth Committee was not aware of those organizational implications, it was only too evident that the Fifth Committee would not be able to grasp the relationship between the Commission's projects and the underpinning required to sustain them.

27. He therefore welcomed the prudent manner in which the Special Rapporteur had drawn up his preliminary report. The aim was not to attract a massive flow of information but to work towards drafts that would elicit a response from Governments and international organ-

izations. The best course would be to proceed gradually, and the Commission might well find sufficient reward at the end of its inquiries if it pursued them gently.

28. Mr. TSURUOKA said he wished to be associated with the congratulations addressed to the Special Rapporteur, whose qualities were a guarantee of success.

29. With regard to the report (A/CN.4/304), he assumed that the Commission intended to draw up an international legal instrument designed to promote the activities of international organizations, which were rendering increasingly valuable services to the peace and prosperity of States and to the well-being of peoples in many fields. Personally, he was in favour of compromise for he believed that it was necessary to work out general rules which were simple and well balanced. Detail and inflexibility were enemies of the Commission's work.

30. The rules drawn up by the Commission were not entirely residuary. As Mr. Bartoš, the former Special Rapporteur for special missions, had pointed out when submitting his draft articles,⁴ there was a minimum number of imperative rules, even when the subjects of international law concerned were left wide latitude, and, where the status and the privileges and immunities of international organizations were concerned, the Commission was not going to leave the field entirely open to the independent will of those concerned. That was an additional reason for formulating simple rules and seeking compromise solutions. Such solutions were also dictated by the fact that, in that sphere, the rules were evolving so much that it was difficult to foresee where the trend would lead. Moreover, it was necessary to consider the interests both of those who benefited from privileges and immunities and of those who granted them. In that connexion, he pointed out that the question of the privileges and immunities to be granted to the United Nations University at Tokyo and to the members of its staff had been the subject of heated discussion in the Japanese Government. It was necessary to find solutions that offered a compromise between theory and pragmatism. In some cases, the Commission should not hesitate to engage in progressive development of international law.

31. He was in favour of limiting the scope of the study, if only because the Commission would not have time to draw up rules applicable to all international organizations. The rules governing international organizations were very numerous and diverse. To overcome the disadvantages of limiting the subject, the Commission could draft an article similar to article 3 of the Vienna Convention on the Law of Treaties,⁵ reserving wider application of the instrument. Finally, it was necessary to decide not only which international organizations should be covered but also to which officials of international organizations the future draft articles should be addressed. One question to which the Special Rapporteur had referred and which

⁴ See, for example, *Yearbook ... 1964*, vol. 1, pp. 15 and 19, 725th meeting, paras. 2 and 49.

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. 287.

should be clarified some time was the precise status of the members of the International Law Commission.

32. Mr. USHAKOV said that there were nearly 300 international organizations, which included organizations of a universal character, such as the United Nations and the organizations attached to it and regional organizations. Those organizations had their headquarters in the territory of a member State or a non-member State, such as Switzerland, and some of them even had permanent organs in the territory of other States. Consequently, the topic of relations between States and international organizations was extremely important for the whole of the international community, for over half the States in the world were now host States. The headquarters of CMEA was in Moscow and almost all the socialist countries had the headquarters of an international organization in their territory.

33. Besides the problem of relations between States and international organizations, it was also necessary to study the problem of relations between international organizations, for many of them had representatives attached to other international organizations. For instance, CMEA had a permanent observer at the United Nations General Assembly in New York. The question which arose in both cases, and which had not yet been settled, was that of the legal status and privileges and immunities of the representatives of international organizations. There was already a wealth of practice and well-established customary and conventional rules on the subject, deriving from the headquarters agreements concluded between States and international organizations. However, relations between States and international organizations differed widely from one headquarters agreement to another, and the rules governing them should be unified.

34. The existing rules of diplomatic law were not imperative rules but always subsidiary or residuary rules. There was thus no risk of their being too rigid or too flexible because international organizations and States could derogate from them. He did not think that they were always special rules since they were based on the common principle that an international organization, in order to exist, must enjoy a special status in the State, whether a member or a non-member, in whose territory it had its headquarters. For without a headquarters agreement establishing that status, an international organization could neither exist nor operate as such. The privileges and immunities of the officials of an international organization were also indispensable for its existence and operation. That was a general rule on which all relations between States and international organizations were based.

35. He thought that the question of the status of international organizations was ripe for codification and that the Commission could find a general basis for the work in the existing conventional and customary rules. It was too soon to decide whether the study should be confined to international organizations of a universal character. Before taking that decision, the Commission should consult the United Nations, the specialized agencies and States in order to ascertain their views and obtain information.

36. The CHAIRMAN, speaking as a member of the Commission, congratulated the Special Rapporteur on

his brilliant report, which contained the many elements of scholarship that were necessary to enable the Commission to adopt a balanced approach to the study it would undertake.

37. In paragraph 59 of his report, the Special Rapporteur had referred to the views expressed in Parliament by the Minister of State during the introduction of the 1944 British Diplomatic Privileges (Extension) Act. Those views had, however, been expressed at a very early stage in the development of thinking on the status, privileges and immunities of international organizations, and since that time there had been many developments in statute law. At present, there was little doubt that the predominant view in United Kingdom Government circles was that the functional approach was the right one and that the source of the privileges and immunities of international organizations lay in the relevant agreements. The wealth of treaties and legislation which had appeared since 1944 had had a definite impact on the basic theory of the status, privileges and immunities of international organizations, and it was now generally agreed that organizations enjoyed privileges and immunities in order to exercise the functions entrusted to them.

38. There was, however, some fear of uniformity because it was thought that, once uniformity had been achieved, international organizations might obtain maximum rather than minimum privileges and immunities. For example, as Mr. Tsuruoka had pointed out, parliaments, ministries of justice and ministries of finance often looked with great suspicion on the privileges and immunities accorded to international organizations and their officials. Mr. Sucharitkul had referred to the possibility that the rules to be formulated by the Commission might constitute a kind of minimum standard. That possibility would also involve a risk, however, because a minimum standard might encourage international organizations established in the future to ask for the minimum and then more. He was therefore of the opinion that the Commission would be right in not trying to codify every aspect of the status, privileges and immunities of international organizations.

39. He shared the view that the Special Rapporteur should be asked to proceed with his study of the second part of the topic of relations between States and international organizations. He noted that the question had been raised whether the study should be confined to relations between States and international organizations of a universal character. That question had not been answered during the discussion and his own view was that it was not a question which the Commission could answer at present; it would require further investigation and the advice and guidance of the Special Rapporteur.

40. As to the question of the materials to be examined by the Special Rapporteur, he fully agreed that the further consultations recommended in paragraph 78 of the report should be carried out. The Special Rapporteur should also be given the fullest freedom to examine any material he thought might be useful, whether it related to organizations of a universal character, members of the United Nations family, regional organizations or other types of organization. The Special Rapporteur should examine a good deal of national legislation in order to arrive at some conclusions concerning the relationship

between international organizations and the exercise of State jurisdiction, for it was through a study of the interplay of international treaties and national legislation that the Commission would be able to decide which rules should be included in a codification instrument.

41. With regard to the subject-matter of the study, he noted that most members of the Commission assumed that it would deal with the effect of the existence and operation of international organizations in the territory of States; in other words, with the effect or lack of effect of internal law on international organizations, not with the international relations of organizations and States or the international relations of organizations *inter se*. He drew attention to that assumption in order to stress the fact that, at present, it would be unwise for the Commission to place undue restrictions on the subject-matter of the study. Moreover, if that assumption was correct, it would mean that the study should deal with three basic questions, namely, the capacity or status of international organizations in internal law, the privileges of international organizations and the immunities of international organizations.

42. He had specially mentioned such capacity because he thought that one of the basic questions to be answered in the study was whether an international organization had legal capacity to contract within the system of internal law and to act as a body corporate by virtue only of its establishment and existence. He was particularly aware of the importance of that question because, in the United Kingdom, it had had to be decided whether a commodity council, to which the relevant agreement had accorded only the capacity of a body corporate with no privileges and immunities, was governed by United Kingdom legislation, which dealt essentially with capacity in the context of privileges and immunities. Although that problem had been solved by the adoption of the necessary Order in Council, it had clearly shown that the question of the capacity or status of an international organization was separate from the question of its privileges and immunities.

43. In that connexion, he thought the study should deal with the scope and content of Articles 104 and 105 of the Charter of the United Nations, which also made a distinction between the legal capacity necessary for the exercise of the Organization's functions and the privileges and immunities necessary for the fulfilment of its purposes. It should also be borne in mind, however, that, if the study dealt with the status, privileges and immunities of an international organization itself, as distinct from those of its officials and experts, it would be moving away from diplomatic law and towards the subject of State immunity, which the Commission had not yet examined but which it might take up as a topic parallel to that being studied by the Special Rapporteur. Although there was, in a sense, a parallel between State immunity and the immunity of an international organization, there was also a very fundamental difference between those two concepts, for State immunity was based on the idea of a State's sovereignty and absolute immunity from foreign jurisdiction, whereas the immunity of an international organization derived from its constituent instruments and any relevant agreements that conferred on it the privileges and

immunities necessary for the exercise of its functions. The parallel between those two concepts could be seen, however, in cases where, for example, local courts dealt with questions of immunity and of waiver in very much the same manner for international organizations as for States.

44. Mr. EL-ERIAN (Special Rapporteur) said that, in referring to the example of the 1944 British Diplomatic Privileges (Extension) Act, Sir Francis Vallat had been quite right in pointing out that many developments had taken place since 1944 and that it was now generally agreed that a functional approach should be adopted in studying the question of the status, privileges and immunities of international organizations. He had given that example in his report mainly in order to show that the origin of the law relating to the status, privileges and immunities of international organizations was not entirely conventional in nature

45. He fully agreed with Sir Francis Vallat that the study should deal with the question of the capacity of international organizations in internal law as distinct from the question of their privileges and immunities. In addition, he thought that a further distinction should be made between the legal capacity of international organizations themselves and the legal capacity of their officials, experts and other persons conducting official business on their behalf. Thus, one of the Commission's main concerns would be the problem of the representation of an international organization in the territory of a State and the status it should enjoy in order to exercise its functions if it sent a representative to another organization in the territory of another State.

The meeting rose at 1 p.m.

1454th MEETING

Wednesday, 6 July 1977, at 10.10 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. El-Erian, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov.

Long-term programme of work

[Item 8 of the agenda]

and

Organization of future work (*concluded*)

[Item 9 of the agenda]

PRELIMINARY REPORT ON THE SECOND PART OF THE TOPIC OF RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (*concluded*) [A/CN.4/304]

1. Mr. EL-ERIAN (Special Rapporteur), summing up the discussion, said that the comments made and the views expressed had done much to clarify the approach to be adopted. Mr. Tsuruoka, speaking at the 1453rd meeting, had rightly pointed out that the main purpose of the study would be to produce a useful codification instrument. Mr. Šahović (1452rd meeting) had stressed the need for an analysis of the practice of States and international organizations and its impact on the United Nations system. Mr. Reuter (1453rd meeting) had drawn attention to the need to take account of the particularities of diplomatic law in its application to relations between States and international organizations. Mr. Quentin-Baxter (1453rd meeting) had said that the Commission should adopt a cautious approach in its study of the topic, while Mr. Francis (1453rd meeting) had advocated a combination of caution and boldness, and Mr. Sette Câmara, Mr. Calle y Calle and Mr. Dadzie (1452nd meeting) had spoken in favour of a vigorous and daring approach. Mr. Schwebel (1453rd meeting) had emphasized the need to reconcile the functional requirements of international organizations and the security interests of host States, and Mr. Ushakov (1453rd meeting) had pointed out that, in view of the many conferences and meetings of international organizations and their organs held throughout the world, all the member States of the United Nations were or might be host States, whose interests should be taken into account in the study.

2. It had been maintained by Mr. Šahović that, although the preliminary report seemed to deal mainly with treaty law, the future study should concentrate on the impact of practice on the functioning of international organizations, particularly in view of the increasingly important role they played in international life. In paragraphs 57 to 62, he had rather briefly discussed the place of custom in the law of international immunities; he would deal more fully with that question in the next report he submitted.

3. With regard to the scope of the study, it had been stressed that the Commission should concentrate on the formulation of basic residuary rules without going into the details of specific cases. Thus, the problem the Commission would have to face would be that of striking a balance between the need to identify the gaps to be filled in the practice, as it had developed since the adoption of the 1946 and 1947 conventions on the privileges and immunities of the United Nations and of the specialized agencies, and the need to avoid excessive detail so as not to hinder the development of the international law relating to the legal status, privileges and immunities of international organizations. In that connexion, Mr. Reuter had said that the Commission would face a difficult task in trying to formulate basic rules to govern every aspect of the status, privileges and immunities of the many different types of international organization that now existed. Mr. Ushakov, however, believed that the Commission would, in fact, be able to formulate a set of residuary rules on the basis of a thorough and cautious study of general international law as distinct from conventional law.

4. Several members of the Commission had also stressed the need to decide whether the study should cover only

organizations of a universal character belonging to the United Nations system or whether regional organizations should also be included. He thought it was too early to settle that question, since it was only when the basic rules had been formulated that it would be possible to see whether or not there were any general rules which could be applied to all international organizations, including the operational regional organizations referred to by Mr. Reuter. On that question, Mr. Ago had advised against any undue restriction of the scope of the study, pointing out that the future draft articles should provide as broad a basis as possible for the discussions of an international conference convened to adopt a convention.

5. As to the subject-matter of the study, Mr. Reuter had taken the view that, as a first step, the Commission should study only the legal status, privileges and immunities of organizations. In the preliminary report, however, it was suggested that the future study should also deal with the question of the privileges and immunities of international officials, experts and other persons engaged in the activities of international organizations and with that of the status of representatives sent by one organization to another. In any event, those were questions on which the Commission could take a decision at a later stage.

6. In his introduction to the preliminary report, he had not taken a stand on the question of the form which a future codification instrument might take. The Commission's Statute provided for many different types of instrument (convention, additional protocol, code or declaration), but that was also a matter on which the Commission could take a decision later.

7. Several members of the Commission had referred to specific examples of international organizations and organs which should be included in the material he would study. Mr. Sucharitkul had suggested (1452nd meeting) that he should also study the internal law of States. He would take those suggestions into account and include in his study additional information available on internal law and on such bodies as UNDP, CMEA, OPEC and the Danube Commission. He would be grateful to the United Nations Secretariat for any help it could give him in obtaining additional information on subsidiary bodies of the United Nations, various regional organizations and the internal law of States.

8. He thought that the members of the Commission were in favour of undertaking a study on the second part of the topic of relations between States and international organizations, and that they supported the recommendation he had made in paragraph 78 of his preliminary report, namely, that the United Nations and the specialized agencies should be requested to provide him with up-to-date information on the practice they had followed during the past 13 or 14 years. The Commission also seemed to agree that he should be authorized to use any available material and information relating to organizations of a universal character and to regional organizations. It had reached tentative agreement on the structure of the study, which would, for the time being, relate both to the privileges and immunities of international organizations themselves and to the privileges and immunities of international officials, experts and other persons

engaged in the activities of international organizations. As suggested by Sir Francis Vallat (1453rd meeting), he would also consider the question of the legal capacity of international organizations. Subsequently, the Commission would have to decide whether a future codification instrument could include provisions on the legal status and immunities of international organizations without entering into the broader topic of State immunity.

9. He thanked the members of the Commission and the Secretariat for their assistance in the preparation of his preliminary report and for the encouragement they had given him to proceed with the task. In making his study, he would try to strike a balance between practice and theory and to reconcile the different approaches to the second part of the topic of relations between States and international organizations.

10. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to authorize the Special Rapporteur to continue his study of the second part of the topic of relations between States and international organizations; to prepare a further report, which would be based on the guidelines laid down in the preliminary report (A/CN.4/304) and would take account of the views expressed and the points raised during the discussion; and to seek additional information on the topic from the United Nations, the specialized agencies and regional organizations.

It was so agreed.

State responsibility (A/CN.4/302 and Add.1-3)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 20 (Breach of an international obligation calling for the State to adopt a specific course of conduct)

11. The CHAIRMAN invited the Special Rapporteur to introduce his sixth report (A/CN.4/302 and Add.1-3) and, in particular, his draft article 20, which read:

Article 20. Breach of an international obligation calling for the State to adopt a specific course of conduct

A breach by the State of an international obligation specifically calling for it to adopt a particular course of conduct exists simply by virtue of the adoption of a course of conduct different from that specifically required.

12. Mr. AGO (Special Rapporteur) said that, especially to facilitate the task of the new members of the Commission, he would begin by briefly tracing the history of codification work on State responsibility.

13. The first attempt had been made at the Conference for the Codification of International Law (The Hague, 1930), which had studied State responsibility for the breach of international obligations solely in regard to the treatment of foreigners, whether natural or legal persons. When the Commission had taken up the topic, it had done so initially in that form, since the study of State responsibility by legal theorists had traditionally been linked with the treatment of foreigners. The Commission had soon come to realize, however, that to approach the

subject in that way would mean in fact codifying the law relating to foreigners, in other words, the primary rules of international law, which imposed on the State international obligations concerning the treatment of foreigners, rather than the rules relating to international responsibility arising out of the breach of those primary rules. The 1930 Codification Conference had failed largely because it had confused the definition of the primary rules of international law on the treatment of foreigners with that of the consequences of breaking those rules.

14. With the support of the General Assembly, the Commission had therefore decided, in 1963, to adopt a new approach, which had been summed up by the formula "all the responsibility and nothing but the responsibility". It was then that it had decided not to associate the study of State responsibility with any particular matter, such as the treatment of foreigners, but to consider responsibility as a consequence of the breach of any kind of international obligation. The matter of the law relating to foreigners was in fact so controversial that it accounted for the failure of the 1930 Conference, which had been unable to agree in particular on the question whether the treatment accorded by a State to foreigners should be the same as it granted to its own nationals or should be measured by a special standard. In short, the Commission had decided not to deal with the definition of the primary obligations of international law, but merely to presume the existence of those primary obligations and to consider only those obligations which were termed secondary because they followed the primary obligations chronologically and were created by a breach of those primary obligations. The Commission had also decided to follow the suggestions of the General Assembly, that the study of responsibility should not be confined to the breach of obligations concerning the treatment of foreigners but should include the breach of existing obligations in other fields, some of which were even more important for relations between States.

15. In deciding to focus its attention on the codification of general rules of State responsibility, which were applicable in whatever sphere the breach of an international obligation had occurred, the Commission had not intended to neglect the work already done. However, it had been obliged at the same time to take account of the consequences which the recent evolution of certain primary rules, in one field or another, might have for the purposes of codification of the rules of responsibility. It was fully conscious of the need to take into consideration any evolution which had been completed and also, where evolution was still in progress, to engage where necessary in the progressive development of international law.

16. Those decisions had occupied the Commission up until 1967. During the next few years, it had drawn up the plan of its study and decided on the criteria to be applied, the method of work to be followed and the terminology to be used. With the approval of the General Assembly, it had then worked on the preparation of a draft convention using the method it had already followed for a long time. However, it did not necessarily follow that a convention would finally be adopted. It would be for the General Assembly to make a final decision in that connexion as between the various possibilities open to it.

17. The Commission had also decided to confine its study strictly to international responsibility for internationally wrongful acts, not because it was indifferent to the very serious problem of so-called responsibility for risks or for lawful acts but because those two categories of responsibility were quite different and should be dealt with separately. The first category had its origin in the breach of a primary obligation whereas the second came under the primary rules themselves. It was probably due to the poverty of legal language that the one term "responsibility" was used to designate two quite different ideas. In that connexion, it should also be remembered that activities which were lawful at one time might subsequently become unlawful. Such a change depended on the universal conscience.

18. As to the distinction between primary rules, which imposed international obligations on States in different areas, and secondary rules, which established the consequences of a breach of such obligations, common sense should be applied. There was certainly no need for the Commission to define within the context of codification of responsibility the content of primary obligations. If it wanted to do so, considering that State responsibility could arise from the breach of any international obligation, the Commission would inevitably have to cover the whole of international law. It did not follow, however, that the content or nature of international primary obligations had no bearing on international responsibility. That point had come to the Commission's attention the previous year, when it had envisaged making a distinction between internationally wrongful acts according to their seriousness, and had been led to refer to the content of international obligations and to take into consideration their importance for the interests of the international community as a whole.¹ At the present session, it would also have to refer, if not to the content of primary obligations, at least to the form they took and the way in which they imposed their requirements on States.

19. Reviewing the articles thus far adopted by the Commission,² he pointed out that the four articles in chapter I stated general principles, while articles 5 to 15 in chapter II concerned the objective element of an internationally wrongful act and set out the conditions of existence of an "act of the State" under international law. In taking up chapter III in 1976, the Commission had turned its attention to the objective element of an internationally wrongful act, namely, the breach of an international obligation. In article 16, the Commission had generally defined the circumstances in which there was a breach of an international obligation. In article 17, it had stated the principle of the irrelevance of the origin of the international obligation breached for the purposes of the qualification of the act committed in breach of that obligation as internationally wrongful, while in article 18 it had laid down the requirement that the international obligation must be in force for the State at the time the act that was to be qualified as internationally wrongful was performed, and had established the consequences of that

basic principle in relation to the various types of act of the State.

20. At the end of chapter III, it would have to revert to a question linked to article 18, namely, the duration of an internationally wrongful act. For the duration might determine the amount of reparation due, and the answer to the question whether a given internationally wrongful act fell within the jurisdiction of particular courts or commissions, whose competence was often limited by their constituent instruments to acts committed before or after a certain date.

21. In 1976, the Commission had considered whether it would be advisable, in referring to the content of international obligations, to make distinctions according to the degree of seriousness of the breach of certain obligations in relation to the breach of other obligations. After clearly indicating that the breach of any international obligation constituted an internationally wrongful act, it had stated that, according to the present conviction of States, as reflected in certain international instruments now in force, there were international obligations whose observance was of such concern to the international community that their breach constituted a crime in the eyes of that community taken as a whole. The concept of an "international crime" had then been contrasted with that of an "international delict", which was applied to the breach of other obligations. The Commission had for the time being refrained from examining the consequences of that distinction for the régime of international responsibility. At a later stage, it would be necessary to establish whether the breach of a given international obligation entailed a reparation or a sanction, and to determine the active subject of responsibility. In other words, it had to be determined whether only the injured State was entitled to invoke responsibility or whether some other subject of international law, in particular an international organization, had the same right.

22. In 1976, the Commission had thus considered the conclusions that could be drawn from the content of an international obligation to determine the existence of a breach. It had emphasized the importance of that content for the international community, in particular from the standpoint of the maintenance of international peace and security, the independence of States, fundamental human rights or the safeguarding of certain resources common to all mankind. Other factors might come into play, however, and give rise to distinctions regarding the breach of international obligations. It might be the nature of the obligation, the form it took, rather than the content that could be taken into consideration: how and in what form the obligation applied to States and what it required of them. In that respect, international obligations differed. Sometimes an international obligation, with a view to achieving the aim set out, not only indicated the required objective to the State but also specified the means by which the State was to achieve it. On the other hand, it might simply require the State to achieve a certain result, leaving it free to choose the means at the internal level. In the former case, the State was specifically required to take certain legislative, executive or judicial measures or to refrain from them; in the latter case, the State had

¹ *Yearbook ... 1976*, vol. II (Part Two), p. 71, document A/31/10, para. 69.

² *Ibid.*, pp. 73-75, document A/31/10, chap. III, sect. B, subsect. 1.

merely to achieve the required result but was free to use the means it chose.

23. Legal doctrine had long made that distinction, emphasizing that in certain fields obligations of the latter type were much more common. There were, however, many examples of obligations of the former type. For instance, under article 1, paragraph 1, of the Convention relating to a uniform law on the international sale of goods (The Hague, 1 July 1964), each contracting State undertook to incorporate a uniform law into its own legislation.³ The Hague Conventions on Private International Law contained the texts of laws which the ratifying States undertook to introduce into their internal legal order.⁴ Some of the international labour conventions also provided for legislative action by the contracting States. On that point, it should be noted that, in reply to a question put by the United States Government, the ILO had replied in 1950 that that Government should, in principle, enact the required law, unless its constitution embodied the principle that treaties automatically formed part of “the law of the land”; in such a case, the legislative act was already contained in the instrument of accession to the international labour convention concerned.⁵ Other examples were the State Treaty for the Re-Establishment of an Independent and Democratic Austria (15 May 1955), which required Austria to codify the principles set out in that treaty and to give effect to them in its legislation, and also the 1965 International Convention on the Elimination of All Forms of Racial Discrimination and the 1960 Convention against Discrimination in Education, which contained similar provisions.⁶ An obligation might even relate to the abrogation of a law, as in the case of the 1955 Austrian State Treaty, which required Austria to repeal or amend all legislative and administrative measures adopted during the Nazi period which conflicted with the principles set out in that treaty.

24. The action required by the obligation might also be incumbent on an executive organ. Peace treaties often imposed specific obligations: for instance, to deliver arms, scuttle warships or dismantle fortifications. There were also cases in which action was required of a judicial organ. A peace treaty might require the competent authorities of a State to revise certain orders of prize courts.

25. In some cases, the conduct required was an act of omission. For instance, under article 10, paragraphs 1 and 2, of the 1955 Austrian State Treaty, Austria had undertaken to keep in force—in other words, not to amend or repeal—the laws already adopted for the liquidation of the remnants of the Nazi régime, and also the law of 3 April 1919, concerning the House of Hapsburg-Lorraine, which prohibited restoration of the imperial régime. In the sphere of diplomatic relations, the police forces of a State were required to refrain from entering certain premises which enjoyed special protection, such as the premises of embassies, consular missions and international organizations. The armed forces of a

country were also under an obligation not to enter the territory of another country. The Treaty of Versailles⁷ had imposed an obligation on the German armed forces not to enter the Ruhr—an obligation whose breach by the Nazi régime was the first stage of the crisis leading up to the Second World War. All those cases involved an obligation to refrain from adopting a particular course of conduct.

26. To determine whether there had been a breach of an international obligation in those various cases, it was sufficient to ascertain whether a particular act had taken place and, if so, in what circumstances. For instance, in the case of the obligation imposed on Germany by article 115 of the Treaty of Versailles, which provided for the dismantling of the fortifications of the Island of Heligoland, it was necessary to ascertain whether those fortifications had actually been destroyed. Thus, a breach existed whenever the act or omission of the State was not in conformity with a specifically determined and required conduct.

27. It should be borne in mind that the breach of an international obligation consisting of a specifically determined action or omission required of a State occurred independently of whether that action or omission on the part of the State had had harmful consequences. It might be that that action or omission had had no consequences and that none the less the failure to adopt the conduct required by international law was in itself a breach of the international obligation. For instance, article 10, paragraph 3, of the International Covenant on Economic, Social and Cultural Rights,⁸ required States to make “punishable by law” the employment of children and young persons in “work harmful to their morals or health or dangerous to life or likely to hamper their normal development”. That obligation was breached merely by the fact that a State party to the Covenant had not enacted the required legislation, even if no specific instance of the prohibited practice had been reported in that State.

28. State practice confirmed the justification for a distinction based on the difference in the objective of the international obligation required of the State. The Swiss Government had brought out that distinction clearly in its reply to point III, No. 1, of the request for information addressed to States by the Preparatory Committee for the 1930 Codification Conference. To the question:

Does the State become responsible [in the case of] ... Failure to enact legislation necessary for the purpose of implementing the treaty obligations of the State or its other international obligations? the Swiss Government had replied:

We should ... be adopting too absolute an attitude if we merely replied in the affirmative to [this] question. ... Failure to enact legislation may of itself involve the international responsibility of the State if some agreement to which the State is a party expressly obliges the contracting parties to enact certain legislation. On the other hand, in the absence of a contractual provision of this kind, it is not failure to enact a law which involves the responsibility of a State, but rather the fact that this State is not in a position, by any means, to fulfil its international obligations....⁹

³ See A/CN.4/302 and Add.1-3, para. 5.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ General Assembly resolution 2200 A (XXI), annex.

⁹ See A/CN.4/302 and Add.1-3, para. 8.

29. Some of the international labour conventions imposed on States parties the obligation to enact or repeal particular legislative provisions. A commission had been appointed under article 26 of the Constitution of the ILO to examine a complaint filed by the Government of Ghana concerning the observance by the Government of Portugal of Convention No. 105 of 1957 (Convention concerning the Abolition of Forced Labour). The Commission had stated in its report that the international obligations placed on the State by certain conventions required the formal rescission of a particular legislative provision and that "a situation in which a legal provision inconsistent with the requirements of the Convention subsists but is regarded as obsolete" or as being superseded *de facto* could not be considered satisfactory for the purposes of the application of the Convention.¹⁰ The Commission had therefore concluded that in that case there had been a breach of the obligation imposed by the Convention. The Commission appointed under article 26 of the Constitution of the ILO to examine the complaint filed by the Government of Portugal concerning the observance by the Government of Liberia of Convention No. 29 of 1930 (Convention concerning Forced or Compulsory Labour) had arrived at exactly the same conclusion.¹¹

30. The distinction he had made between the two types of international obligation was also confirmed by doctrine, which on that point coincided with State practice. Writers, from Heinrich Triepel onwards, had stressed that, when an obligation required of a State conduct—whether active or omissive—"which must necessarily be carried out in certain ways and by specific bodies", any conduct of the State which was not in conformity with that specifically required constituted as such "a direct breach of the existing international legal obligation", so that, "if all the other requisite conditions exist, we are confronted with an internationally wrongful act".¹²

31. One might be tempted to adopt, in international law, language which was commonly used in civil-law countries and refer to "international obligations of conduct" or, if it was preferred, "of means", and "international obligations of result". However, it was necessary to ensure that the use of such terminology, which could be very useful in practice, did not give rise to ambiguity, for, as Mr. Reuter had shown, the distinction made in the civil-law systems of certain countries between "obligations of conduct" and "obligations of result" was not exactly the same. Moreover, civil-law systems were not in force in all countries. Accordingly, until the Commission's attitude was known on that matter, he had referred to an "obligation calling for the State to adopt a specific course of conduct" and an "obligation requiring the State to achieve a particular result".

32. The case covered by article 20—that of the breach of an international obligation requiring the State to adopt a specific course of conduct—was evidently the simpler of the two. The real difficulties would arise with article 21, which related to the breach of an international obligation

requiring the State to achieve a particular result, because the situation was not as clear and precise in that case as in the first.

The meeting rose at 12.55 p.m.

1455th MEETING

Thursday, 7 July 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. El-Erian, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

State responsibility (*continued*) (A/CN.4/302 and Add.1-3)
[Item 2 of the agenda]

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

ARTICLE 20 (Breach of an international obligation calling for the State to adopt a specific course of conduct)¹
(*continued*)

1. Mr. TABIBI said that the Special Rapporteur's excellent report and oral presentation provided a very illuminating introduction to article 20. The rule established by that article set out the obligation imposed on a State by international law; it related, first, to relations between States and, second, to matters of concern to the whole international community. The second of those elements was of the highest importance for inter-State relations were governed by many rules of international law. However, under the terms of the article, the interests of the international community took precedence, since a State was required to act or not to act in some specifically determined way.

2. The cardinal importance of that principle and, thus, of the article itself lay in the fact that it co-ordinated inter-State relations, which were important for world peace, and safeguarded the interests of the world community by demanding that a State should take legislative, administrative or judicial measures to satisfy a specific requirement, or should refrain from a particular course of conduct. As the Special Rapporteur had pointed out, international law in a sense invaded the sphere of the State by requiring some specific component of the State machinery to adopt a particular course of conduct. Most important of all, the article clearly established the supremacy of international law over internal law.

¹⁰ *Ibid.*, para. 9.

¹¹ *Ibid.*

¹² *Ibid.*, para. 11.

¹ For text, see 1454th meeting, para. 11.

3. Again, article 20 allowed the State to choose the means—administrative, legislative, judicial or even extraordinary action—of engaging in, or refraining from, an act required of it in inter-State relations under a treaty or under rules of general international law. The negative or positive course of action, in other words, to carry out or refrain from an act, was important not because the State was legally bound to meet a specific requirement but because it must fulfil its obligations in the interests of the international community.

4. The report cited as examples a number of instruments, such as the Convention relating to a uniform law on the international sale of goods (The Hague, 1 July 1964), certain international labour conventions and the 1965 International Convention on the Elimination of All Forms of Racial Discrimination,² which clearly showed how a State was required to engage in or refrain from certain actions.

5. It was also evident from the works of writers such as Triepel and Anzilotti that international law prevailed over internal law and that, when treaty law imposed certain provisions on internal law, the non-adoption or abrogation of those provisions constituted a breach of an obligation. An obligation might well have been forced upon a State in time of war, however, and it could not then be treated in the same way as an obligation under international law.

6. He wished to emphasize that the importance of the article was that it protected the interests of the international community and ensured that international law would prevail over internal law. He was grateful for the Special Rapporteur's highly scientific commentary and for the simplicity of the formulation of the rule in article 20, which he warmly supported.

7. Mr. REUTER, after warmly congratulating the Special Rapporteur, said that he had no substantive objection to article 20. On first reading the article, he had thought that it stated a truism, but on reflection he had realized that the Special Rapporteur had no doubt been right to devote some articles to the effects of the nature of obligations on the mechanisms of responsibility; indeed, those articles were not so simple as they appeared. The article under consideration could therefore be referred to the Drafting Committee.

8. There were a few questions of terminology which might complicate the Drafting Committee's task. In that connexion, he pointed out that his proposal concerning the application of certain concepts of civil law to international law, to which the Special Rapporteur had referred in foot-note 27 to his sixth report, was probably lacking in terminological precision; he therefore concurred in the Special Rapporteur's views. The text proposed by the Special Rapporteur nevertheless raised a question of substance and one of vocabulary. Of the articles which would be devoted to the form of international obligations, article 20 was the one which dealt with the most precise obligations. The obligations referred to by that provision called for acts, either legal or physical, on the part of States. At a lower degree of precision, there were obliga-

tions which specified the final result and, at a third degree, obligations which required of the State neither specific acts nor definite results, but simply an attitude conducing to a result which was not mandatory. An example of an obligation in the third category was the general obligation to be vigilant, which international law imposed on States in the absence of a real obligation of result, in order to ensure the protection of diplomatic agents residing in their territory.

9. It was the English version of article 20 which had led him to make those distinctions. The word *comportement* had been ingeniously translated into English as "course of conduct". The word "behaviour" might have been expected, but that term would, precisely, have denoted an act in the third category, namely, an attitude. The expression "course of conduct" seemed to correspond fairly closely to the idea which the Special Rapporteur had intended to express. He would therefore prefer some expression such as *actes spécifiquement déterminés* to be substituted, in the French version of article 20, for the rather vague term *comportement*. Whereas all the examples of physical acts given by the Special Rapporteur were simple and precise, the examples of legal acts were more complex. In short, the latter examples all related to general protection of human rights. In that respect, he fully agreed with the Special Rapporteur: there was no domain exclusively reserved to internal law and no domain exclusively reserved to international law. Modern international law had penetrated internal law, and it was true that it sometimes required States to carry out certain legal acts within the framework of their internal order. In the case of labour legislation, it was indisputable that there was an obligation to enact laws. With regard to human rights, and leaving aside the Universal Declaration of Human Rights, the question arose whether regional conventions could require a State to refer certain matters to a judge. That question, on which there were already some judicial decisions, was very controversial. Consequently, if the Commission wished to take up such questions, it would have to draft the English and French versions of article 20 with great precision. In French, the word *comportement* was not sufficiently precise, and it was even possible that, in the English expression "course of conduct", the word "conduct" had a behaviourist connotation.

10. The CHAIRMAN pointed out that, from the outset, the present topic had raised numerous translation problems. In article 5 of the draft,³ the French term *comportement* had been translated into English as "conduct". Again, for the term *fait de l'Etat*, the expression "act of the State" had been used in English although it had a special connotation.

11. Mr. FRANCIS said that the incisiveness of thought displayed by the Special Rapporteur in his excellent report would be of great benefit to the Commission and to the Drafting Committee. Article 20, which detailed the circumstances in which a breach of an international obligation existed, brought into sharp focus the basic principle of *pacta sunt servanda*. The fact that there had been omission was enough for the obligation to be

² See A/CN.4/302 and Add.1-3, para. 5.

³ See 1454th meeting, foot-note 2.

regarded as having been breached. Mr. Tabibi had been right in affirming that the article was of great importance in regard to obligations of concern to the international community as a whole. While the same principle should of course be observed in good faith in bilateral relations, the damage was far too extensive to be taken lightly in the case of the breach of an international obligation towards the international community.

12. The essence of the rule set out in article 20 was to be found in the Special Rapporteur's comment that "The finding should not be influenced by whether or not the non-conformity of the conduct adopted with the conduct which should have been adopted had harmful consequences" (A/CN.4/302 and Add.1-3, para. 7). In other words, failure to perform an act prescribed, or performance of an act prohibited, by a treaty were in themselves enough to constitute a breach.

13. In his opinion, the rule set out in the article had a more direct impact in terms of the consequences of the breach. If a State was required to refrain from a particular act—for example, if it was required to prevent its police forces from entering the premises of a diplomatic mission—and failed to do so, it was clear that there were sufficient grounds for the breach to attract punitive consequences. Two situations were conceivable: one in which failure to perform an act might not have had any detrimental effect other than what might be termed the psychological effect of the failure to perform it, and one in which the performance of a prohibited act in itself resulted in damage. There would be punishment in both instances, but also two distinct areas of liability in the strictest sense.

14. He wondered whether, from the drafting standpoint, the wording of the article might not encompass both the positive and the negative elements of an obligation, that was to say, the requirement to perform a particular act and the requirement to refrain from performing a particular act. For the sake of precision, it might be possible to find a more suitable expression than "particular course of conduct". Another problem of language lay in the use of the word "exists", which implied a continuing situation. A breach might well have taken place and have been repaired, in which case the question of a continuing situation did not arise. The Drafting Committee could perhaps consider replacing the word "exists" by the word "occurs". Lastly, with reference to the comments by Mr. Reuter, he agreed that the word "behaviour" would not be appropriate in English.

15. Mr. ŠAHOVIĆ associated himself with the congratulations addressed to the Special Rapporteur, who had been right to propose an article on international obligations requiring the adoption of a particular course of conduct. After having doubted the need for such an article, because the notions of an internationally wrongful act and a breach of an international obligation had already been carefully defined, he had reached the conclusion that the article was justified in view of the purposes of the draft. Moreover, practice also told in favour of such a provision. The distinctions made by the Special Rapporteur were not new and deserved to be taken into consideration in the draft articles, in view of the need to

strengthen international legality and to develop rules on responsibility.

16. He was not sure, however, what importance should be attached to the distinction between the result aimed at by an international obligation and the means used to achieve that result. Article 20 centred on specific means. However, from a general point of view, it should not be forgotten that it was the result which mattered. Admittedly, article 21 dealt expressly with obligations requiring the State to achieve a particular result *in concreto*, thus leaving the choice of means to the State, but it seemed that, even in article 20, the result should take precedence. It was true that the article was based on practice and that there were certain reasons which militated in favour of it. Furthermore, article 20 could play a not insignificant part in the development of the law relating to international obligations and State responsibility, and thus contribute to strengthening the rôle of international law in a world where the development of internal law and that of international law were interdependent.

17. With regard to the wording of article 20, like Mr. Reuter, he thought the Drafting Committee should give the fullest attention to the proposed text in order to make it express the Special Rapporteur's ideas more accurately. In particular, the expressions "specifically" and "particular course of conduct" might not be calculated to make the substance of the rule in article 20 clearly understandable.

18. Mr. SETTE CÂMARA congratulated the Special Rapporteur on his excellent introduction to article 20, which could be described, in words which the Special Rapporteur had rejected because of their overtones of internal law, as dealing with obligations of conduct as opposed to obligations of result. In the case of article 20, the State undertook to fulfil an obligation in a particular manner but, in the case of obligations of result, the State was free to choose the ways and means of fulfilling the obligation.

19. The type of obligation contemplated in article 20 might consist of an act or an omission and might relate to the conduct of the executive, legislative or judicial organs of the State. It should be remembered that there was a very delicate balance between those organs. The executive branch, which was normally competent to enter into treaty negotiations, should be very careful in assuming the type of obligation covered by article 20, for the future conduct of the legislative and judicial organs would be beyond its control. Of course, the responsibility of the State would none the less be engaged under the terms of articles 5 and 6 of the draft, but the executive branch should proceed carefully where obligations of conduct were concerned.

20. The Special Rapporteur had given many practical examples to illustrate the various possible situations and, from an investigation of abundant practice, he had come to the conclusion that, in the case of obligations of conduct, mere failure to adopt the prescribed and agreed conduct constituted a breach of an international obligation, regardless of the existence of any really delictual act. The Special Rapporteur had also preferred to use the phrases "internationally wrongful act of conduct" and "internationally wrongful act of result" (A/CN.4/302 and

Add.1-3, para. 12), rather than the distinction between obligations of conduct and obligations of result, which could be traced back to Roman law.

21. The text proposed for the article offered no difficulty, excepting the use of the word “different”. A course of conduct might coincide with that prescribed by the obligation without being exactly the same. Measures adopted by the legislative or judicial authorities might slightly diverge from the requisite conduct, but nevertheless be fully satisfactory in regard to the result achieved. The best solution might be to use the words “not in conformity with”, which the Special Rapporteur himself had used in his oral presentation. As Mr. Šahović had suggested, the Commission should consider the relationship between the ways and means of fulfilling an obligation and the actual result. For example, a State might be required under an international obligation to dismantle certain fortifications completely. If it used parts of those fortifications for the storage of grain and they could no longer be used for the military purposes, would the international obligation be regarded as having been breached? Such conduct might be different from that prescribed by the obligation but it would still bring about the desired result. He was sure, however, that the Special Rapporteur would clarify that question, and he agreed with previous speakers that the article could be referred to the Drafting Committee.

22. Mr. USHAKOV said that he endorsed the views expressed by the Special Rapporteur in his excellent commentary and brilliant introduction to article 20. Nevertheless, he had some doubts about the drafting of that provision. The article dealt with international obligations requiring a certain action or omission within the internal competence of States. As was clear from the commentary, either legislative measures or action by an executive or judicial organ might be required. But the Special Rapporteur went further, and even referred to the obligation which general international law placed on the police forces, and *a fortiori* on the armed forces of all countries, not to enter the territory of another country without its consent. Such an obligation no longer pertained to the internal sphere but to that of international relations. It was no doubt right and useful to draft a provision on the actions or omissions which an international obligation required of a State at the internal level, but it would be a very delicate matter to go any further.

23. With regard to drafting, he observed, first, that the expression “particular course of conduct” was not very satisfactory since any conduct required by an international obligation was a particular course of conduct, even if it was a general course of conduct such as refraining from the use of force. An international obligation which did not require a particular course of conduct of a State would no longer be an international obligation. Similarly, the word “specifically” was not essential since anything required by an international obligation was specifically required. In the expression “simply by virtue of”, the word “simply” did not seem to be essential either.

24. With regard to the words “conduct different from”, he asked what the notion of difference covered. In what way and to what extent must such conduct be different?

The Commission had already laid down in article 16 that: “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”. If the Special Rapporteur now intended to add a clarification of article 16 in regard to the acts or omissions which an international obligation required of a State within the sphere of its internal jurisdiction, that clarification should be expressed in terms similar to those of article 16. But the wording of article 20 was not as precise as that of article 16; it did not refer to an act which was “not in conformity” but to a different course of conduct.

25. In the commentary to article 16, the Commission had explained what was meant by an act not in conformity with what was required of a State by an obligation; it had pointed out that it could, for instance, be a complete or partial omission. In the case of article 20, it was conceivable that an international obligation might require a State to enact a law and that the law enacted by that State only partly fulfilled the obligation. In that case, the question arose to what extent the conduct of the State was “different from that specifically required”. That was why he considered that the wording of article 20 should be as precise as that of article 16. It might also happen that an international obligation required a State to enact a law, but that, instead of doing so, it achieved the desired result by means of an order, an amendment to its constitution or an administrative act. Thus, it certainly seemed that it was the result which mattered but that result was determined by the internal organization of the State. Consequently, even the most precise international obligation could not prescribe entirely precise means.

26. The utmost caution should therefore be exercised in drafting a provision involving the domestic jurisdiction of States, in the sense given to that expression in Article 2, paragraph 7, of the United Nations Charter. It was obvious that the responsibility of a State was engaged if it did not respect its international obligations, but the question of the means of fulfilling those obligations was one which, in the last analysis, fell within its domestic jurisdiction. International obligations should never require of States any action or omission of a kind that would constitute an interference in their internal affairs.

27. In spite of the drafting difficulties he had pointed out, he had no doubt that a satisfactory text could be formulated, and he was therefore in favour of referring article 20 to the Drafting Committee.

28. Mr. AGO (Special Rapporteur) said he had used the word *comportement* in the French version of article 20 because it was a neutral word which denoted both an action and an omission or a set of actions or omissions. He was not sure whether the word *actes* suggested by Mr. Reuter covered both aspects, the active and the passive, of the course of conduct specifically required by the international obligations referred to in article 20. Instead of the single word *comportement*, it might be possible to use the words—*action ou omission*—as proposed by Mr. Francis, to distinguish between cases in which the international obligation required an action by the State and those in which it required an omission. Were there not, however, also some cases in which there was a set of actions or omissions?

29. The case covered by article 20 was more usual in some respects, particularly where the obligation had direct effects in the sphere of inter-State relations. In other cases, particularly where an obligation had effects in the internal domain of the State, the obligation generally only required the State to achieve a certain result without imposing on it a particular course of conduct. It was obviously easier to determine the existence of a breach of an obligation when the obligation was one of "conduct" or of "means" since, for a breach to exist, the State had only to adopt a course of conduct different from that specifically required.

30. The case dealt with in article 21, in which international law required the State to achieve a particular result but left it free to choose the means of doing so, was more complex from the point of view of establishing the existence of a breach, since the degree of freedom permitted for the fulfilment of the international obligation could differ widely.

31. It would be seen that, in some cases, the State was free at the outset to choose the means to achieve the required result. Once it had acted, however, it had no further choice of means; if it failed to achieve the result required by the means it had chosen, the breach was complete.

32. In other cases, however, the State had such freedom of choice of means, not only at the outset but also subsequently. If it did not achieve the required result by the means it had chosen at the start, it could subsequently achieve that same result by other means and, if it succeeded in doing so, there was no breach of the obligation.

33. In yet other cases, if the first action taken by the State did not achieve the required result and if that result had in fact become unattainable by reason of the conduct initially adopted, the State was still allowed to discharge its obligation by achieving an alternative result instead of that initially required—for example, a result that was the economic equivalent of the result initially required. In article 22, it would be seen that, if the beneficiaries of the international obligation were private individuals—natural or legal persons—their co-operation was, quite logically, required to ensure the fulfilment of the obligation. It was thus those individuals who must take the initiative to promote further action by the State to remedy the effects of its initial conduct, which had been incompatible with the internationally required result.

34. There was yet a fourth case mentioned by Mr. Reuter, involving the special category of obligations which required the State to take measures to protect foreign States or individuals from particular external events. In that case, did the breach occur before or at the time of the event which revealed the States negligence and acted as a catalyst for it? For example, if a State neglected for a long time to take the necessary steps to protect the embassies in its territory and one of those embassies was broken into owing to inadequate security services, was it at the time of the actual invasion of the embassy that the breach of the obligation could be said to have occurred or did the breach already exist before the event which had revealed the State's negligence? That question would be answered later in article 23.

35. It was evident, as Mr. Šahović had pointed out, that each obligation had a specific object but approached it in a different way. In some cases, as had been seen, the obligation specified the means to be used by the State; in other cases, it left the choice of means to the State and merely indicated the result to be achieved.

36. He had not sought to make a distinction according to whether the obligation had effects in the sphere of the internal legal order or in that of inter-State relations; he had only tried to distinguish what was important for assessing the manner in which the breach occurred.

37. With regard to the relationship between article 20 and article 16, to which Mr. Ushakov had referred, he pointed out that article 16 laid down a general principle whereas article 20 dealt with a special case. It was not therefore by chance that article 16 referred to an "act of the State" since that was a very broad expression, which included the fact of not having achieved a certain result. Article 20, on the other hand, referred to a very precise and concrete action or omission.

38. Mr. VEROSTA asked what was the exact position of articles 20 and 21 in the draft as a whole. Should they be regarded as an application of the general principle stated in article 16, even though they were separated from that article by three other articles? Should articles 16 to 19 be regarded as a group of general provisions, which would be followed by more specific rules deriving from article 16?

39. Mr. AGO (Special Rapporteur) said that article 16 provided a basic criterion by defining in general terms the notion of a breach of an international obligation, whereas the subsequent articles answered a certain number of specific questions.

40. Article 17 replied in the negative to the question whether the origin of the international obligation had any effect on the determination of a breach.

41. In article 18, the Commission had replied in the affirmative to the question whether, for an act of the State to constitute a breach of an international obligation, it was necessary for the act to have taken place at a time when the obligation was in force for the State. It had, however, considered the particular aspects of the case in which the act, which had been wrongful when it had taken place, had subsequently become mandatory by virtue of a preemptory norm of international law. The Commission had mainly considered how the principle stated in paragraph 1 applied in the specific cases of continuing, composite or complex acts.

42. After considering whether the content of the obligation was of any significance in the determination of a breach and also whether the breach of one and the same obligation could differ in gravity, the Commission had distinguished in article 19 between two categories of breach according to the subject-matter of the obligation breached and the gravity of the breach itself. It had thus distinguished between international crimes and international delicts.

43. On the basis not of the subject-matter of the international obligation but of the form it took, he now proposed to distinguish between the breach of obligations which required a particular course of conduct by the State

(article 20) and the breach of obligations which required the achievement of a particular result by the State (article 21).

44. Mr. DADZIE congratulated the Special Rapporteur on his sixth report and the very instructive introduction to article 20 he had given at the previous meeting. As Mr. Verosta had said, the new members of the Commission were at a disadvantage in discussing a topic with which the Commission had been dealing for some time, but the Special Rapporteur's introductory remarks had removed their difficulties.

45. While he agreed with the minor drafting changes to article 20 suggested by other members of the Commission, he saw no substantive improvements that could be made to that article, which related to the breach of an international obligation requiring a State to adopt a particular course of conduct. He therefore shared the view that article 20 could be referred to the Drafting Committee.

46. He was also grateful for the Special Rapporteur's reply to Mr. Verosta's question. The explanations the Special Rapporteur had given concerning the relationship between article 16 and article 20 had clearly demonstrated the importance of the subject of State responsibility as a whole.

47. Mr. CALLE Y CALLE associated himself with the expressions of appreciation concerning the clarity and accuracy of the Special Rapporteur's analysis of the rule relating to the breach of an international obligation requiring a State to adopt a particular course of conduct. He noted that that rule, which was stated in article 20, formed part of chapter III of the Commission's draft, articles 16 to 19 of which had been discussed at great length by the United Nations General Assembly at its thirty-first session. During that discussion, it had been generally agreed that those articles, and in particular article 19, marked an important turning point in, and made a valuable contribution to, the development of international law and its future application.

48. At the Commission's previous meeting, the Special Rapporteur had described the historical background to the question of the breach of an international obligation and, at the present meeting, he had given an extremely helpful account of the over-all structure of the draft articles relating to that question. Article 16 provided an introduction to chapter III and laid down a general rule, namely, that "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", whereas article 20 provided that an international obligation could entail more than an action or an omission, by requiring a State to adopt a particular course of conduct, which could extend over a period of time. Thus, in article 20, the purpose of the international obligation was to specify the means or, in other words, the course of conduct, by which a State could achieve a certain result. If, however, the State adopted a course of conduct different from that specifically required, it could be said to have breached the international obligation in question.

49. As stated in paragraph 8 of his report, the Special Rapporteur had drawn a distinction, in articles 20 and

21, between the nature of the international obligation which required of the State a specific activity and the nature of the obligation which required only that the State should achieve a certain result, leaving it to choose the means of doing so. Those two articles thus expanded on the very succinct rule embodied in article 16.

50. The wording of article 20, which did not require many changes, should not present any difficulties for the Drafting Committee. In his opinion, the expressions "a particular course of conduct" and "a course of conduct different from that specifically required" could not be clearer or more precise. He therefore supported the suggestion that article 20 should be referred to the Drafting Committee.

The meeting rose at 1 p.m.

1456th MEETING

Friday, 8 July 1977, at 10.10 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

State responsibility (*continued*) (A/CN.4/302 and Add.1-3) [Item 2 of the agenda]

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

ARTICLE 20 (Breach of an international obligation calling for the State to adopt a specific course of conduct¹ (*concluded*))

1. Mr. QUENTIN-BAXTER said that, like his earlier reports, the Special Rapporteur's sixth report on State responsibility had given him food for thought and illuminated some of the dark areas in his knowledge of the law. It had also caused him some surprise, for he had been under the impression that article 19² was the last in the set of draft articles relating to the breach of an international obligation.

2. As the Special Rapporteur had pointed out, one of the main difficulties of the subject-matter was that, by its very nature, it called for careful study of the most basic situations. Thus, even a rule such as the one embodied in article 20, which might appear to state an

¹ For text, see 1454th meeting, para. 11.

² See 1454th meeting, foot-note 2.

obvious truth, definitely had a place in the draft articles. Indeed, in dealing with State responsibility, the Commission sometimes had to play the role of a philosopher and explain even well-known principles and rules. He therefore had no objection to the rule embodied in article 20.

3. He also recognized the validity of the basic distinction which the Special Rapporteur had drawn between obligations of conduct, referred to in article 20, and obligations of result, referred to in article 21. He was, however, somewhat concerned about the apparent absoluteness of that distinction for he was not sure that every international obligation could be satisfactorily classified as either an obligation of conduct or an obligation of result. Indeed, foot-note 27 of the report (A/CN.4/302 and Add.1-3) showed that the distinction between an obligation of conduct and an obligation of result was not always as clear-cut as might be expected.

4. Another example in which the distinction between the two types of obligation was not immediately apparent was that in which a coastal State had an obligation to grant the right of innocent passage through its territorial sea. In his opinion, blocking the innocent passage of foreign ships by the navy of the coastal State would be a case of breach of an obligation of conduct, whereas if the State, for example, failed to prevent its oil industry from setting up derricks which completely blocked an international strait, that would be a case of breach of an obligation of result, for the State in question would have had freedom to choose the means by which the right of passage through the strait could be ensured. In both cases, the obligation was the same but it could be viewed from two different angles.

5. If one of the examples given by the Special Rapporteur in paragraph 5 of his report, namely, that of article 1, paragraph 1, of the Convention relating to a uniform law on the international sale of goods (The Hague, 1964), which imposed on the contracting States the obligation to incorporate in their own legislation the uniform law on the international sale of goods, was contrasted with the example of the introductory provision of the section of the four 1949 Geneva Conventions,³ which related to the repression of breaches of the Conventions and which stated:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article,⁴

it could be seen that, in both cases, a particular course of conduct had been enjoined upon the States in question. In the case of the Hague Convention, the required conduct was very narrowly defined while, in the case of the Geneva Conventions, the States concerned were free to decide what was necessary in order to bring their internal law into conformity with the requirements of the latter. Both of those cases thus came within the scope of article 20. In the second case, however, the States concerned would not have to enact specific legislation in order to achieve the required result. The article might thus also

be said to involve an obligation having some of the characteristics of an obligation of result.

6. The contrast between those two examples could be further sharpened by reference both to the principle embodied in article 20 and to the principle embodied in article 21. In terms of article 20, it could be said that, in the first case, the States concerned had an obligation to enact legislation which was in conformity with the provisions of the uniform law whereas, in the second case, they had a duty to decide which obligations the Geneva Conventions laid down and to ensure that those obligations were fulfilled through the enactment of internal legislation. In terms of article 21, it could thus be said that, in both cases, a result had been required.

7. He had cited those examples in order to indicate that, although the rules embodied in articles 20 and 21 were important and deserved a place in a future codification instrument, he was not sure that the Special Rapporteur's distinction between an obligation of conduct and an obligation of result would be very helpful to those who would look to a future convention for guidance. He therefore suggested that, in order to take better account of the complexities of the law and of international life, the Commission should treat the distinction between the two types of obligation as one of degree rather than of kind. A solution of the problem of the absoluteness of that distinction might be simply to state that the provisions of article 20 applied when an international obligation specifically called for a State to adopt a particular course of conduct and that the provisions of article 21 applied when an international obligation required a State to achieve a particular result.

8. Mr. SUCHARITKUL said that he much appreciated the clarity and precision of the statement by the Special Rapporteur, whose position he could only endorse. Like the Special Rapporteur, it was his belief that the legal concept of State responsibility in international relations should be extended to all spheres of State activity and should no longer be confined to traditional areas, such as the treatment of aliens.

9. He agreed with article 20 both as to substance and form and, like the Special Rapporteur, considered that, in the case covered by that article, the essential criterion for breach of the obligation was the adoption by the State of a course of conduct different from that which was specifically required. He would, however, point out that, if the different conduct which the State adopted was superior to the conduct required, there was no breach of the obligation incumbent on the State. There was only a breach of that obligation if the conduct of the State was inferior to the conduct required. It would therefore perhaps be preferable to replace the words "different from" by the expression "not in conformity with", as Mr. Sette-Câmara had suggested.⁵

10. He was grateful to the Special Rapporteur for having introduced into article 20 the new dimension of time. In his view, the temporal element was essential for determining whether there had been a breach of the obligation, since the duration of the course of conduct required

³ Geneva Conventions of 12 August 1949 for the protection of war victims.

⁴ United Nations, *Treaty Series*, vol. 75, pp. 62, 116, 236 and 386.

⁵ 1455th meeting, para. 21.

should be taken into account, as well as the point at which the different course of conduct had been adopted.

11. He shared the view expressed by Mr. Francis at the previous meeting, regarding the distinction to be drawn between a positive or active course of conduct and a negative or passive course of conduct. The nature of the conduct depended on the nature of the obligation, which required the State to achieve a positive result or to avoid a negative result. In order to achieve a positive result, the State could adopt either a single act of conduct or a whole series of acts; consequently, its course of conduct was of more or less limited duration. On the other hand, a passive obligation was of virtually unlimited duration since, to avoid a particular harmful result, the State had to continue to refrain from certain acts.

12. In conclusion, he thought that article 20 could be referred to the Drafting Committee.

13. Mr. EL-ERIAN said he wished to join the other members of the Commission in congratulating the Special Rapporteur on the clarity and precision of his sixth report and the explanations he had given concerning article 20.

14. Articles 20 and 21, which were the logical consequence of articles 16 to 19, dealt with the substantive aspects of international obligations from the point of view of the form of the obligation. Although article 20 stated such an obvious rule that several members of the Commission had questioned whether it was really necessary to include it in the draft articles, he was of the opinion that its inclusion was necessary and that it was quite appropriate for the Commission to formulate articles of an expository nature, to make the draft as complete and as clear as possible. Such expository articles had, moreover, been included in the Vienna Convention on the Law of Treaties⁶ and in the draft articles on succession of States in respect of treaties.⁷

15. The wording of article 20 was acceptable and the words "a particular course of conduct" took fully into account the concepts of active and omissive conduct. With regard to the important distinction between obligations of conduct and obligations of result made in articles 20 and 21, he noted that, in foot-note 27 of his report, the Special Rapporteur had acknowledged that the distinction between those two types of obligation could sometimes become blurred, especially when concepts proper to civil law were applied to international law. Accordingly, he was not certain that the Special Rapporteur had been right in stating that, in positive international law, the obligation of a State to protect foreigners should be characterized as an international obligation of result. The reason why such an obligation could also be described as an obligation of conduct could, however, be discussed in connexion with article 21.

16. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur in his sixth

report had, as usual, led the Commission through many examples of precedent and doctrine to a conclusion with which it was difficult not to agree. He was thus fully convinced that articles 20 and 21 were necessary and that the distinction between international obligations of conduct and international obligations of result was an important one, for experience had often shown that, when a breach of an obligation occurred, it was first necessary to determine exactly what type of obligation was involved.

17. In order to bring out the importance of that distinction, he need only mention the example of the public discussion which had been going on for several years in the United Kingdom concerning legislation to give effect to the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁸ also known as the European Convention of Human Rights. It had been argued in some quarters that the Convention provided that States had to enact legislation to give effect to the obligations it laid down. In the United Kingdom, it had, however, been argued that the Convention required only that States should guarantee to all persons the rights and freedoms provided for in the substantive articles of the Convention. From the point of view of observance of the Convention, it was of crucial importance to decide which of those arguments was right. It might have been wise for the United Kingdom to take the view that the European Convention on Human Rights laid down an obligation of conduct rather than an obligation of result because, in supporting the view that the States parties were concerned only with an obligation of result, it ran a considerable risk of an unintentional breach of the obligations laid down in the Convention.

18. Another example of the distinction made in articles 20 and 21 was that in which one State enacted customs legislation in order to give effect to the provisions of a customs treaty, and another State party to that treaty enacted legislation giving its executive authorities power to vary its customs duties in ways that were not in conformity with the obligations laid down in the treaty in question. In a case involving the payment by the first State of customs duties on a large shipment of wheat, the question whether the second State had committed a breach of an obligation of conduct or a breach of an obligation of result would be of critical importance if, for example, it changed its customs duties when the ship carrying the wheat was already on the high seas.

19. Although he was of the opinion that the distinction between those two types of obligation was essential, he shared the concern expressed by Mr. Reuter and by Mr. Quentin-Baxter that a very strict distinction might have the result of creating a gap between the obligations covered by article 16 and those covered by articles 20 and 21. The wording of articles 20 and 21 and the commentaries thereto should therefore make it clear that the Commission had had no intention of leaving any such gap in the draft articles.

20. As regards the wording of article 20, he noted that there was a problem involved in translating the words *comportement déterminé* into English. He was of the

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. 287. The Convention is hereafter referred to as the Vienna Convention.

⁷ *Yearbook ... 1974*, vol. II (Part One), pp. 174 *et seq.*, document A/9610/Rev.1, chap. II, sect. D.

⁸ United Nations, *Treaty Series*, vol. 213, p. 221.

opinion that the words "specific conduct" would be closer to the meaning of the French words than the words "a particular course of conduct" now to be found in article 20. He therefore suggested that the Commission might consider a text drafted along the following lines:

A breach by a State of an international obligation requiring specific conduct on the part of that State occurs when the conduct of the State is not in conformity with the conduct specifically required.

21. Mr. VEROSTA said that he shared the Chairman's concern regarding the gaps that might result from the dichotomy established under articles 20 and 21. In his opinion, the Drafting Committee could not find a definitive solution to the problems to which article 20 gave rise without having first examined the problems to which article 21 gave rise. He would therefore reserve his position on article 20 until article 21 had been considered.

22. Mr. AGO (Special Rapporteur) said he felt that the concern expressed by Mr. Quentin-Baxter, the Chairman and Mr. Verosta about possible gaps that might result from the dichotomy established under articles 20 and 21 was a little exaggerated. The Commission was, in any case, still only at the stage of first reading and the comments of Governments would certainly be helpful in determining whether or not such gaps existed.

23. With regard to the order of the articles, when the draft was considered on second reading, articles 20, 21 and 22 might be placed after articles 16, 17 and 18, since that was the logical sequence, and, at any rate, before article 19, which dealt with a problem of a different kind.

24. Mr. Quentin-Baxter had questioned whether the distinction drawn between the obligation of conduct and the obligation of result was really necessary. The Chairman had shown clearly that such a distinction was essential for determining in each case, whether there was a breach of an international obligation and when that breach occurred. For example, if a State was simply required to ensure that children did not work at night—an obligation of result—there would only be a breach of the obligation if it was established that there were actually cases in that State of children being employed on night work. On the other hand, if a State was required to pass legislation prohibiting night work for children—an obligation of conduct or of means—failure to pass such legislation would, of itself, be a breach of that obligation.

25. The Commission's work on responsibility should also prove useful to States which adopted international treaties because, when they realized that the establishment of a breach could differ according to the nature of the obligation, in other words, according to whether the obligation required the State to adopt a particular course of conduct, or merely required it to achieve a particular result but left it free to choose the means of doing so, they might follow a different course from the one they would otherwise have chosen.

26. In that connexion, the Chairman had said that it was often preferable to impose an obligation of conduct in an international treaty. That was probably true, but the sovereignty of States also had to be taken into

account, which meant respecting as much as possible their freedom of choice at the internal level and, thus, merely requiring them to achieve a particular result, provided that such a requirement did not involve any serious disadvantages. It was not for the Commission but for States to say whether it was better to provide, in a convention, for an obligation of conduct or an obligation of result. States, moreover, had not always been logical in that respect, as was clear from ILO conventions on similar subjects, which sometimes provided for obligations of conduct and sometimes for obligations of result. The Commission, for its part, should merely note that, in that respect, there were two types of obligation and confine itself to determining how the breach arose in each case.

27. Mr. Quentin-Baxter had introduced a new dichotomy within the dichotomy already established by pointing out that an international treaty, such as the 1964 Hague Convention relating to a uniform law on the international sale of goods, came within the scope of article 21 as well as of article 20, since it provided both for an obligation of conduct, namely, the enactment of legislation, and for an obligation of result, namely, the achievement of uniformity in the internal laws relating to the sale of goods. However, the objective pursued by States whenever they adopted a treaty—which, in the case in point, was standardization of private law—should not be confused with the fact that that objective was pursued by imposing on the States an obligation of result and leaving them free to choose the means of fulfilling it. In the case of an international treaty which provided for a uniform law, the requirements for fulfilling the obligation were so strict that there was a breach of the obligation if the State adopted a law that did not conform entirely to the model proposed. The obligation imposed by that kind of treaty was thus the most typical example of an obligation of conduct, not of an obligation of result.

28. The other treaty to which Mr. Quentin-Baxter had referred also imposed on the State an obligation of conduct of a legislative nature, since it called upon the State to adopt the necessary legislation to provide for adequate penal sanctions, even though it left it more freedom than the first kind of treaty since it did not require it to reproduce a model law word for word. In that case as well, there was nevertheless a breach of the obligation if the required legislation was not adopted; the obligation was thus one of conduct.

29. When a treaty imposed on the State an obligation of result, it might leave the State completely free to choose the means to be used to achieve that result or it might express a certain preference in the matter, although such a preference was not, in the final analysis, binding on the State. In order to determine whether there was a breach of an obligation, it was necessary to compare the specifically required action or omission with the action or omission actually adopted in the case of an obligation of conduct, and the required result with the result actually achieved in the case of an obligation of result. In his view, the dichotomy between the obligation of result and the obligation of conduct could be extremely useful and it would be unwise to blur it unduly in order to take account of every possible aspect of a multifaceted reality.

30. Mr. Sucharitul had pointed out that he (the Special Rapporteur) had introduced into all the articles in chapter III the dimension of time, which was essential where responsibility was concerned.

31. With regard to the treatment of aliens, there were also obligations which called for a specific course of conduct and obligations which merely required the State to achieve a particular result. That was because two different factors came into play: on the one hand, custom, which was extremely cautious about everything that came within the internal domain of the State, and, on the other hand, treaties, which sometimes revealed the growing concern of international law for man's well-being. In any event, there was no doubt that, with regard to the treatment of aliens, obligations of result were absolutely predominant.

32. With regard to the drafting, he noted that he had already suggested that, when the draft was considered at second reading, articles 20, 21 and 22 should be placed before article 19 so that they would be closer to article 16. He agreed with Mr. Verosta that the Drafting Committee should consider articles 20 and 21 together because those two articles were closely linked. He thanked Mr. Ushakov and the Chairman for the texts which they had proposed for article 20 and which would undoubtedly assist the Drafting Committee in arriving more rapidly at a satisfactory solution.

33. Mr. USHAKOV said that, while he was very satisfied with the Special Rapporteur's explanations, he would point out that, in some cases, an obligation could be an obligation of conduct as well as an obligation of result. There was a need for extreme caution in the case of obligations of conduct, and it should be made quite clear in the commentary that the course of conduct imposed by the obligation was "particular" only within certain limits. For example, if a treaty required the State to adopt legislation, that legislation could take very different forms: it could be a law in the strict sense, but also a decree or an administrative act.

34. Mr. AGO (Special Rapporteur) said that there were admittedly cases where it was hard to say whether the obligation was one of conduct or of result since, as he had stressed, reality had many facets. But it was still necessary to formulate a rule, leaving it to the practice of States and to international tribunals to decide, in case of dispute, whether an obligation fell within the scope of article 20 or within that of article 21.

35. He agreed with Mr. Ushakov regarding the need for caution in the case of obligations requiring action of a legislative nature; paragraph 14 of his report stated that a legislative obligation "requires that the legislative organ, or at any rate some organ having a normative function, issue or revoke certain rules". The form of the legislation mattered little: what mattered was that rules of internal law were created.

36. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer article 20 to the Drafting Committee.

*It was so agreed.*⁹

⁹ For the consideration of the text proposed by the Drafting Committee, see 1462nd meeting, paras. 18-24, and 1469th meeting, paras. 1-6.

ARTICLE 21 (Breach of an international obligation requiring the State to achieve a particular result)

37. The CHAIRMAN invited the Special Rapporteur to introduce draft article 21, which read:

Article 21. Breach of an international obligation requiring the State to achieve a particular result

1. A breach of an international obligation requiring the State to achieve a particular result *in concerto*, but leaving it free to choose at the outset the means of achieving that result, exists if, by the conduct adopted in exercising its freedom of choice, the State has not in fact achieved the internationally required result.

2. In cases where the international obligation permits the State whose initial conduct has led to a situation incompatible with the required result to rectify that situation, either by achieving the originally required result through new conduct or by achieving an equivalent result in place of it, a breach of the obligation exists if, in addition, the State has failed to take this subsequent opportunity and has thus completed the breach begun by its initial conduct.

38. Mr. AGO (Special Rapporteur) said that article 20 covered cases where the international obligation required a State to perform or refrain from a particular act. In such a case, the State did not have the choice of means; they were indicated by the international obligation itself, which made it fairly easy to determine when there was a breach of the obligation. All that was needed was to compare the course of conduct adopted by the State with the course of conduct required of it. The difference, if any, between those two courses of conduct constituted the essence of the breach of the international obligation, according to the definition of a breach given in article 16. He had already given several examples of international obligations requiring a State to enact or repeal a law, or calling upon its executive or judicial organs to perform or refrain from a particular act. In all such cases, a breach of the obligation occurred if the required act had not been performed.

39. Article 21 dealt with more subtle cases, when international law came to a halt, as it were, at the frontiers of the State: it left the State free, in the exercise of its sovereignty, to choose the means of fulfilling its obligation, provided that, by such means, it achieved the desired result. Several possibilities came to mind. Sometimes, international law might leave the State freedom of choice as to means but, once the choice was made at the outset, it would be possible to determine immediately, once and for all, whether or not the result had been achieved and, consequently, whether or not there was a breach. Also, as was frequently the case, international law might adopt a more permissive attitude, not only leaving the State free to choose at the outset the means of fulfilling its obligation but also permitting it, if it did not obtain the required result by that first means, to have recourse subsequently to other means. The obligation might even be so liberal that the State could regard itself as having discharged it by achieving an equivalent result, for example, by offering the economic equivalent of the result that had become impossible to attain because of the State's initial conduct.

40. As examples of what he meant by leaving the State "free to choose at the outset the means" of fulfilling its international obligation, he mentioned article 14 of the Treaty establishing the European Coal and Steel Com-

munity, which expressly stated that "the choice of appropriate means for achieving" the objectives should be left to the Parties; and the International Convention on the Elimination of All Forms of Racial Discrimination, article 2, paragraph 1, of which declared that "States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms".¹⁰ In that case, international law respected the freedom of States to the maximum; it did not, as in other cases, even make any suggestion as to the means considered most appropriate. The same applied to articles 22, paragraph 2, and 29 of the 1961 Vienna Convention on Diplomatic Relations and articles 31, paragraph 3, and 40 of the 1963 Vienna Convention on Consular Relations.¹¹ In other cases, the freedom of the State was implicitly clear from the fact that only the result was indicated, without any reference to means. That was the case with the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms,¹² the States parties to that Convention being left free to choose the appropriate means to guarantee the rights and freedoms defined therein. Apart from international treaty obligations, of which he had given examples, there were many international obligations of customary origin. International custom usually respected the State's freedom to choose the means of achieving the required result, particularly when it was seeking a result that was to be achieved in the internal domain of the State.

41. International obligations were sometimes formulated in such a way as to give suggestions concerning the means to be used to achieve the required result, but such suggestions were in no way binding. He mentioned the International Covenant on Economic, Social and Cultural Rights, article 2, paragraph 1, of which declared that each State party undertook to take steps "with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".¹³ Despite the reference to the adoption of legislative measures, the formula used in no way restricted the freedom of the State. The State was not in breach of its obligation if it achieved the required result by a means other than the adoption of legislative measures. The legislative method was mentioned merely by way of advice but, in the final analysis, it was only the result that mattered. The same could be said of the International Covenant on Civil and Political Rights, which also provided, in article 2, paragraph 2, that States could give effect to the rights in question by adopting "legislative or other measures".¹⁴ He reminded the Commission of the reply given in 1929 by the ILO to the Government of the Irish Free State when it had asked whether legislation was specifically required for the implementation of Convention No. 14 (Convention concerning the application of the weekly rest in industrial undertakings), since

a weekly rest period of 24 hours for industrial workers was already standard Irish practice. While observing that the most usual method would be to pass legislation making the weekly rest compulsory, the ILO had pointed out that the Convention left Governments free to apply any system which met with their approval and would secure the effective application of the Convention. It did not conceal its view that the most appropriate method was the passing of legislation to give the force of law to existing practice,¹⁵ but the conclusion to be drawn from the reply was that, in its view, the only criterion for the fulfilment or breach of the obligation was whether or not the weekly rest had been effectively secured.

42. He had given examples of the cases in which the State's freedom of choice with regard to the fulfilment of its obligation extended over a period of time. Sometimes, the State already enjoyed initial freedom of choice between different means of fulfilling its obligation but, in other cases, there was, at the outset, no real freedom of choice with a view to achieving the required result. For example, a State which contracted an international obligation relating to the administration of justice could usually act only through its courts. In either of those two cases, since the situation created by the initial course of conduct was not considered final, it could not yet be concluded that the obligation had been breached. If a court of first instance, in giving a decision or failing to give a decision when it should have done, created a situation incompatible with the required result, international law would not thereupon consider that the result had not been definitively achieved. In fact, through its courts of second and third instance, the State could expunge the consequences of the decision at first instance, so that the obligation would then be regarded as having been fulfilled. If, however, the courts of second and third instance confirmed the situation which was incompatible with the required result and the latter could no longer be achieved, there would be a breach of the international obligation, which would, of course, exist as from the time of the decision of the court of first instance. That was one of the cases mentioned during the drafting of article 18. The internationally wrongful act of the State was constituted by the aggregate of the decisions of the courts; it was thus a complex act.

43. In paragraph 19 of his report, he had pointed out that recourse to a subsequent course of conduct designed to remedy the internationally unacceptable effects of an initial course of conduct was a feature of the "pathology" rather than the "physiology" of the fulfilment of international obligations. It would be inadmissible if States which were required to achieve a particular result adopted the habit of usually doing so merely by rectifying *ex post facto* an initial unacceptable situation.

44. That having been made clear, there was no doubt that, if the international obligation so allowed, when the initial organ involved in the case did not achieve the required result but remedies were available, it was possible for the State to fulfil the international obligation by other, less normal means than those which should have been employed from the outset. States parties to a

¹⁰ See A/CN.4/302 and Add.1-3, para. 17.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*, para. 18.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

treaty might, for example, be requested to place aliens on the same footing as their nationals with regard to the grant of a mining concession. The usual means of achieving that result was for the competent administrative authority to grant such concessions to aliens who applied for them. If an alien who had not obtained a concession appealed to a higher court, however, and the latter granted the concession to him, with compensation, where appropriate, for the delay incurred, the result was also achieved. There was thus no breach of the obligation in question because it did not require the result to be achieved by the decision of a particular organ. That was why it was always necessary to take into account, not only the terms in which the international obligation was stated in the instrument providing for it, but other clauses in the same instrument which might shed light on it, the object and purpose of the instrument and even customary law. Interpretation could be of decisive importance in that respect.

45. When the International Covenant on Civil and Political Rights laid down that "Everyone shall be free to leave any country, including his own" (article 12, paragraph 2) or that "Everyone shall have the right to recognition everywhere as a person before the law" (article 16),¹⁶ it was clear that every State was free to achieve those results by the means of its choice. There would only be breach of those obligations if the freedom to leave a particular country or the right to recognition as a person before the law was not reflected in the facts. Bearing in mind the spirit of the Covenant, it was evident not only that contracting States enjoyed full freedom of choice as to the means to be used to achieve the required result but also that, if the conduct of one of their organs created a situation incompatible with that result, they could rectify that situation. In such a case, there would be no breach of the international obligation if the final result was achieved thereby. There was no doubt about the possibility of remedying an initial situation when a treaty providing for a specific obligation contained a clause requiring the individuals concerned by the fulfilment of the obligation to exhaust all local remedies before the State could be regarded as being in breach of that obligation. It should, however, not be concluded that the possibility of remedying the situation existed only when there was such a clause and, in particular, only when the international obligation in question related to the treatment of individuals, for it was then that a clause of that kind was to be found. As had already been said, the question whether or not the State could fulfil its obligation by remedying, where necessary, a situation incompatible with the internationally required result created by the conduct of one of its organs was to be answered by reference to the text, to the context, to other international instruments or to customary international law.

46. Under paragraphs 1 and 2 of article III of GATT,¹⁷ each contracting party was required to ensure that foreign products were not placed at a disadvantage on the domestic market because heavier taxes were applied to them than to domestic products. There was no doubt

that, in the event of an unjustified taxation being applied, the result at which those obligations were aiming would be achieved if the State took steps to abolish the discriminatory charge, even if no clause of the Agreement expressly required it to do so.

47. Summing up, he said that certain obligations did not go so far as to require a specific course of conduct of the State, but merely required it to achieve a particular result. Those obligations were characterized by a varying degree of permissiveness, depending on whether they simply left the State free to choose the means at the outset, in which case it was considered that there was a breach of the obligation if the result was not achieved by that means, or on whether they permitted the result to be achieved later, the negative effects of an initial action being remedied by a subsequent action.

The meeting rose at 1 p.m.

1457th MEETING

Monday, 11 July 1977, at 3.30 p.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Quentin-Baxter, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Statement by the Chairman

1. The CHAIRMAN said that one of the factors contributing to the delay in starting the meeting was that, although they carried official passes on their motor cars, at least two members of the Commission had not been allowed to enter the garage and use the parking space available. Unfortunately, it was not the first time that there had been such an occurrence. The members of the Commission, who had important meetings to attend, should be provided with the necessary facilities for doing so, and a firm protest must be made to the appropriate authorities.

State responsibility (*continued*)
(A/CN.4/302 and Add.1-3)
[Item 2 of the agenda]

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

ARTICLE 21 (Breach of an international obligation requiring the State to achieve a particular result)¹
(*continued*)

¹⁶ *Ibid.*, para. 20.

¹⁷ *Ibid.*, para. 21.

¹ For text, see 1456th meeting, para. 37.

2. Mr. AGO (Special Rapporteur), referring to the question of the breach of the obligations dealt with in article 21, said that it was very important to determine how such a breach occurred, for it was only when the existence of a real breach was established that the international responsibility of a State could be engaged. In the case of the obligations of means referred to in article 20, which required a particular course of conduct, it was sufficient to compare the conduct actually adopted with that required in order to determine whether the obligation had been discharged or breached. However, in considering the obligations of result covered by the present article, it was necessary to compare the result actually attained with the result which the State should have attained. If those two results coincided, the obligation had been discharged; if they did not, it had been breached. All that might seem quite simple, but matters were, in fact, more complicated because there were so many possibilities to be taken into account.

3. In the simplest case, that of an international obligation which required a State to achieve a particular result and left it freedom of choice at the outset as to the means of doing so but only that initial freedom, the State was bound by the choice it made. It could achieve the required result by using one means or another—or even by not actually using any means at all if the result could be attained by omission. The restriction of the State's freedom of choice to an initial freedom of choice could derive either explicitly or implicitly from the instrument establishing the international obligation; there was then no room for doubt. If the State adopted conduct which did not lead it to the achievement of the required result, there was definitive failure to achieve it and a breach of the obligation was established. The restriction in question might, however, not derive from the text establishing the obligation, but could be due to an obstacle in the internal legal order which would rule out any possibility of correcting the effects of the course of conduct adopted at the outset. That was the case when a State chose, as the means of fulfilling its obligation, the enactment of a law, which did not lead to the achievement of the internationally required result but which no judicial authority was empowered to repeal; there was little chance of modifying the situation thus created by internal means and the freedom of choice as to means of fulfilling the obligation amounted to nothing more than initial freedom of choice. The same applied if the means initially chosen by the State was the adoption of a judicial or administrative decision from which there was no appeal. In such circumstances, the general conclusion must be that an international obligation was fulfilled if the result attained by the means chosen by the State at the outset corresponded to the result required by the obligation; otherwise it was breached.

4. That conclusion comprised four elements, all of which were confirmed by an examination of State practice, international jurisprudence and doctrine.

5. First, if, at the outset, the State chose a means which in fact enabled it to achieve the required result, there was, of course, no breach of its international obligation; and its international responsibility was not engaged because it had chosen one means rather than another, even if a

preference for one particular means had been expressed in the statement of the obligation. What counted was that the result had been achieved, even if the means used might seem the least appropriate.

6. Second, if, at the outset, the State chose a means which did not seem to be the most suitable, until it could be established *in concreto* that the State had failed in its task of achieving the result required, the fact that it had not taken the measure which, *in abstracto*, appeared to be most suitable was not sufficient grounds for concluding that the State had breached its obligation or that its responsibility was engaged.

7. Third, if a State took a measure which was, in principle, likely to obstruct achievement of the required result but did not itself create a concrete situation contrary to that result, there was no breach of the obligation and no responsibility of the State so long as no real failure to attain the required result was established.

8. Fourth, if the situation actually created by the State, by one or other of the means open to it, was contrary to the required result, the State could not claim to have fulfilled its obligation by saying that it had done its best to do so, namely, that it had adopted measures that were, in theory, likely to lead to the achievement of the required result.

9. With regard to the first two elements of that conclusion, he drew attention to the State practice which he had described in his sixth report and, in particular, to the reply of the ILO to the Government of the Irish Free State.² He also referred the Commission to the replies of the Swiss and Polish Governments to the request for information made by the Preparatory Committee for the Conference for the Codification of International Law (The Hague, 1930).³ Those replies confirmed the validity of the second element, which was connected with the first. He quoted the opinions of the writers mentioned in paragraph 31 of his report.

10. The third element of the conclusion related to the specific case in which the achievement *in concreto* of a result required by an international obligation had not yet been rendered definitely impossible, but the State had taken action, such as the enactment of a law, which made its achievement difficult. An example was the case of an international treaty obligation requiring one State to refrain from confiscating without compensation the property of the nationals of another State. If the State which had assumed the obligation enacted a law providing that foreigners in general could be subjected to confiscation without compensation, it would obviously be moving towards a breach of its obligation, but there would not in fact be any breach until the nationals of the State to which the undertaking had been given actually became victims of the application of that law and were subjected to confiscation without compensation. Among the cases cited in his report, he drew particular attention to the *Tolls on the Panama Canal* case, which had been brought by the United Kingdom against the United States,⁴ and

² See A/CN.4/302 and Add.1-3, para. 29.

³ *Ibid.*, paras. 29-30.

⁴ *Ibid.*, para. 34.

the *Mariposa Development Company* case.⁵ Those cases showed that, so long as there had been no effective concrete acts incompatible with the internationally required result, but only the adoption of a law making such acts possible, there was no breach of an international obligation.

11. The fourth element of the conclusion related to the fact that a State which had not achieved the required result could not take refuge behind the excuse that it had nevertheless adopted measures by which it had hoped to achieve that result. Thus there was a breach of the international obligation precisely by reason of the conflict between what the State had actually achieved and what it ought to have achieved.

12. He then went on to consider other cases. The one he had been discussing until now was the simplest but, as he had said at the previous meeting, it was not the most frequent. It was undoubtedly more usual for a State which had freedom of choice as to the means of achieving the internationally required result to have such freedom not only at the outset but also subsequently and to be able to achieve the required result by redressing, if necessary, the situation which was incompatible with that result and which had been created by its initial conduct. Most international obligations of result were of that type. States were still often unable to discharge their obligations by remedying, by subsequent conduct, the situation created by their initial conduct because such conduct had in fact made the result definitively unattainable or, as he had already said, because there were obstacles in their internal legal systems, such as the absence of a right of appeal, which prevented them from remedying the situation created.

13. Lastly, there was the type of case in which the international obligation was so permissive that it allowed the State to discharge its international duties by achieving an alternative result instead of the originally required result: for example, a result that was the economic equivalent of the original result.

14. He outlined the substance of the two paragraphs of the text he was proposing for article 21. The first paragraph related to the first case to which he had referred, and the second to the two other cases.

15. Mr. TABIBI said that the numerous examples cited by the Special Rapporteur in his brilliant report and oral presentation made it easier to endorse the principles underlying article 21. The first feature of the text, as it stood, was that it simply required a State to ensure the achievement of a particular result. The second, and very interesting, feature was that it left the State free to choose the means of achieving that result and thus respected the State's internal freedom of action. Indeed, the great value of the proposed article was that it would command acceptance by two schools of jurists: that which believed in the supremacy of international law and in international co-operation, and that which defended the interests of the State itself. Fortunately, the article protected the interests of the international community and international law,

but at the same time allowed the State to adopt whatever means it thought fit in the light of its own particular situation and its economic, social and other requirements.

16. The Special Rapporteur had explained very lucidly the conclusion he had reached after studying the different types of case, namely, cases in which it was left entirely to the State to choose between the means available to it and cases in which the international obligation did at least indicate a preference. The important factor to bear in mind, however, was the way in which a State achieved the required result and fulfilled its international obligations. Gilberto Amado, a former member of the Commission, had once observed that States were like wild beasts. They did many things to satisfy their own needs but they also did many things to avoid international blame. One of the great difficulties, in the present instance, was to determine how a State could be held responsible when it deliberately sought to evade its international obligations by using delaying tactics or by advancing political, social or other pretexts. Fortunately, article 21 comprised two elements: it gave a State which adopted a reasonable attitude an opportunity of choosing the means of achieving a particular result, since only the State itself was fully acquainted with its own political and economic difficulties, and it also safeguarded the interests of the international community. Nevertheless, the text would require careful scrutiny, both by the Commission and by the Drafting Committee, in order to ensure that the interests of the State and those of the international community were equally protected.

17. Mr. VEROSTA said that the Special Rapporteur's introduction of article 21, although excellent, had not been entirely convincing. He wondered whether the rule stated in paragraph 1 of the article was valid in all cases. It might, for example, lead to difficulties in regard to the protection of diplomatic missions or agents. Was there a breach of an international obligation in the event of an assault on a diplomatic agent if the State which had been required to protect him proved that it had done its best in accordance with customary or written international law? To make embassies totally safe, it would be necessary to convert them into veritable fortresses which no one could enter without the permission of the head of mission. He therefore believed that the draft articles should contain a provision derogating from the strict rule set out in article 21, paragraph 1.

18. Practice showed that terrorism was not new. Many Heads of State had been the victims of assault in foreign territory in the relatively recent past. For example, in 1934, King Alexander I of Yugoslavia had been assassinated at Marseilles on his arrival in France for a three-day official visit at the invitation of the French Government. Clearly, the case did not come under paragraph 2 of article 21 since there was so possible remedy to the situation. It was open to question, however, whether the rule stated in paragraph 1 would have been applicable if France had been able to prove that it had taken appropriate measures. Consequently, he wondered whether the Special Rapporteur considered that, in such cases, a host country which failed to ensure the safety of its guests breached an international obligation, even if it was able to prove that it had taken all the necessary precautions.

⁵ *Ibid.*, para. 35.

If not, what were the exceptions to the rule stated in paragraph 1?

19. To sum up, while he agreed that it was the result that counted, he wished some account to be taken of cases in which a State was unable to attain the required result for reasons beyond its control and in spite of having employed all appropriate means in an evident desire to fulfil its international obligations.

20. Mr. AGO (Special Rapporteur) said that he intended to deal in a subsequent article (article 23) with the case of what might be termed, by analogy with municipal law, "wrongful acts conditional on an event". Such wrongful acts were characterized by the occurrence of an external event, such as an attack by individuals on an embassy or a foreign dignitary, which thereby revealed the wrongful nature of the conduct of the State. The purpose of the international obligation was to ensure that the State exercised vigilance to prevent the event from occurring and to protect certain persons from such an occurrence. The event itself was obviously not an act of the State; it could be occasioned by nature or by a third party—an individual or a crowd. The current wave of terrorism gave that situation a special significance, which Mr. Verosta had been right to point out. The act of the State was negligence. So long as no event occurred, such negligence had no effect and it was impossible to determine that the obligation had been breached. But if the event occurred, there was definitely a breach if it could be established that the State could have prevented the event from occurring by exercising greater vigilance.

21. Accordingly, he thought there was no reason for concern about the relationship between the future article 23 and the articles which the Commission was now considering. Obligations whose purpose was to ensure that the State exercised vigilance to prevent certain occurrences could be obligations requiring vigilance to be exercised by a particular organ as well as obligations which left the State free to choose the means by which to exercise such vigilance. It should also be borne in mind that, regardless of the occurrence to be prevented, such prevention could not be absolute. The State could not be required to prevent the event from occurring in any circumstances whatsoever; the obligation merely required it to take every possible step to prevent the occurrence of the event. In other words, the State was not required to do the impossible if the event could not be prevented. It should be noted that the amount of vigilance to be exercised varied according to the importance of the event whose occurrence was to be prevented; an attack on a Head of State in the course of an official visit was not the same as an attack on a private individual. It was thus above all a matter of determining in each case the exact content of the primary obligation breached. There was no contradiction therefore between articles 20 and 21, and the rule on obligations of that nature.

22. Mr. FRANCIS said that he had no basic difficulties with the rules embodied in article 21, which provided that a State was free to choose the means of achieving an internationally required result. He did, however, object to the use of the words "at the outset" in paragraph 1, for in his opinion the State could not be said to have a choice of means only at the outset. It could exercise

its freedom to choose from the great variety of means available to it for the achievement of the internationally required result on a continuing basis.

23. For example, in giving effect to the provisions of article 22, paragraph 2, and article 29 of the 1961 Vienna Convention on Diplomatic Relations,⁶ a State could, as an initial step, launch a public relations campaign to inform people of its obligation to protect the premises of diplomatic missions and to prevent any attack on the person, freedom or dignity of diplomatic agents. Subsequently, however, it might decide that such a campaign was not sufficient. It could then provide additional protection, for example, by assigning special security guards to some or all of the diplomatic missions in its territory. It would thus be exercising a continuing choice of means of implementing the Convention.

24. He therefore suggested that, in paragraph 1, the words "at the outset" should be deleted. Thus, the general rule embodied in article 21 would be stated in paragraph 1 and the exception to the general rule in paragraph 2.

25. He also objected to the use of the word "conduct" in paragraph 1 because he thought that, since article 20 concentrated on the particular course of conduct to be adopted by the State in achieving a certain result, article 21 should emphasize the fact that the State often had a choice of means of achieving a required result. As the Special Rapporteur had pointed out, the State's intention was of little importance when an international result was to be achieved. Thus, although the State's conduct might be consistent with the highest international standards, it might still be inadequate for the achievement of the required result, precisely because of a fundamental defect in the means chosen by the State for that purpose. On the other hand, the State's choice of means might be excellent, but its conduct might be such as to prevent the achievement of the required result. He would therefore prefer article 21 to place greater emphasis on two possible cases: that in which the exercise of the choice of means of achieving the required result was hampered by the State's conduct, and that in which the State's conduct was frustrated by a basically faulty choice of means.

26. He also had some problems with paragraph 2, which dealt with cases in which the international obligation was less strict than the one referred to in paragraph 1, and in which a State whose initial conduct had led to a situation incompatible with the required result was given a subsequent opportunity to rectify that situation. In his opinion, the wording of that paragraph was likely to give rise to misunderstandings. It should be made clear that a breach of the type of international obligation in question was deemed to exist only if the State had failed to take the opportunity of remedying the situation created by its initial conduct which was incompatible with the required result.

27. Mr. USHAKOV said that a State which received a foreign Head of State must take all possible measures to ensure his safety and that its responsibility was engaged if it failed, despite those measures, to prevent an assault. Whatever the circumstances, whether attenuating or aggravating, its responsibility stood.

⁶ *Ibid.*, para. 17.

28. He accepted the principle of the rule stated in article 21, which derived from that set out in article 20. He pointed out, however, that in his commentaries to both those articles the Special Rapporteur had cited as examples mainly measures, whether legislative, administrative or judicial, which the State should take within the sphere of its domestic jurisdiction, whereas obligations of result were generally obligations of international law. They required a State to take measures not only within the sphere of its domestic jurisdiction but also in that of international relations. The Commission should mention that point in its commentary for the benefit of foreign ministries, and not confine itself to quoting examples drawn from the sphere of internal affairs.

29. He approved of the substance of the article proposed by the Special Rapporteur but found the text too descriptive. In paragraph 1, the words "*in concreto*" seemed pointless, for a result was always concrete. The word "particular" also seemed to him to be superfluous. In his opinion, it would be preferable to refer simply to the "result required by the obligation". Nor did he see the need for the phrase "but leaving it free to choose at the outset the means of achieving that result", for it was obvious that, if the obligation required the State to achieve a result, the State was free to choose the means of achieving it. The words "by the conduct adopted in exercising its freedom of choice" seemed equally unnecessary, since a result was always achieved by some form of conduct. In his view, those were explanatory phrases which no doubt had their place in the commentary but were superfluous in an article, which should be confined to stating a rule that could be interpreted in only one way. It would accordingly suffice to say, in paragraph 1, that:

"A breach of an international obligation exists if the State has not achieved the required result."

Perhaps the phrase "Subject to the provisions of paragraph 2" should be added at the beginning of paragraph 1, since paragraph 2 provided for an exception to the rule set out in paragraph 1.

30. In his opinion, paragraph 2 was really concerned with the "act of the State", for it was that which was incompatible with what was required of the State by the obligation. Thus, the case contemplated in paragraph 2 was an application of article 16. If an initial act of a State was incompatible with the required result, the State could achieve that or an equivalent result by another act.

31. He was in favour of referring article 21 to the Drafting Committee, which would no doubt be able to find suitable wording with the help of the Special Rapporteur.

32. Mr. SETTE CÂMARA said that article 21 dealt with obligations of result, by which the State was committed to achieve a particular result by whatever means it chose. In international life, obligations of result were encountered much more frequently than obligations of conduct, which had been dealt with in article 20.

33. In paragraph 19 of his sixth report (A/CN.4/302 and Add.1-3), the Special Rapporteur had noted, in referring to obligations of result imposed by treaties, that, even if a State had initially adopted conduct not in

conformity with an obligation, it might be given another opportunity to correct that conduct in order to achieve the desired result. The Special Rapporteur had, however, pointed out that that situation was different from the one in which a State fulfilled an obligation by whatever means it chose, for recourse to a subsequent course of conduct led to an *ex post facto* correction of a situation which had frustrated the achievement of the internationally required result. It thus partook "of the pathology rather than the physiology of the fulfilment of international obligations". The Special Rapporteur had also referred to another, more radical case, in which the State's initial conduct, which had not been in conformity with the obligation, was completely obliterated by the subsequent adoption of a different course of conduct and in which the required result was achieved by alternative means. An example of such a case was that of reparation for injury.

34. In paragraph 27 of his report, the Special Rapporteur had reached the logical conclusion that the State's choice of the means to be employed could in no case constitute a breach of the obligation in question, and that the breach could consist only in the fact that the State had not in practice succeeded in achieving the result internationally required, by one or other of the means available to it. The four elements of that conclusion, which had been described in paragraph 27, gave a complete picture of the different situations in which a State might find itself in attempting to fulfil an obligation of result. In paragraph 28, the Special Rapporteur had then shown that the conclusion he had reached in paragraph 27 was the obvious consequence of the fact that "in the cases considered, it is only the result actually achieved which counts, and a comparison of that result with the result which the State should have achieved is the only criterion for establishing whether the obligation has been breached or not". The Special Rapporteur's review of the opinions of writers had, moreover, shown that permissiveness had as important a place in article 21 as specificity had in article 20.

35. Although he had no major difficulties with the rules embodied in article 21, he thought that the wording could be improved. For example, the Latin words "*in concreto*" in paragraph 1 could be deleted because they added nothing to the idea of the achievement of "a particular result"; moreover, the Commission usually avoided the use of Latin words in draft articles. With regard to the concept of an incomplete breach introduced in paragraph 2, he believed that a breach of an international obligation, which might be corrected by subsequent conduct, either existed or it did not. There could not be an incomplete breach which was subsequently completed. He therefore suggested that, in paragraph 2, the words "the State has failed to take this subsequent opportunity and has thus completed the breach begun by its initial conduct" should be replaced by the words "the State has failed to take the subsequent opportunity to correct the breach begun by its initial conduct". The Drafting Committee might take those drafting comments into account when it considered article 21.

The meeting rose at 6.05 p.m.

1458th MEETING

Tuesday, 12 July 1977, at 12.10 p.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (continued)* (A/CN.4/285,¹ A/CN.4/290 and Add.1,² A/CN.4/298, A/CN.4/L.255/Add.2 and Corr.1 and Add.3)

[Item 4 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the titles of sections 2, 3 and 4 of part III of the draft articles and the texts of articles 28, 29 and 31 to 34 as proposed by the Drafting Committee (A/CN.4/L.255/Add.2 and Corr.1).

2. Mr. TSURUOKA (Chairman of the Drafting Committee) said that the titles of sections 2 and 3 and the texts of articles 28, 29, 31, 32 and 33 were identical with those which had been submitted by the Special Rapporteur in his fourth report (A/CN.4/285), except that, in the title and text of article 29, the words "between one or more States and one or more international organizations" had been added after the word "treaties" and the word "treaty" respectively as had been done elsewhere in the draft articles.

3. In the title of section 4 and in the title and text of article 34, the word "non-party", which had been used by the Special Rapporteur in his sixth report (A/CN.4/298) to qualify States or international organizations, had been replaced by the word "third" in order to take account of comments made during the Commission's discussions. In addition, for the sake of clarity and precision, the basic distinction between treaties to which only international organizations were parties and treaties to which both States and international organizations were parties had been reflected in two separate paragraphs in article 34 instead of a single paragraph as proposed by the Special Rapporteur.

ARTICLE 28 (Non-retroactivity of treaties) and

ARTICLE 29³ (Territorial scope of treaties between one or more States and one or more international organizations)

* Resumed from the 1451st meeting.

¹ Yearbook ... 1975, vol. II, p. 25.

² Yearbook ... 1976, vol. II (Part One), p. 137.

³ For the consideration of the texts originally submitted by the Special Rapporteur, see 1436th meeting, paras. 41-47, and 1437th meeting, paras. 21-42.

4. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to approve the title of section 2 of the draft and the texts of articles 28 and 29 proposed by the Drafting Committee, which read:

Article 28. Non-retroactivity of treaties

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.

Article 29. Territorial scope of treaties between one or more States and one or more international organizations

Unless a different intention appears from the treaty or is otherwise established, a treaty between one or more States and one or more international organizations is binding upon each State party in respect of its entire territory.

It was so agreed.

ARTICLE 31 (General rule of interpretation),

ARTICLE 32 (Supplementary means of interpretation) and

ARTICLE 33⁴ (Interpretation of treaties authenticated in two or more languages)

5. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to approve the title of section 3 and the texts of articles 31 to 33 proposed by the Drafting Committee, which read:

Article 31. General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

⁴ For the consideration of the text originally submitted by the Special Rapporteur, see 1438th meeting, paras. 28-41.

- (a) leaves the meaning ambiguous or obscure; or
 (b) leads to a result which is manifestly absurd or unreasonable.

*Article 33. Interpretation of treaties
 authenticated in two or more languages*

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

It was so agreed.

ARTICLE 34⁵ (General rule regarding third States and third international organizations)

6. The CHAIRMAN drew attention to the fact that the English text of article 34, paragraph 2, was contained in document A/CN.4/L.255/Add.2/Corr.1.

7. Mr. USHAKOV said he was not sure that it was necessary to refer to a "third" State in paragraph 1. It might be enough to refer simply to "a State" since, in the case of a treaty between international organizations only, a State could only be a third State.

8. Mr. REUTER (Special Rapporteur) said that, at first sight, Mr. Ushakov's comment seemed justified, but he thought it might be better to retain the words "third State" since article 36*bis* would deal with the case of third States which were also not third States by reason of their membership of an international organization which was a party to the treaty.

9. The CHAIRMAN said he thought it would be advisable for the Commission to follow the Special Rapporteur's suggestion.

10. If there was no objection, he would take it that the Commission agreed to approve the title of section 4 ("Treaties and third States or third international organizations") and the text of article 34 as proposed by the Drafting Committee.

11. The text of the article was as follows:

*Article 34. General rule regarding third States and
 third international organizations*

1. A treaty between international organizations does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

2. A treaty between one or more States and one or more international organizations does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

It was so agreed.

⁵ For the consideration of the text originally submitted by the Special Rapporteur, see 1438th meeting, paras. 42-50, and 1439th meeting, paras. 1-23.

12. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text of article 2, paragraph 1 (j),⁶ and the texts of articles 27 and 30 proposed by the Drafting Committee (A/CN.4/L.255/Add.3).

13. Mr. TSURUOKA (Chairman of the Drafting Committee) said that, since article 27, paragraph 2, contained a reference to the "rules of the organization", the Drafting Committee had found it necessary to include in article 2, paragraph 1, a new subparagraph (j) containing a definition of that expression, which was identical with that contained in the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.⁷

14. Article 27, which completed section 1 of part III of the draft articles, corresponded to the article 27 submitted by the Special Rapporteur (A/CN.4/285), the text of which had been rearranged and redrafted to increase its clarity and precision. For example, the first few words of the introductory sentence of the original text had been included in paragraph 3. The former subparagraphs (a) and (b) had been made into two separate paragraphs, namely, paragraphs 1 and 2, each of which incorporated the idea expressed in the second part of the introductory sentence of the original text. Thus, the text of article 27 now corresponded more closely to the text of article 27 of the Vienna Convention.⁸

15. Paragraph 1 restated the rule of the Vienna Convention regarding a State party and, in accordance with the practice followed throughout the draft articles, specified the type of treaty in question, namely, a treaty between one or more States and one or more international organizations.

16. The first part of paragraph 2 stated a similar rule with regard to international organizations by referring to the "rules of the organization". In recognition of the special character of international organizations, the second part of paragraph 2 was intended to provide for an exception to the rule embodied in the first part of that paragraph. The members of the Drafting Committee had not, however, been able to agree either on the need to provide for such an exception or on its scope. Some members had been of the opinion that paragraph 2 should merely state the rule embodied in the first part of the paragraph while others, who had been in favour of including an exception, had nevertheless expressed doubts about the way that exception had been stated. In view of the political importance of the matter, however, the Drafting Committee had decided to adopt the second part of paragraph 2 as it now stood so that the Commission might take a final decision on it.

17. In paragraph 3, the reference to article 46 had been placed in square brackets to show that that article had not yet been considered and in order not to prejudice the question of its adoption.

⁶ See 1429th meeting, foot-note 3.

⁷ *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. 207.

⁸ See 1429th meeting, foot-note 4.

18. Article 30, which completed section 2 of part III, reproduced the title and text submitted by the Special Rapporteur in his fourth report, with some drafting changes made for the sake of greater clarity. The title and text of article 30 thus followed the wording of the Vienna Convention as closely as possible. The introductory phrase of paragraph 1 of the former text had been redrafted and made into paragraph 6 of the proposed new article 30 in order to avoid any unintended interpretations concerning the applicability or non-applicability to international organizations of Article 103 of the Charter of the United Nations. In paragraph 4, (a) and (b), the various possible combinations of parties to successive treaties relating to the same subject-matter had been set out in full. Lastly, as in the case of article 27, references to articles which had not yet been adopted had been placed in square brackets in article 30, paragraphs 3 and 5.

19. He suggested that, as a matter of convenience, the Commission might first consider article 30, then article 2, paragraph 1 (j), and then article 27.

ARTICLE 30⁹ (Application of successive treaties relating to the same subject-matter)

20. The CHAIRMAN read out the text of article 30 as proposed by the Drafting Committee:

Article 30. Application of successive treaties relating to the same subject-matter

1. The rights and obligations of States and international organizations parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. 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.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated [or suspended in operation under article 59], the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between two States or two organizations, or between one State and one organization which are respectively parties to both treaties, the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, as between a State party to both treaties and an organization party to only one of the treaties, as between an organization party to both treaties and an organization party to only one of the treaties, and as between an organization party to both treaties and a State party to only one of the treaties, the treaty which binds the two parties in question governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice [to article 41,] [or to any question of the termination or suspension of the operation of a treaty under article 60 or] to any question of responsibility which may arise for a State or for an international organization from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State or another international organization under another treaty.

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

⁹ For the consideration of the text originally submitted by the Special Rapporteur, see 1437th meeting, paras. 43-50, and 1438th meeting, paras 1-12.

21. Mr. USHAKOV suggested that, in paragraph 4 (a) and (b), the word "international" be added before the word "organization(s)" so as to bring the wording of those subparagraphs into line with that of the preceding articles. He also suggested that, in subparagraph (a), the word "respectively" should be placed before the words "two States" and that, in the French text of subparagraph (b), the words *en cause* should be replaced by the words *en question*, in conformity with the wording used in the rest of the draft. Lastly, he suggested that, at the end of paragraph 5, the words "towards another State or another international organization" should be replaced by the words "towards the State or another State, the international organization or another international organization" in order to take account of the various types of treaty.

22. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to adopt Mr. Ushakov's suggestion that, in order to bring the wording of article 30, paragraph 4, into line with the wording of other draft articles, the word "international" should be added before the word "organizations" and the word "organization" wherever they appeared in subparagraphs (a) and (b).

It was so agreed.

23. Mr. REUTER (Special Rapporteur) said that Mr. Ushakov's comment concerning the place of the word "respectively" in paragraph 4 (a) was justified. He therefore suggested that that subparagraph should read: "as between, respectively, two States, two international organizations or one State and one international organization which are parties to both treaties ...". He also supported Mr. Ushakov's suggestion that, in the French text of subparagraph (b), the words *en cause* should be replaced by the words *en question*.

24. Mr. Ushakov's comment on paragraph 5 also seemed to him to be justified but he feared that the proposed text might not be clear to uninformed readers. He thought it might therefore be better to delete the word "another" and simply say: "towards a State, or an international organization under another treaty".

25. Mr. SCHWEBEL, referring to Mr. Ushakov's suggestion concerning the use of the word "respectively" in paragraph 4 (a), said he thought that the meaning of that subparagraph would be perfectly clear if the word "respectively" was simply deleted.

26. Mr. QUENTIN-BAXTER supported that view.

27. The CHAIRMAN, speaking as a member of the Commission, said that he, too, agreed with Mr. Schwebel. He even believed that the word "respectively" should be avoided in all the draft articles.

28. Speaking as Chairman, he said that, if there was no objection, he would take it that the Commission agreed to delete the word "respectively" from paragraph 4 (a), which would then read: "as between two States, two international organizations, or one State and one international organization which are parties to both treaties, . . .".

It was so agreed.

29. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to adopt Mr. Ushakov's suggestion that, in the French text of article 30, paragraph 4 (b), the words *en cause* should be replaced by the words *en question*.

It was so agreed.

30. The CHAIRMAN then referred to Mr. Reuter's suggestion concerning article 30, paragraph 5, that the words "another State or another international organization under another treaty" be replaced by the words "a State or an international organization under another treaty".

31. Mr. CALLE Y CALLE said he thought the wording of paragraph 5, which corresponded to that of article 30, paragraph 5, of the Vienna Convention, should be retained as it stood in the text proposed by the Drafting Committee.

32. The CHAIRMAN suggested that the Commission should continue its consideration of article 30 and, in particular, of the suggestion made by Mr. Reuter concerning paragraph 5 at the following meeting.

Most-favoured-nation clause

[Item 6 of the agenda]

33. The CHAIRMAN said that the General Assembly, in recommending in its resolution 31/97 of 15 December 1976 that the International Law Commission should complete at its thirtieth session the second reading of the draft articles on the most-favoured-nation clause, had referred to the comments to be received, in particular, from the competent organs of the United Nations and from interested intergovernmental organizations. It seemed to be the General Assembly's intention that the Commission should itself decide to which organs the draft articles adopted by it on first reading at its twenty-eighth session¹⁰ should be circulated for observations.

34. The Commission could either restrict the circulation of the draft to the organizations and agencies listed in the Special Rapporteur's second report¹¹ or extend it to the United Nations bodies, specialized agencies and intergovernmental organizations indicated on the standard list used by UNCTAD.

35. The Enlarged Bureau had recommended that the Commission should use the standard UNCTAD list and that the international organizations and United Nations bodies concerned should be asked to submit their observations on the draft articles by 31 December 1977.

36. If there was no objection, he would take it that the Commission agreed to approve that recommendation.

It was so agreed.

The meeting rose at 1.05 p.m.

1459th MEETING

Wednesday, 13 July 1977, at 10.10 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (concluded) (A/CN.4/285,¹ A/CN.4/290 and Add.1,² A/CN.4/298, A/CN.4/L.255/Add.3)

[Item 4 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (concluded)

ARTICLE 30 (Application of successive treaties relating to the same subject-matter)³ (concluded)

1. Mr. REUTER (Special Rapporteur) suggested that, in the light of the comments made by Mr. Ushakov and Mr. Calle y Calle at the 1458th meeting, the last part of paragraph 5 be worded to read: "towards a State or an international organization not party to that treaty under another treaty".

2. Mr. FRANCIS said that neither the text of the last part of paragraph 5 adopted by the Drafting Committee nor the new version just proposed was satisfactory in English, because they were not sufficiently precise. If the new version was acceptable to the members of the Commission, he would certainly not object to its adoption, but he would prefer a formulation such as "... incompatible with their respective obligations towards another party under another treaty" or simply "... their respective obligations under another treaty".

3. The CHAIRMAN said that a text of the type suggested by Mr. Francis might eliminate the distinction between parties to the treaty in question and parties to another treaty, which was the very essence of the part of the paragraph under consideration.

4. Mr. USHAKOV said he thought the text suggested by the Special Rapporteur clearly conveyed the intended meaning of paragraph 5, namely, that the preceding paragraph would apply without prejudice to any possible incompatibility between the obligations laid on a State or an international organization by the earlier treaty and the later treaty, respectively.

5. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to approve

¹⁰ *Yearbook ... 1976*, vol. II (Part Two), pp. 11 *et seq.*, document A/31/10, chap. II, sect. C.

¹¹ *Yearbook ... 1970*, vol. II, p. 242, document A/CN.4/288 and Add.1, annex III.

¹ *Yearbook ... 1975*, vol. II, p. 25.

² *Yearbook ... 1976*, vol. II (Part One), p. 137.

³ For text, see 1458th meeting, para. 20.

article 30 as proposed by the Drafting Committee, with the amendments made by the Commission.

It was so agreed.

ARTICLE 2 (Use of terms), paragraph 1 (j) ("rules of the organization") and

ARTICLE 27⁴ (Internal law of a State, rules of an international organization and observance of treaties)

6. The CHAIRMAN invited the Commission to consider article 2, paragraph 1 (j),⁵ in conjunction with article 27, as proposed by the Drafting Committee, since the views expressed on article 27 might well affect the definition contained in article 2.

7. He read out the texts proposed by the Drafting Committee, which were worded as follows:

Article 2. Use of terms

[1. For the purposes of the present articles:
...]

(j) "rules of the organizations" means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the organization.

Article 27. Internal law of a State, rules of an international organization and observance of treaties

1. A State party to a treaty between one or more States and one or more international organizations may not invoke the provisions of its internal law as justification for its failure to perform the treaty.

2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty, unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization.

3. The preceding paragraphs are without prejudice to [article 46].

8. Mr. DÍAZ GONZÁLEZ said that, in the Spanish version of article 2, paragraph 1 (j), commas should be inserted before and after the words *en particular*. In addition, the words "and established practice of the organization" should be rendered in Spanish by the words *y la práctica inveterada en la organización*, which would signify a practice that was constantly applied by the organization.

9. The CHAIRMAN said that the secretariat would check the form of words used in the Spanish version of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character,⁶ on which the definition was based.

10. Mr. USHAKOV suggested that, in the French text of article 27, paragraph 2, either a comma should be inserted after the words *l'exécution du traité* or the comma after the words *dans l'intention des parties* should be deleted. He found that paragraph generally acceptable,

⁴ For the consideration of the text originally submitted by the Special Rapporteur, see 1435th meeting, paras. 37-53, and 1436th meeting, paras. 1-40. See also 1451st meeting, paras. 47 *et seq.*

⁵ See 1429th meeting, foot-note 3.

⁶ See 1458th meeting, foot-note 7.

although he would prefer it to refer to the interpretation of the treaty rather than to the intention of the parties.

11. Mr. REUTER (Special Rapporteur) said that he was in favour of the deletion of the comma after the words *dans l'intention des parties*.

12. The CHAIRMAN observed that, in the English version, it would be advisable to retain both the commas.

13. Mr. DÍAZ GONZÁLEZ said that the use of commas in the Spanish version was correct.

14. Mr. SCHWEBEL said that the formulation of paragraph 2 proposed by the Special Rapporteur to the Drafting Committee, namely:

An international organization may not invoke the provisions of the rules of the organization as justification for its failure to perform a treaty,

was preferable to the Drafting Committee's proposal, which provided that an international organization could not invoke its rules as justification for failure to perform the treaty unless performance was subject to the exercise of the functions and powers of the organization. Surely, the performance of treaties entered into by international organizations was invariably subject to the exercise of the powers and functions of the organization. Fortunately, the Drafting Committee's text was qualified by a reference to the intention of the parties, which indicated that it was not the will of the international organization alone that would be legally dispositive. Nevertheless, in the absence of any clear demonstration of the intention of the parties, it could be presumed that their intention was that performance of the treaty by the international organization would be subject to the exercise of the functions and powers of the organization, for the simple reason that such an attitude was the most plausible one, particularly in the case of a treaty between an international organization and a group of States that were members of that organization.

15. He hoped the Commission's report would mention the text he had quoted and indicate that it had attracted some measure of support. Governments should have the opportunity to reflect on that alternative approach, which was more in keeping with article 27, paragraph 1, and, if followed, would clearly inhibit any efforts by an international organization to escape from its international obligations.

16. Mr. SUCHARITKUL pointed out that the term "international organization" included the United Nations. In the case of a treaty between the United Nations and Member States, for example, if a doubt or controversy arose regarding the meaning of a particular provision of the treaty, it was always possible for the United Nations to seek an advisory opinion from the International Court of Justice, which might then be invoked by the United Nations. Moreover, under the definition contained in article 2, paragraph 1 (j), the United Nations could also invoke decisions of the Security Council or resolutions of the General Assembly.

17. Mr. QUENTIN-BAXTER said that the balance between article 6, article 27, paragraph 2, and article 46, which had yet to be considered, was one of the most critical matters involved in the entire set of draft articles.

When an international organization entered into a treaty with a State, both parties probably held similar expectations regarding the relationship between the treaty obligations and the constitutional freedom of the organization concerned. In the case of a disease-eradication programme conducted by an international organization in a particular country, it was unlikely that either the organization or the State envisaged a situation that would cause the organization to claim that it could not carry out its obligations under the arrangements made. It was also possible, however, that, in the case of a treaty with the United Nations, there might be no doubt in the minds of the parties that major policies of the United Nations might, in the course of time, affect details of the treaty.

18. The difficulty which States might have encountered regarding the relationship between article 6, article 27, paragraph 2, and article 46 had been overcome by the insertion of the words “unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization”, an addition which he regarded as very important. That reservation did not create any presumption as to the intention of the parties; it simply pointed out that, in interpreting a treaty between States and international organizations, it was necessary to seek the best indications of what the parties had had in mind, always allowing for the fact that international organizations had limited competence and were composed of States which wished to retain their freedom to direct the organization on major issues, and the fact that a certain respect was required for the actual terms of the treaty.

19. In his opinion, the compromise text proposed by the Drafting Committee formed a useful basis for discussion and comment by Governments.

20. Mr. CALLE Y CALLE said it was true that the Commission could have chosen a straightforward formulation like that contained in article 27 of the Vienna Convention,⁷ but it was important, in the case of treaties involving international organizations, to specify that the obligations assumed by the international organization must be compatible with its internal rules. Generally speaking, an international organization could not invoke its internal rules as justification for failure to perform a treaty. Under the terms of the text proposed by the Drafting Committee, however, if it was apparent from the intention of the parties that performance of the treaty was subject to observance of the internal rules of the international organization, then—and only then—the internal rules of the organization could prevail over the provisions of the treaty, precisely because that was the wish of the parties.

21. Like Mr. Quentin-Baxter, he considered the additional element proposed by the Drafting Committee extremely useful, for it would elicit comments from international organizations and also from States, which had nothing to gain by complicating the life of international organizations.

22. Mr. FRANCIS said that, even with the best of intentions, a treaty could be negotiated and ratified but

something might arise which would cause the situation to be challenged—something that was inconsistent either with the fundamental law of the State or with the constituent instrument and internal rules of the international organization. His position remained unchanged, for he considered that there were circumstances in which, given the particular situation, the constituent instrument and internal rules of the international organization might very well have to prevail over the provisions of the treaty.

23. The CHAIRMAN speaking, as a member of the Commission, congratulated the Drafting Committee on producing a text which to some extent unified the views of the members and also pinpointed the difficulty involved in the very important provisions set out in article 27. He did not wish to take a final position on the wording but thought that it could certainly be approved on first reading.

24. The inclusion in article 2 of a definition of the “rules of the organization” introduced a welcome clarification, but the problem of the definition of an international organization was not solved in the context of article 2, paragraph 1 (j) or of article 27, paragraph 2. Moreover, that problem was further complicated by the formulation employed in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

25. In article 2, paragraph 1 (i), the English text should be aligned with the French and Spanish versions by replacing the words “rules of the organizations” by “rules of the organization”. The words “the organization”, at the end of the definition, should remain as they stood because they were based on a text which had already been adopted internationally. At the end of article 27, paragraph 2, however, the same words could perhaps be replaced by “that organization”, but he would not press for that change.

26. Mr. DADZIE said that he did not object to the text of article 27, paragraph 2, at the stage of first reading. On second reading, however, steps would have to be taken to improve the drafting, for the phrase introduced by the Drafting Committee: “unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization”, could be used to justify failure to perform a treaty. While it did provide some clarification, it should not form part of a rule.

27. Mr. SCHWEBEL said that the phrase “according to the intention of the parties”, in article 27, paragraph 2, although not necessarily adequate, was of critical importance. The absence of such a qualification would open the way for arbitrary repudiation of treaties by international organizations, which could simply adopt resolutions incompatible with them. He hoped the commentary would show that at least some members of the Commission believed that the provision as a whole could be much criticized if it did not include the phrase in question. Some of the examples cited in the Drafting Committee in support of a provision containing no such phrase had clearly demonstrated that other members of the Commission took the view that international organizations should have an unfettered power to repudiate

⁷ See 1429th meeting, foot-note 4.

treaties to which they were parties—a view that he could not accept.

28. Mr. SETTE CÂMARA said that he had doubts about the parallelism between paragraphs 1 and 2 of article 27 because the relevant rules of an international organization were the source of its treaty-making capacity. An international organization might be in a position to invoke its internal rules in the case of treaties concluded *ultra vires*, under the terms of article 47 of the Vienna Convention. He fully recognized that that was a remote possibility but it should not be overlooked.

29. At the same time, he wished to congratulate the Drafting Committee on a very good compromise formulation, which would help to elicit comments from Governments.

30. The CHAIRMAN said that one of the useful features of the draft was that article 27, paragraph 3, referred separately to article 46, which would show the reader that the Commission still had to consider that article. The commentary would doubtless mention some of the problems arising in connexion with the relationship between article 27 and article 46.

31. If there was no objection, he would take it that the Commission agreed to approve the text of article 27 and that of article 2, paragraph 1 (j), as proposed by the Drafting Committee.

It was so agreed.

32. Mr. USHAKOV said he wished to point out that the words “according to the intention of the parties”, even if they referred only to the intention of the contracting parties, meant that it would be necessary to interpret the treaty. He did not see what else they could mean.

The meeting rose at 11.30 a.m.

1460th MEETING

Thursday, 14 July 1977, at 10.10 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

State responsibility (*continued*)*
(A/CN.4/302 and Add.1-3)
[Item 2 of the agenda]

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

ARTICLE 21 (Breach of an international obligation requiring the State to achieve a particular result)¹ (*continued*)

1. Mr. THIAM agreed with Mr. Ushakov that the expression “*in concreto*” in paragraph 1 should be deleted since a result could only be concrete. He said that the words “but leaving it free to choose at the outset the means of achieving that result” and “by the conduct adopted in exercising its freedom of choice” should also be deleted. The statement should simply read:

“A breach of an international obligation exists if the State has not achieved the internationally required result”.

2. It seemed to him that paragraph 2 introduced the idea of means whereas article 21 dealt exclusively with obligations of result. He wondered about the meaning of the expression “breach begun” since, in his view, a breach either existed or it did not. He nevertheless agreed with those who had proposed that article 21 be referred to the Drafting Committee.

3. Mr. ŠAHOVIĆ said that, in principle, he favoured the solution proposed by the Special Rapporteur in article 21, but he thought that a clearer idea should be had of the Special Rapporteur’s intentions regarding the continuation of the work before a final position was taken on the article. Articles 20 and 21 seemed logical to him and they accorded with the existing position in regard to State practice and international law in general. He wondered, however, whether the Special Rapporteur had succeeded in reflecting in those articles the wealth of complex propositions which he had put forward in his report. In his opinion, a number of questions raised in the report had not been answered in article 21, and paragraph 2, in particular, did not take account of all the problems to which the Special Rapporteur had himself referred in his report.

4. He considered, first, that the content of the international obligation referred to in article 21 should be defined in that article. He further considered that article 21 modified to a certain extent the definition of a breach given in article 16,² which was perhaps too general to meet the needs of the draft. He wondered whether the cases covered by article 21 were exceptional or an intrinsic part of the obligation of result. In that connexion, the Special Rapporteur had given examples drawn from State practice, but one might ask whether the circumstances they involved were a logical consequence of the obligation of result and always occurred with every obligation of that kind, or whether they represented a third category of obligation.

5. He also wondered whether the remedy referred to in paragraph 2 was a legal remedy in the usual sense of the term or whether it was inherent in the obligation of result. In his view, paragraph 2 left unanswered a number of questions concerning the situations described.

6. It was necessary to determine how and when an initial course of conduct led to a situation incompatible with the required result. It was also necessary to determine how and when a treaty obligation permitted the

¹ For text, see 1456th meeting, para. 37.

² See 1454th meeting, foot-note 2.

* Resumed from 1457th meeting.

State to rectify such a situation. The Special Rapporteur dealt in chapter III, section 7, of his report with the question of exhaustion of local remedies, which was linked to article 21. An article on exhaustion of local remedies would not, however, fully answer the questions raised in article 21. In his opinion, those questions should be answered not only in the commentary but also in the article itself.

7. The Special Rapporteur had considered the possibility of placing articles 20 and 21 after articles 16, 17 and 18 when the draft was examined on second reading.³ In his own view, it would likewise be more logical to place article 21 before article 20 since the kind of obligation covered by article 21 was much more frequent than the kind covered by article 20, as the Special Rapporteur had himself said.

8. Mr. CALLE Y CALLE said that he fully agreed with the basis for article 21, which dealt with obligations of result. The Special Rapporteur, with clear and persuasive reasoning, had discussed in his report a number of examples of treaty obligations and also obligations under customary law which, although not formulated in precise terms, none the less required the achievement of a particular result. Moreover, in speaking of equivalent or alternate results, the Special Rapporteur had used a term that in English might seem at first glance to relate more to medicine or to the pharmacopoeia but was nevertheless juridical, i.e. local remedies.⁴ It would acquire even greater importance when the Commission came to consider the exhaustion of local remedies as a prerequisite for the international responsibility of the State. Quite rightly, it was the comparison of an ideal result with the actual result which revealed whether or not the international obligation had been breached. In his view, doctrine, practice and jurisprudence all demonstrated the firm foundations of the rule that was now being proposed.

9. As to the drafting, the words "at the outset" in paragraph 1 could be deleted without any loss of meaning, for they implied that the State had an initial freedom of choice but that, later, the obligation would indicate the means of achieving the result. In fact, the State had freedom to choose the means throughout the existence of the obligation. Similarly, the word "internationally" might be deleted from the paragraph since the implication was that two results were involved—a national result and an international result—whereas it was quite clear from the beginning that the paragraph concerned an international obligation.

10. Paragraph 2 referred to cases in which the obligation permitted the State to remedy a situation incompatible with the required result, either through new conduct or by achieving an equivalent result. The words "in addition" should be deleted for they gave the impression that there was an additional requirement for the existence of a breach of the obligation, which was not in fact the case. Also, even though a breach could be a composite or complex act, it would be sufficient to say that the State had "... completed the breach represented by its initial conduct"; in other words, the word "begun" should be deleted.

11. It should also be remembered that the breach did not exist until the result was final or definitive, as the Special Rapporteur himself had pointed out in his report.⁵ It would therefore be advisable to seek a way of incorporating the idea of final or "definitive" result in the text of paragraph 2.

12. Mr. VEROSTA said that he did not altogether see what end the Special Rapporteur had in view, but he continued to think that articles 20 and 21 were a logical complement to article 16. He wished to draw attention to the time factor, which played a very important role in article 21, since it was possible to distinguish between different stages in the breach of the international obligation referred to in that article. Article 21 stated that a breach of an international obligation existed if the State had not in fact achieved the result required by the obligation, but it also stated that a breach existed if, after initial conduct which had led to a situation incompatible with the result required, the State had not taken the subsequent opportunity afforded to it of rectifying that situation, thereby completing the breach begun by its initial conduct.

13. He would be most interested to know the content of the article which the Special Rapporteur had promised to devote to the "time of the breach of an international obligation". It would be very useful for the Drafting Committee to have a rough idea of what that article would contain before taking a final position on article 21.

14. In conclusion, he drew attention to the link existing between article 16, articles 20 and 21 and the articles that would be devoted to exhaustion of local remedies and the time of the international breach.

15. Mr. EL-ERIAN said that, having dealt in article 16 with the existence of a breach of an international obligation, in article 17 with the irrelevance of the origin of the international obligation breached, in article 18 with the time element and in article 19 with régimes of responsibility, the Special Rapporteur had now moved on, logically and systematically, to the content of the international obligation breached, which formed the subject of articles 20 and 21. Mr. Šahović's point about articles 20 and 21 being placed after articles 16 to 18 would, of course, have to be dealt with by the Drafting Committee but, for his own part, he preferred the arrangement followed by the Special Rapporteur, who was to be congratulated both on the scholarly commentary and on the drafting of article 21.

16. The present article was ambitious in that it covered a large range of cases and the various possibilities within that range. Among the examples of treaty obligations, useful reference could be made in the commentary to obligations under the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.⁶ For example, article 23 of that Convention, concerning inviolability of premises, dealt with the type of situation envisaged by the Special Rapporteur.

17. Paragraph 1 of the article was perfectly acceptable. Paragraph 2 covered a complex situation in which the

³ See 1456th meeting, para. 23.

⁴ See for example A/CN.4/302 and Add.1-3, para. 21.

⁵ *Ibid.*, para. 45.

⁶ See 1458th meeting, foot-note 7.

State had the possibility open to it of achieving an alternative result but failed to do so. In paragraph 45 of his report, the Special Rapporteur had said that "it must be established that the State, not having achieved the priority result, has also failed to achieve the alternative result, namely, full and complete compensation of the victims for the injury sustained". Compensation was a separate problem that related to all types of responsibility. The principle underlying compensation was reparation *in rem*, or restoration of the *status quo ante*. If the situation could not be restored, the injured party had to be compensated. His difficulty lay precisely in the Special Rapporteur's assertion that failure to comply with the obligation to make compensation itself generated responsibility. In fact, a distinction must be made between responsibility and compensation. He would be most grateful to know whether the Special Rapporteur considered that, in certain situations, compensation represented an alternative result.

18. Finally, he would venture to suggest that, in view of its complexity, paragraph 2 should form a separate article.

19. Mr. SCHWEBEL said that he greatly appreciated the acuity, legal imagination and scholarship of the Special Rapporteur's magisterial draft on what was a fundamental area of international law. Unfortunately, he was at a disadvantage in that he had not been present at the creation of the bulk of the set of articles and it was difficult to contribute to a discussion on a few of them without a full understanding of the whole, an understanding that he did not yet have.

20. Some of the provisions of the articles so far adopted seemed straightforward and even appeared to be a statement of the obvious—for example, articles 1, 2, 3, 4, 16 and 17. However, the draft was not at all simple. Its lucidity reflected subtlety, sophisticated analysis and expert legal craftsmanship. Some provisions, notably articles 5 to 15, clarified and constructively developed matters that were not in themselves altogether clear and uncontroverted. Other provisions, for example, some of those of article 18 and possibly those of article 21, paragraph 2, went into considerably more detail than was to be expected at such a high level of international legal theory. Yet others, like the provisions of article 18, paragraph 2, and article 19, adopted bold positions which had been the subject of both favourable and adverse comments by a large number of Governments represented in the Sixth Committee. It remained to be seen whether the Commission would wish to reconsider those particular provisions.

21. Article 21, like article 20, contained elements of both simplicity and complexity. Its substance and the distinctions so ably drawn in the commentary were persuasive. The result was simple but the supporting analysis was not. However, some members of the Commission had succumbed to the temptation to simplify still further the terms of article 21, a course which might lead to a very inadequate text. For instance, if paragraph 1 was reworded to read:

"A breach of an international obligation requiring the State to achieve a specified result exists if the State has not achieved the specified result",

it would indeed be a statement of the obvious. Undue pruning of the text might cause it to lose most of its point and would certainly fail to give a sense of the depth of analysis involved in its conception. He questioned whether it was advisable to aim at a draft whose true meaning and profundity would become clear only after a study of the commentary.

22. The wording of paragraph 1 proposed by the Special Rapporteur was entirely satisfactory, but he recognized the value of the comments by Mr. Šahović and Mr. Verosta that it was difficult to adopt a final position until a clear view could be gained of the draft as a whole. A compromise version between the Special Rapporteur's excellent formulation and the suggestions for simplification that had been made in the course of the discussion might read:

"A breach of an international obligation requiring the State to achieve a specified result but leaving it free to choose the means of achieving that result exists if, by the exercise of its freedom of choice, the State has not in fact achieved the required result".

In any event, the Drafting Committee would doubtless be able to arrive at a suitable wording.

23. It was particularly reassuring to note the emphasis laid, in paragraphs 27 and 38 of the report and in foot-note 88, on the importance of States actually implementing their international obligations, not only in law but also in fact. There appeared to be a disturbing tendency among some States to assume far-reaching international obligations which called for domestic performance; however, the enactment of, or reliance upon, the apparently requisite law—even constitutional law—was coupled with failure to observe those international obligations. A very serious question was whether some of the parties to the International Covenants on Human Rights genuinely fulfilled their international obligations, and the question became even more serious when States resisted international means of monitoring their performance.

24. Mr. REUTER said that he unreservedly shared the Special Rapporteur's approach with regard to the substance of the matter. In his view, articles 20 and 21 reflected a line of thinking which sought to shape the question of responsibility by reference to the characteristics of the obligation. Paragraph 1 of article 21 did not give rise to any problem, in his view. Paragraph 2, on the other hand, left him with the impression that the Special Rapporteur had telescoped the development of his argument and that an intermediate stage had been covered a little too quickly.

25. As was clear from the commentary, the Special Rapporteur had entered, in that case, into the area of what he had termed the "complex act", where the obligation involved a series of actions or omissions. In that connexion, the Commission would recall that Professor Rolin, in pleading in the *Barcelona Traction* case,⁷ had charged Spain with a series of separate international wrongs and, in addition, with an even more serious

⁷ *I.C.J. Pleadings, Barcelona Traction, Light and Power Company, Limited (New Application: 1962)*, vol. VIII, pp. 11-54.

wrong which he had termed the “global wrong” which was made up of all the individual wrongs combined. According to him, it was possible for a specific wrongful course of conduct to be constituted by the aggregate of separate wrongful courses of conduct.

26. The Special Rapporteur had already given other examples of a global wrong when he had referred in his fifth report, in proposing the text which had become article 18, to the wrong of systematic discrimination against a group of persons resulting from the accumulation of a number of particular acts which, taken individually, did not in themselves necessarily constitute international wrongs.⁸

27. He therefore proposed the following provision, which might be the subject of a separate article or be inserted between paragraphs 1 and 2 of article 21, since it established a logical link between the two:

“Where the obligation of the State relates to a series of actions or omissions which must be considered globally in their final result, the breach of the obligation is not established in regard to international law until after the final action or omission.”

28. That provision, of which the existing paragraph 2 was only one specific case, reflected the Special Rapporteur’s idea that a breach begun was not a breach. It also accorded with the notion of a global wrong which Professor Rolin had sought to establish, since the global wrong had arisen only after the last element in the series of wrongful acts which constituted the breach.

29. The Special Rapporteur, however, had not selected the case of an incipient wrong where each new act was added to the previous one so as to constitute, in the end, a global wrong. He had selected one particular example of that case, namely, where one act among those constituting the wrong materially consummated the whole of the injury at the outset without the wrong being constituted legally. He had thus introduced the notion that, in the series of acts that would constitute a wrong, there were material acts and remedies, the latter representing one element of the wrong.

30. In his own view, it was difficult to introduce abruptly, into the notion of a complex wrong, the question of exhaustion of local remedies since, in international practice, the rule of exhaustion of local remedies was of a more or less empirical nature. Charles de Vischer had said that the rule was one of substance—which was the Special Rapporteur’s theory—but also one of procedure.

31. Before taking a position on that particular question, he would like to know the practical consequences of the Special Rapporteur’s approach regarding the scope of the obligation to exhaust local remedies. He trusted that the question would be examined thoroughly since the theory of exhaustion of local remedies was still obscure. In addition, he felt that article 21, paragraph 2, should be preceded by a more general provision, formulated in the way he had indicated earlier and expressing the idea of a complex wrong—which was the Special Rapporteur’s idea—since in the existing paragraph 2 the Commission

was already dealing with a very special case, namely, the combination of material acts and remedies as the act which constituted a wrong.

32. Mr. DADZIE said that, although the substance of article 21 proposed by the Special Rapporteur could not be criticized, the wording of the article did give rise to some difficulties. Thus, he agreed with Mr. Ushakov⁹ and Mr. Francis¹⁰ that the Drafting Committee should examine the use of the words “*in concreto*” and the words “at the outset” in paragraph 1. In particular, he thought that the words “at the outset” lacked the necessary legal precision. With regard to the word “exists” in the third line of paragraph 1, he shared the view expressed by Sir Francis Vallat that the Drafting Committee should consider the possibility of replacing it by the word “occurs”. Similarly, the Drafting Committee might look into the possibility of replacing the word “conduct” in paragraph 1 by the word “method” in order to stress the fact that article 21 related not to obligations of conduct but to obligations of result and the means of achieving them.

33. In paragraph 2, he objected to the use of the words “a situation incompatible with the required result”, and would prefer them to be replaced by the words “a situation not in conformity with the required result”. He also had some slight difficulty with the word “rectify”, which, in his opinion, was more commonly used to refer, for example, to the amendment of a document. He therefore suggested that the word “rectify” should be replaced by the word “remedy”, which would make it clear that, if a State had followed one method in trying to achieve a required result but that method had failed, it could remedy the situation it had created by adopting another method. His reaction to the words “new conduct” in the third line of paragraph 2 was the same as to the use of the word “conduct” in paragraph 1. He therefore suggested that the words “new conduct” should be replaced by the words “new method”.

34. In conclusion, he said that he fully supported the text suggested by Mr. Schwebel, although he thought that the word “occurs” would be more appropriate than the word “exists”.

35. Mr. QUENTIN-BAXTER said that he supported the view expressed by Mr. Thiam concerning the use of the word “conduct” in article 21, paragraph 1, which might enable States to invoke their conduct as an excuse for not having achieved a required result. In his view, therefore, the Commission might delete the word, and could probably draft paragraph 1 in as straightforward a manner as article 20. The paragraph would thus state a principle more or less parallel to the one enunciated in article 20.

36. That having been said, he believed that the reference to the conduct of the State in article 21, paragraph 1, indicated that the relationship between obligations of conduct and obligations of result was more subtle than the Commission had yet recognized. Indeed, since jurists not infrequently had to determine whether, in a specific

⁸ *Yearbook ... 1976*, vol. II (Part One), pp. 22-23, document A/CN.4/291 and Add.1-2, paras. 65-66.

⁹ 1457th meeting, para. 29.

¹⁰ *Ibid.*, para. 22.

case, a State had had an obligation of conduct or an obligation of result, and since they had often found that the State did in fact have an obligation to achieve a particular result, it might be concluded that article 21 dealt with the typical case and article 20 with the exception. However, he was not sure whether that conclusion was right.

37. In that connexion, he referred to the award rendered by the Mexico-United States General Claims Commission in the *Janes* case,¹¹ in which a man had been killed in circumstances which the authorities could not have been expected to prevent and in which the police had failed to take proper steps to apprehend the culprit, who had gone unpunished. During the discussion of the claim brought before that Commission, one of its members had argued that the conduct of the authorities had amounted to a "condonation" of the offence. The member in question had thus considered that what was important in that case was not the failure of the State to achieve the result of apprehending, trying, convicting and punishing the criminal, but rather the fact that the conduct of the authorities of the State against which the claim had been made had not been consistent with that State's international obligations.

38. He had given that example in order to show that the assessment of a State's conduct was often a decisive factor in determining whether or not that State had breached an international obligation, and that the situations contemplated in article 21, paragraph 2, could also arise in relation to obligations falling within the scope of article 20. Other examples were a case in which soldiers had indeed sought to protect foreigners but had failed to do so because they had merely stood by, and a case in which soldiers who had been sent to protect foreigners had in fact caused them injury by joining in an attack on them. There could be no doubt that the direct attack by the soldiers on the people whom they were supposed to protect constituted a breach of an obligation of conduct. It was, however, more difficult to determine the position in the first case, where the soldiers had simply failed to protect the foreigners in question, but he thought that, in assessing the international responsibility of the State, the element of conduct would again be decisive.

39. In his view, it was a short step from the consideration of obligations of conduct and obligations of result to the consideration of the question of complex acts, with which the Commission had dealt in article 18. In a case similar to the ones to which he had just referred, in which a foreigner was injured by a private individual, it could not be said that the State was directly involved because foreigners ran the risk of injury in any country they visited. When, however, the State reacted to the situation, sought the alleged assailant and brought the case before a court, whose decision was then reviewed by a higher court, a complex act could be said to have occurred and the conduct of the State could then be assessed only in terms of that complex act.

40. Similarly, if an administrative tribunal took an improper decision by denying a foreigner mining rights

to a certain piece of land, the responsibility of the State could be said to be engaged only when the right of recourse to another administrative tribunal had been exercised and when it had been determined that the latter tribunal had also failed to take the proper action. In such a case, a breach of an international obligation could be said to exist according to the provision in article 21, paragraph 1. Yet, it was undoubtedly also right to say that, in every case in which a breach of an international obligation existed, the State was required to take the necessary action to make good that breach. He therefore found the wording in article 21, paragraph 2, which read: "in cases where the international obligation permits the State whose initial conduct has led to a situation incompatible with the required result to rectify that situation", to be insufficient, and he did not think the Commission should take a final decision on it until it had considered article 22, relating to the exhaustion of local remedies, and had defined the boundaries of a complex act or, in other words, the relationship between an initial breach of an international obligation and what followed.

41. The CHAIRMAN, speaking as a member of the Commission, compared articles 20 and 21 to the keystone of an arch; the Commission had one half of the arch and was waiting for the other. In the meantime, it was difficult for it to keep the keystone in position and to see the overall structure of the draft articles. However, some of the problems which had arisen in connexion with article 21, in particular, could be solved by referring back to article 18, dealing with complex acts, and by looking forward to article 22, dealing with the exhaustion of local remedies.

42. The question of the time of occurrence of the breach, which would have to be reserved for future consideration, therefore had to be borne in mind when article 21 was considered. Another important question to be kept in mind was the fact that the difference between obligations of conduct and obligations of result could easily become blurred. The wording of articles 20 and 21 therefore had to be general enough for the nature of the obligation in question to be determined, and the provisions of the appropriate article applied, in each individual case.

43. In support of his view that the nature of the obligation was the essence of the problem to be solved in articles 20 and 21, he referred to the example of denial of justice, which for the sake of convenience could be called a defect in the way justice was administered by the courts of a State. Although it was obvious that the State had an obligation to ensure that justice was properly administered, a breach of that obligation could not be said to have occurred until it had been shown that the courts had collectively failed to carry out their respective duties. An obligation of a different nature might, however, be involved if, in a particular case, a specific obligation had been breached. For example, a treaty might lay down an obligation for a State to allow certain aliens to enter its territory. If the immigration authorities of that State refused to allow the aliens in question to enter the country, it could be said that the obligation embodied in the treaty had been breached. Whether such a breach could be rectified by subsequent action was a matter that had to be considered in the light of the interpretation to be put on the nature of the obligation. Moreover, if the

¹¹ *Yearbook ... 1972*, vol. II, pp. 103-105, document A/CN.4/264 and Add.1, paras. 83-85.

treaty also provided for the exhaustion of local remedies, the nature of the obligation might change again, because the judiciary of the State would have to ensure that there were adequate remedies for the aliens in question if they were, for instance, unlawfully detained. All those factors would have to be taken into account in determining the time when the breach had actually occurred.

44. Referring to the commentary to article 21 (A/CN.4/302 and Add.1-3, chap. III, sect. 6), he said that, although it provided a wealth of information, it did not contain very many examples of State practice. The draft articles would, however, be of valuable assistance to many persons and, in particular, to ministry of foreign affairs officials. He therefore suggested that it should be indicated in the report that, although the commentary did not contain very many examples of State practice, the members of the Commission had based their conclusions on their experience of the development of that practice. He also suggested that, when Governments were requested to comment on the draft articles, they should also be requested to provide further examples of State practice in order to assist the Special Rapporteur and reinforce the experience of the members of the Commission.

45. Mr. USHAKOV stressed the importance of the distinction between obligations of means or conduct and obligations of result. With regard to obligations of result, he was more and more convinced that the emphasis should be placed not on a particular course of conduct but on a particular act. In the *Tolls on the Panama Canal* case, referred to by the Special Rapporteur in paragraph 34 of his sixth report, there had been a particular course of conduct on the part of the United States Government—the enactment of a law—but no act leading to a result that was not in conformity with the result required by the international obligation in question, since that law had not been applied. When the law was amended, the international obligation had not been breached. He therefore considered that a breach of the international obligation existed, not in the case of conduct by the State which did not in fact achieve the internationally required result, but in the case of an act by the State which was not in conformity with the result required of it by that obligation. In the case in point, there would have been a breach of the international obligation if the United States Government had levied tolls in application of the said law.

46. Referring to Mr. Reuter's remarks to the effect that the breach of an international obligation could arise out of a series of actions or omissions, in the case of a complex act, he pointed out that a single act would suffice in such a case. Where an official of the customs authorities of a State party to GATT charged duty on foreign products in breach of article III of the Agreement, there was an act conflicting with the achievement of the internationally required result, giving rise to a breach of the provisions in question. If that act was not rectified, the breach would exist from the time of the first act. If it was rectified, for example, by rescinding the mistaken decision, the second act would cancel out the first.

47. Finally, he referred to the case of a receiving State which did not accede to the request of a State for its embassy to be placed under the protection of the local police. As long as no unauthorized person entered the

embassy premises, there was no act that conflicted with the internationally required result but merely a course of conduct by the receiving State. That conduct did not of itself give rise to a breach of an international obligation.

The meeting rose at 1.05 p.m.

1461st MEETING

Friday, 15 July 1977, at 10.10 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

State responsibility (*continued*) (A/CN.4/302 and Add.1-3) [Item 2 of the agenda]

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

ARTICLE 21 (Breach of an international obligation requiring the State to achieve a particular result)¹
(*concluded*)

1. Mr. AGO (Special Rapporteur) said he would sum up the debate on article 21, first reviewing the principal comments made by the members of the Commission and then taking up some general matters.

2. At the outset (1457th meeting), Mr. Tabibi had stressed a fundamental point: breaches of international obligations varied according to the form of the obligations. Mr. Verosta had made excursions into the past and the future (1457th meeting) and had brought out the close link between article 21 and article 16² (1460th meeting), while Mr. Francis (1457th meeting) had dwelt on a very important point, namely, that a distinction must be made between the means a State chose to achieve the required result and its actions or omissions after making that choice. Sometimes the choice was excellent but the ensuing actions or omissions prevented achievement of the required result.

3. Mr. Ushakov had shown (1457th meeting) the importance of article 21 from the point of view of both the time and the circumstances of the breach. He had spoken about the commentary to the article and also about its text, and several of his drafting comments had touched on matters of substance. Finally, he had rightly pointed out (1460th meeting) that the act of the State referred to in

¹ For text, see 1456th meeting, para. 37.

² See 1454th meeting, foot-note 2.

article 16 and the action or omission of the State to which article 18 referred were notions which did not necessarily coincide. Mr. Sette Câmara had made some valuable drafting comments (1457th meeting), particularly with regard to the expression "*in concreto*". In a pertinent comment, which merited the Commission's attention, Mr. Thiam had questioned (1460th meeting) whether it was really appropriate to introduce the idea of means in a provision relating to obligations of result. He had also asked what was meant by the reference in article 21, paragraph 2, to the beginning of a breach. It must be admitted that the wording in question required, at the least, some clarification.

4. After stressing the importance of distinguishing between international obligations according to their nature when dealing with the question of a breach, Mr. Šahović (1460th meeting) had suggested a change in the order of the draft articles. He had also expressed the view that article 16 was rather too general. Mr. Calle y Calle (1460th meeting) had commented mainly on points of drafting and translation.

5. As Mr. Reuter (1460th meeting) had elegantly put it, his intention in drafting article 21 had been to shape the question of responsibility (for the breach) by reference to the characteristics of the obligation. Mr. Reuter had also said that, in his opinion, there was a gap between article 16 and articles 20 and 21, and he had suggested that it should be filled in article 21. He (the Special Rapporteur) considered, however, that account must also be taken of article 18 and, to that end, he would later draft a provision on the duration of the wrongful act. Mr. El-Erian (1460th meeting) had expanded on the question of alternative results, observing that the alternative result which a State might be authorized to produce when the original result was no longer attainable very often took the form of compensation or reparation. It must be emphasized that such cases involved the fulfilment of a primary obligation, which had nothing to do with reparation for an internationally wrongful act.

6. Mr. Schwebel (1460th meeting) had taken the view that the wording of article 21 should be somewhat simplified. He agreed, but wanted to ensure that none of the essential elements of the provision were eliminated. Mr. Dadzie (1460th meeting) had concentrated on the drafting and had advocated the use of the word "method" as corresponding more or less to the word *moyen*. He had spoken of a "new method" designed to remedy a situation not in conformity with the internationally required result. Mr. Quentin-Baxter (1460th meeting) had shown, on the basis of judicial decisions, that the difference between the two types of international obligation envisaged was more subtle than it appeared. He had maintained that the decisive factor was the meaning to be given to the expression "complex act", and it would, in his opinion, be necessary to define the relationship between the initial and the subsequent conduct of the State in each particular case.

7. Sir Francis Vallat had referred (1460th meeting) to article 18 and pointed out that one and the same treaty provision could impose on a State both obligations of conduct and obligations of result. He had stressed the importance of the notion of a complex act for the purposes

of articles 21 and 22 and had suggested that Governments be requested to provide the Commission, for its second reading of the draft, with additional information on international judicial decisions and State practice, since the examples given in the report under study, although numerous, were mainly limited to certain countries and certain types of case.

8. Turning to more general matters, he observed that all the members of the Commission had shown that they were fully aware of the importance of articles 20 and 21 and of the distinction made, for the purpose of establishing the existence of a breach, between the two types of international obligation to which they applied.

9. As to the order of the articles, it seemed out of the question to place article 21 before article 20, since it was logical to proceed from the more simple to the more complex. Although it would be possible to place articles 20, 21 and 22 (and, perhaps, future articles 23 and 24) immediately after article 18, so that the present article 19 would become the final provision of chapter III, articles 20 and 21 could not be placed immediately after article 16, since articles 16, 17 and 18 formed a logical sequence and articles 17 and 18 were the indispensable premise for the subsequent articles.

10. In that connexion, he pointed out that the chapter under study dealt with the objective aspect of an internationally wrongful act, in other words, the breach of an international obligation, whereas chapter II dealt with the subjective aspect. Article 16, the first article of chapter III, contained an entirely general rule, the wording of which could perhaps be improved. In that provision, the Commission had referred to the "act of the State", and not to its conduct, whether action or omission. It could be seen from article 18 that there were acts of a State which did not involve an instantaneous action or omission and which could extend over a period of time (continuing acts), or consisted of a set of similar actions or omissions relating to separate cases (composite acts) or of a plurality of different actions or omissions by State organs relating to the same case (complex acts). Article 18 dealt first with the simplest case: that of an act constituted by an instantaneous action or omission. The article stated that there was a breach of the obligation in that case if the instantaneous act was performed at a time when the obligation was in force. The article went on to deal with acts having a continuing character. In order for the obligation to be breached, it was enough for it to have been in force at any time in the period during which the act had continued. The article then dealt with the case of a composite act. If an international obligation prohibited a discriminatory practice, the State could not be held to have breached that obligation merely because it had committed an isolated act of discrimination against one person. No internationally wrongful act and, thus, no breach of the international obligation existed until cases of discrimination had become sufficiently numerous to constitute a discriminatory practice. The internationally wrongful act then comprised all the instances of such conduct of the State, from the first to the last. Nevertheless, if the international obligation arose during that process, only the cases of discrimination subsequent to the creation of the obligation would come into consideration.

There was thus a breach of the obligation only if such subsequent cases alone were sufficient to constitute the "discriminatory practice" prohibited by the obligation.

11. The last paragraph of article 18 covered the case of a complex act. Such an act involved either successive action by several organs in the same case or repeated action by one organ with, in all cases, a plurality of actions or omissions. Such an act occurred, for example, when a foreigner who had applied to a court of first instance to settle a dispute under internal law had his case dismissed because he was a foreigner or because the court denied him the right to defend himself or gave a judgment that was obviously and purposely unfair. Such conduct on the part of a court was not, however, sufficient to constitute a denial of justice in the strict sense of the term. It was only when the judicial organs before which the case was subsequently brought had acted in the same way as the court of first instance that the denial of justice could be established. There was then a "complex act" comprising a plurality of actions or omissions. For it should be noted that an international obligation requiring the State not to deny justice to foreigners was usually not aimed at the conduct of a particular judicial organ but at the judicial system as a whole and its ability to ensure proper administration of justice in regard to foreigners.

12. The debate on article 21, paragraph 2, had to some extent run over on to article 22, which covered cases in which the international obligation was established for the benefit of individuals and in which the achievement of the internationally required result therefore called for the co-operation of the individuals concerned. Article 21 did not cover such special cases. But international obligations which the State could still discharge by rectifying, by subsequent conduct, a situation which had been created by its initial conduct and which was incompatible with the required result did not relate only to the treatment of individuals. Even in the case of obligations requiring a result which directly concerned only States themselves, a State might have to rectify, by the action of a higher authority, the unsatisfactory action of a lower authority. In such a case, there could be no question of the co-operation of individuals or of the exhaustion of local remedies by the individuals concerned.

13. At the 1460th meeting, Mr. Quentin-Baxter, taking up a comment by Mr. Thiam, had questioned whether it was appropriate to introduce the idea of means in a provision concerning obligations of result. In his own view, it was obvious that the requirements of article 20 and of article 21, in the final analysis, necessarily related to the conduct of the State. The difference between the two articles was that, in the case of article 20, the action or omission which the international obligation required or sought to prevent was specifically indicated whereas, in the case of article 21, in which the obligation required only a result, it was obviously by some form of conduct that the State would be able to achieve it, but the State was free to choose the form of conduct by which it would do so. If an international obligation required a State not to discriminate between men and women with regard to remuneration for work, the State could achieve the required result by enacting a law, by adopting a certain

practice, by giving instructions to local labour authorities or by any other appropriate means. There would be a breach of its international obligation only if it could be established that women were in fact paid less than men for the same work and that such a situation resulted from an action or an omission by the State.

14. He therefore saw no objection to using the word "conduct" in the text of article 21, even though it was clear that the article related not to a breach of an obligation "of conduct" but to a breach through the conduct adopted of an obligation "of result". In any event, care must be taken to avoid fetishism in regard to the terminology of the preceding articles. For example, he was not averse to the use of the expression "obligation of conduct" as an equivalent of the expression "obligation requiring specific conduct", as suggested by Sir Francis Vallat.

15. As for the expression "*in concreto*", which had been criticized, he had used it to show clearly that the result must actually be achieved. A State could not justify failure to achieve the internationally required result by claiming to have taken measures designed to achieve the result. Thus, it was not enough to enact a law providing for equal pay for equal work by men and women: the law must be applied. If a contrary practice persisted, the result was not achieved "*in concreto*". He agreed, however, that the use of the Latin expression was not absolutely necessary. The words "at the outset" were merely intended to show that, in certain cases, the international obligation left the State initially free to choose between different means of achieving the required result. As in the first case considered, the State might, however, be given only such initial freedom of choice, whereas it had been seen that other international obligations also allowed the State to remedy by a subsequent means the situation created by the initial use of a particular means. Comments had also been made on the words "breach begun", which had already been used when the Commission had studied complex acts in connexion with article 18. In any event, it should not be forgotten that the texts of the articles he was proposing were only provisional and that their final wording would be the joint work of the Commission.

16. Lastly, referring to a comment made by Mr. Ushakov (1457th meeting), he explained that, if the cases he had cited as examples in connexion with article 21 concerned certain matters rather than others, it was partly because the compilations did not give a complete survey of all disputes, but also because international obligations which were fulfilled in the sphere of inter-State relations rather than in the sphere of the internal order of the State were more often germane to article 20 than to article 21. In the direct relations between States, the State was often required to adopt a particular course of conduct (to hand over or sink its warships, not to fortify a region, not to fly over a certain territory or to refrain from entering extraterritorial premises etc.). International obligations of result, on the other hand, were much more common where the purpose of international law was to produce certain effects in the internal order of States. He would try to add to the examples he had already given, but the new examples would relate more to article 20 than to article 21, for the reason he had just stated.

17. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer article 21 to the Drafting Committee.

*It was so agreed.*³

The meeting rose at 11.15 a.m.

³ For the consideration of the text proposed by the Drafting Committee, see 1469th meeting, paras. 1-10.

1462nd MEETING

Monday, 18 July 1977, at 3.10 p.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (para. 4 of General Assembly resolution 31/76) (concluded)*
(A/CN.4/300, A/CN.4/305)

[Item 5 of the agenda]

REPORT OF THE WORKING GROUP (A/CN.4/305)

1. Mr. EL-ERIAN (Chairman of the Working Group), introducing the report, said that the Working Group set up by the Commission to consider item 5 of the agenda (A/CN.4/305) had held three meetings, at which it had discussed ways and means of carrying out the task entrusted to it and had reached agreement on the course of action to be recommended to the Commission.

2. Most of the members of the Working Group had been of the opinion that the Commission should undertake the study of the topic at its 1978 session, so that the Secretary-General could take the results into account in the report on the implementation of the 1961 Vienna Convention on Diplomatic Relations, which he had been requested to submit to the General Assembly at its thirty-third session, pursuant to paragraph 5 of General Assembly resolution 31/76. They had also maintained that the Commission would require further information and observations from Governments. Other members of the Group had taken the view that the study should concentrate mainly on finding solutions to the problems concerning abuses of the diplomatic immunities of diplomatic couriers and abuses of the diplomatic bag. The Working Group had nevertheless been able to reach a consensus

* Resumed from the 1425th meeting.

on suitable ways and means of dealing with the topic. The conclusions it had agreed to recommend to the Commission were contained in paragraph 4 of its report, which it was submitting to the Commission for its consideration and approval.

3. The Group had recommended that the topic should be included in the Commission's programme of work for its 1978 session, and that it should be taken up during the first half of that session in order to facilitate the Secretary-General's task in submitting his analytical report to the General Assembly at its thirty-third session. The Working Group considered it advisable to follow a procedure similar to that adopted by the Commission when studying the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, and it was prepared to undertake the first stage of the study of the topic and to report on it to the Commission without appointing a special rapporteur.

4. The Working Group intended to study the topic on the basis of the proposals and observations submitted by States Members of the United Nations, pursuant to General Assembly resolutions 3501 (XXX) and 31/76. To facilitate the Group's task, members of the Commission would be invited to submit papers, preferably before the beginning of the 1978 session, and the Secretariat would be requested to remind Member States of the Commission's intention of studying the topic and of the desirability of sending it their proposals and observations. The Secretariat would also be requested to prepare a paper presenting the proposals submitted by Member States. The Working Group had agreed that the Secretariat paper would consist of an introductory part dealing with proposals relating to the topic in general, and a substantive part containing an analysis of those proposals.

5. Mr. TABIBI said he fully supported the report prepared by the Working Group and the recommendations it contained. He would, however, be grateful to the Chairman of the Working Group for a fuller explanation of why the Group had considered it appropriate to depart from the usual practice, which was that the Chairman raised questions and asked members of the Group and of the Commission to comment on them.

6. When the Working Group undertook its study, he thought it should bear in mind the complicated nature of the status of the diplomatic courier and the diplomatic bag, and the many developments in the practice of States that had taken place since the adoption of the 1961 Convention on Diplomatic Relations. For example, the diplomatic bag was, at present, often carried by special, rather than regularly scheduled, aircraft. The Group would therefore have to decide whether the protocol to be drafted should contain provisions relating to such special aircraft.

7. Since the topic of the diplomatic courier and the diplomatic bag was a matter of concern to all States Members of the United Nations, he thought that the States which had not yet done so should be urged to transmit their proposals and observations to the Commission in time for its 1978 session. Those proposals and observations would be of great assistance to the Commis-

sion when it came to consider the details of State practice relating to the diplomatic courier and the diplomatic bag.

8. Mr. EL-ERIAN (Chairman of the Working Group), replying to Mr. Tabibi, said that the Working Group had decided not to follow the usual practice because it had considered that the appointment of a special rapporteur was not necessary and that all the members of the Commission who wished to do so could assist the Group by submitting papers on the status of the diplomatic courier and the diplomatic bag.

9. The other point made by Mr. Tabibi, concerning the developments which had taken place since the adoption of the Vienna Convention on Diplomatic Relations, was particularly pertinent because paragraph 4 of General Assembly resolution 31/76 had requested the Commission to study "the proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, which would constitute development and concretization of the Vienna Convention on Diplomatic Relations of 1961". Those proposals would thus be used as a basis for determining whether the time had come to codify the legal rules governing the diplomatic courier and the diplomatic bag. The Working Group would take Mr. Tabibi's point fully into account in its study of the topic.

10. He fully agreed with Mr. Tabibi that the replies of Member States to the Secretariat's request for information, proposals and observations were of the greatest importance. The Working Group had not considered it appropriate to begin its study of the topic at the present session precisely because it hoped that it would receive additional information by the 1978 session.

11. Mr. SCHWEBEL said that, as a member of the Working Group, he fully supported the approval of the report and its inclusion in the Commission's report to the General Assembly. The outcome of the study to be undertaken by the Group and, subsequently, by the Commission would in no way be prejudged by the procedural course of action recommended in the report. On completion of its study, the Group might thus recommend the elaboration of a protocol designed either to increase the diplomatic immunities of diplomatic couriers or to prevent abuses of such immunities.

12. Mr. ŠAHOVIĆ said that the Working Group had carried out its task admirably, taking account both of the nature of the subject and of the Commission's experience. He fully endorsed its recommendations and particularly that contained in paragraph 4 (*d*) which, he considered, was very realistic. He therefore had no hesitation in recommending the adoption of the report.

13. Mr. REUTER joined previous speakers in congratulating the Working Group on its excellent report, the conclusions of which he found logical and entirely satisfactory. The proposal in paragraph 4 (*f*) was particularly useful since it would help to expedite the Commission's work by allowing members to submit their comments in writing before the beginning of the thirtieth session.

14. He would like to know whether the Secretariat intended to send members of the Commission any additional information on the subject. In his view, such

information should reach them before the end of February 1978 so that they could send their comments to the Secretariat in good time.

15. Mr. EL-ERIAN (Chairman of the Working Group), replying to Mr. Reuter, said he was sure that the material which had been supplied to the members of the Group, as well as any other relevant material, could also be made available to all members of the Commission who might wish to submit papers to assist the Group in its task.

16. Mr. RYBAKOV (Secretary to the Commission) said that all the material relating to the topic under consideration as well as any further replies and observations received from Governments would, of course, be made available to all members of the Commission.

17. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to approve the report of the Working Group (A/CN.4/305) and to reproduce it in its report to the General Assembly on the work of its current session.

It was so agreed.

State responsibility (continued)
(A/CN.4/302 and Add.1-3, A/CN.4/L.263)
[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE

ARTICLE 20¹ (Breach of an international obligation requiring of a State a specifically determined action or omission)

18. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 20 adopted by the Committee, which read:

Article 20. Breach of an international obligation requiring of a State a specifically determined action or omission

There is a breach of an international obligation requiring of a State a specifically determined action or omission when the action or omission of that State is not in conformity with that required of it.

19. Mr. TSURUOKA (Chairman of the Drafting Committee) drew attention to the fact that several corrections should be made to the proposed text of draft article 20. The words "by a State" should be added after the word "breach"; the words "of a State" should be replaced by the words "of it"; and, at the end of the text, the words "of it" should be replaced by the words "by that obligation".

20. In dealing with the text proposed by the Special Rapporteur, the Drafting Committee had taken account of the comments made on it by the members of the Commission, and had made some drafting changes which did not alter the substance. The wording now proposed was modelled on the wording of article 16.² The words "a particular course of conduct", proposed by the Special Rapporteur, had been replaced by the words "a specifi-

¹ For the consideration of the text originally submitted by the Special Rapporteur, see 1454th to 1456th meetings.

² See 1454th meeting, foot-note 2.

cally determined action or omission", which were designed to bring out more clearly the difference between international obligations of conduct and international obligations of result.

21. Mr. USHAKOV suggested that the words "of a State" might be deleted from the title of the article.

22. Mr. AGO (Special Rapporteur) said he had no objection to that suggestion.

23. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to delete the words "of a State" from the title of draft article 20.

It was so agreed.

24. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to approve the title, as amended, and the text of article 20 proposed by the Drafting Committee.

*It was so agreed.*³

The meeting rose at 4.15 p.m.

³ See also 1469th meeting, paras. 1-5.

1463rd MEETING

Tuesday, 19 July 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Later: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

State responsibility (*continued*) (A/CN.4/302 and Add.1-3) [Item 2 of the agenda]

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

ARTICLE 22 (Exhaustion of local remedies)

1. The CHAIRMAN invited the Special Rapporteur to introduce draft article 22, which read:

Article 22. Exhaustion of local remedies

There is a breach of an international obligation requiring the State to achieve a particular result, namely, to accord certain treatment to individuals, natural or legal persons, if, after the State's initial conduct has led to a situation incompatible with the required result,

the said individuals have employed and exhausted without success the local remedies which were available to them and which possessed the necessary effectiveness to ensure either that the required treatment would continue to be accorded to them or, if that should prove impossible, that appropriate compensation be awarded to them. Consequently, the international responsibility of the State for the initial act or omission and the possibility of enforcing it against the State are not established until after local remedies have been exhausted without satisfaction.

2. Mr. AGO (Special Rapporteur) said that articles 20 and 21 dealt, respectively, with the international obligations which required a State to adopt a particular course of conduct and with those which only required a State to achieve a particular result, leaving it free to determine the course of conduct by which to do so. In both cases, the State was required to perform or not to perform one or more actions or omissions; the difference was that, in the case of article 20, the required conduct was dictated by international law whereas, in the case of article 21, the initiative rested with the State. Moreover, the international obligations referred to in article 21 could be distinguished according to whether, in addition to being able to choose at the outset one means rather than another, the State did or did not have the faculty of rectifying, by a new course of conduct, the situation created by an initial inadequate course of conduct. If it had that faculty, there was no definitive breach of the international obligation until there had been a definitive failure to achieve the result, even in that exceptional manner. Sometimes, as had been seen, the obligation was so permissive that, when the originally required result was no longer attainable, the State could none the less discharge its obligation by achieving an equivalent result. That showed therefore how the way in which an international obligation was breached depended on the nature of the obligation itself.

3. Account should also be taken of a large and special category of international obligations: those assumed by States concerning the treatment of private individuals, particularly foreigners. When the result required by an international obligation was a certain kind of treatment for individuals, it was normal for the individuals concerned to co-operate in achieving that result, either by making an appropriate request at the outset or, if the obligation also allowed the State to rectify a situation which had been created by its initial conduct and which was incompatible with that required by the international obligation, by setting the necessary machinery in motion to remedy the unsatisfactory situation. For example, in the case of a conventional or customary international obligation providing for equality of treatment of nationals and foreigners in regard to the practice of a particular profession, if an authority of the State did not allow a foreigner to benefit from such equality of treatment, it was naturally incumbent on the foreigner to take the initiative to have the decision of that authority reversed by a higher administrative authority or by a judicial organ. The State itself could not be asked to take the initiative in every case, and that was how the principle of the exhaustion of local remedies had come into being.

4. On the other hand, when the beneficiary of an international obligation was a State and the obligation allowed it to remedy the effects of an inadequate initial course of

* Resumed from the 1461st meeting.

conduct, it was naturally for that State to take the initiative by adopting different conduct to rectify the initial conduct. That was the case covered by article 21, paragraph 2, and not by article 22.

5. When an authority did not accord internationally required treatment to individuals and they appealed to a higher authority, the latter authority could rectify the situation by according them the desired treatment or by requesting the lower authority to do so. In that case, there was no breach of the international obligation because it required only the achievement of a result, namely, that certain treatment should be accorded *in concreto* to the individuals in question. If, on the other hand, the higher authority confirmed the decision of the lower authority and it thus became definitely impossible to achieve the required result, there was a breach of the international obligation and the State incurred international responsibility, since all the means available to it had not produced the desired result. Where, however, the individuals concerned, whether natural or legal persons, had themselves failed to set the necessary machinery in motion, the State could not, of course, be blamed for lack of diligence. It might happen, indeed, that individuals had little interest in rectifying the situation or allowed themselves to be barred by negligence. In that case, the further condition requiring the co-operation of the individuals, in other words, the exhaustion of local remedies, was not fulfilled.

6. The rule of exhaustion of local remedies had given rise to much controversy as to its origin—whether customary or conventional—and as to its nature—whether substantive or procedural. He believed it to be a very old rule, which had come into being at the same time as those designed to ensure certain treatment for foreigners. The question of exhaustion of local remedies must have arisen on the day when, for the first time, an individual established in a country other than his own had been the victim, in that country, of treatment different from that to which an international obligation entitled him.

7. The dispute as to the nature of the rule had arisen basically because the problem had been wrongly stated. Those who considered it to be a procedural rule invoked the fact that it was provided for in treaties where it entailed the consequence that a State could not intervene by giving diplomatic protection to its nationals or institute proceedings on their behalf before an arbitral tribunal or the International Court of Justice so long as the individuals concerned had not exhausted local remedies. But common sense compelled recognition that the exhaustion of local remedies, as a customary rule of very long standing, could not be a procedural rule applying only to the exercise of diplomatic protection or, still less, to the institution of proceedings before an international tribunal, since international tribunals all had their origin in treaties; there was no international jurisdiction established by custom. It was clear that the principle itself, which expressed a basic condition for the existence of a breach of an international obligation, had been confused with its corollary, which concerned the possibility of establishing responsibility for the breach.

8. The principle of the exhaustion of local remedies did, in fact, comprise a main proposition and a corollary.

The main proposition was that there was no breach of an international obligation of the type referred to, and therefore no international responsibility so long as a special condition had not been fulfilled, that condition being exhaustion by the individuals concerned of the remedies offered by the internal legal system. The corollary was that a State could not institute proceedings to establish responsibility for the breach of the obligation in question so long as the special condition for the generation of responsibility had not been fulfilled, that condition being exhaustion by the individuals concerned of the local remedies which could lead to the result required by the international obligation. In other words, it was only because responsibility was not generated until the moment when the required result could obviously no longer be attained that the international responsibility of a State could be engaged only when the individuals concerned had exhausted local remedies.

9. The *raison d'être* of the principle in question had its origin in the natural logic of certain international obligations. To breach an international obligation was to impair a subjective right. The existence for a State of an international obligation "of result" towards another State meant that the latter had the subjective right to demand that the former should achieve the result required by the obligation. A breach by the former State of its obligation amounted to impairment of the subjective right of the latter State. Thus, if the subjective right in question was impaired, a new international subjective right emerged for that State: the right to demand compensation for the impairment of the right it had previously possessed. There were no suspended subjective rights. It was inconceivable that, in order to assert a subjective right which it already possessed, a State should have to wait until an individual had obtained a decision by a domestic court on an appeal he had lodged. If the State could not act with a view to exercising its new subjective right, it was because that right did not, for the time being, yet exist—because, so long as there was still a possibility that, on the individual's appeal, the result required by the original subjective right might be achieved, the State still did not, as was only logical, have any new rights deriving from the impairment of its original right. That impairment was not yet complete.

10. There was some confusion in the works of learned writers. Borchard, who had been one of the first to study the matter, had well understood the two aspects of the principle. Subsequently, some writers had espoused his views, while others had favoured the idea that the condition of the exhaustion of local remedies was established by a purely procedural rule and yet others had recognized both a substantive and a procedural aspect of the principle. Some writers, who had first maintained that it was a procedural rule, had subsequently realized that they had considered only the logical consequence of the substantive aspect of the rule. He had referred only to a selection of writers in paragraph 54 of his sixth report (A/CN.4/302 and Add.1-3), and some other recent studies had since been brought to his attention. In any event, the Commission was not called upon to enter into a doctrinal controversy, but to seek confirmation of the existence and the meaning of the principle of the exhaustion of

local remedies in State practice and international case law.

11. Before proceeding to that analysis, it would be well to draw attention once again to one essential aspect. To affirm that the principle in question precluded application to an international tribunal so long as local remedies had not been exhausted was not to deny that it was above all a decisive factor in the breach of an international obligation and, consequently, in the generation of international responsibility. International tribunals often had to consider the question of the exhaustion of local remedies in dealing with the question of the admissibility of proceedings, for it was not uncommon for the respondent State to raise an objection as to admissibility based on the principle of the exhaustion of local remedies. In so doing, however, the State was merely asserting the corollary to the principle—which was the only matter of concern to it at the time—and the tribunal necessarily did the same. To be able to deny that the principle had both a substantive and a procedural aspect, it would be necessary to find, in judicial decisions, the affirmation that it related solely to procedure, to the exclusion of any effect on the existence of international responsibility.

12. As to State practice, reference should, as usual, first be made to the Conference for the Codification of International Law (The Hague, 1930). The replies to the request for information addressed to Governments by the Preparatory Committee for that Conference had not been very clear about the matter under consideration, but some had clearly indicated that international responsibility arose only after local remedies had been exhausted without satisfaction. The United Kingdom alone had referred only to the procedural aspects of the principle, but it should be noted that subsequently, on other occasions, it had taken a different position. At the Conference itself, the opinions expressed had revealed several trends. Many delegations—in particular, the Romanian delegation, whose very clear and precise statement was reproduced in paragraph 55 of his report—considered the exhaustion of local remedies to be a condition for the generation of responsibility. A few other delegations, such as that of Italy, had expressed a contrary, albeit much less definite, view. The delegations of the United States and Norway had stated that the exhaustion of local remedies was sometimes a condition for responsibility and sometimes a condition for the possibility of establishing it. Thus, no clear and final conclusion had emerged from the Conference, but it could be said that the majority of delegations had considered that international responsibility arose only after individuals had exhausted local remedies.

13. It was interesting to note that the Governments of the United States and Norway had expressly stated that the exhaustion of local remedies gave rise to responsibility if the internationally wrongful act related to the administration of justice in regard to foreigners. In that sphere, however, it was usual for several organs to intervene successively, so that the administration of justice was normally not limited to the action of the first organ. Moreover, to assert that, where the administration of justice was concerned, there was no final breach of an international obligation so long as a higher court could

still undo what a lower court had done obviously amounted to establishing a general principle that was valid outside that particular sphere. He therefore believed that the United States and Norwegian replies confirmed that the principle of the exhaustion of local remedies certainly had consequences at the procedural level but that, above all, it determined the existence of a breach of the obligation and the generation of responsibility.

14. With regard to international diplomatic and judicial practice, he first stressed the need to take account of the circumstances of each particular case. It was always necessary to inquire whether a State had affirmed the principle only when challenging the admissibility of proceedings brought against it, for it was then obvious that it was asserting only the procedural aspect of the principle, not the substantive aspect. It should also be noted that international tribunals, when considering a preliminary objection relating to admissibility, must refrain from examining the substance of the case before them. It would therefore be wrong to consider the views expressed on such occasions as a rejection of the substantive aspects of the principle.

15. He then referred to the parts of his report in which he had analysed some examples of international practice with a view to drawing conclusions. In its decision No. 21 of February 1930, the Great Britain-Mexico Claims Commission had stated that “the responsibility of the State under international law can only commence when the persons concerned have availed themselves of all remedies open to them under the national laws of the State in question”.¹ In the *Administration of the Prince von Pless* case, referred to the Permanent Court of International Justice,² both the Polish and the German Governments had recognized that there could be no question of international responsibility of a State so long as the local remedies had not been exhausted. In the *Finnish Vessels Arbitration* case,³ the arbitrator had succeeded in maintaining a sort of neutrality between the two ways of approaching the requirement of exhaustion of local remedies to which he had referred, but he had brought out one essential point: the parties must in fact have exhausted local remedies with the intention of winning their case. The condition of exhaustion of local remedies was not a mere formality, and it was not enough for individuals to appeal for the sake of form, reserving certain weighty arguments for a future international proceeding. *The Phosphates in Morocco* case⁴ between Italy and France, which had been heard by the Permanent Court of International Justice, was not very instructive either for the purposes of the question covered by article 22. The European Commission of Human Rights, on the other hand, had stated a principle of general application when it had affirmed that the responsibility of a State arose only at the moment when local remedies had been exhausted.⁵

¹ See A/CN.4/302 and Add.1-3, para. 63.

² *Ibid.*, para. 64.

³ *Ibid.*, para. 65.

⁴ *Ibid.*, paras. 66-69.

⁵ *Ibid.*, para. 71.

16. Lastly, he drew attention to the separate or dissenting opinions of several judges of the International Court of Justice and the Court which had preceded it.⁶

17. He concluded from the foregoing analysis that all the really clear and positive indications of practice and case law, as well as the separate opinions of distinguished judges, led to the same result: there was no breach of an international obligation or generation of responsibility so long as remedies were still available to the parties at the internal legal level, by which the State could produce the internationally required result.

Mr. Sette Câmara, first Vice-Chairman, took the Chair.

18. The question arose whether or not the principle that the exhaustion of local remedies was a supplementary condition for the breach of an obligation of result when the result required consisted in ensuring that foreigners would be treated in a particular way was a principle of general international law.

19. Some recent writers had maintained that the principle of exhaustion of local remedies was a purely conventional principle; not being in favour of it, they had endeavoured to limit its scope by reducing it to a purely procedural principle established by certain international conventions. However, that was an isolated theoretical opinion, and the great majority of writers considered that the principle of the exhaustion of local remedies was a general principle of international law, which was, moreover, only the logical consequence of the nature of certain international obligations.

20. International jurisprudence came close to legal theory on that point. The judgments or decisions pronounced in such cases as the *Mavrommatis Palestine Concessions* case (1924), the *Panevezys-Saldutiskis Railway* case (1939), the *Interhandel* case (1959), the *British Property in Spanish Morocco* case (1925), the *Mexican Union Railway* case (1930), the *Ambatielos* case (1956) and the *German External Debts* case (1958)⁷ recognized without exception that the principle of the exhaustion of local remedies was a well-established rule of general international law.

21. That position was confirmed by the practice of States, which were unanimous in recognizing the general character of the principle of the exhaustion of local remedies, as was shown by the positions taken by Governments in the disputes referred to the International Court of Justice. The Polish Government in the *Administration of the Prince von Pless* case, the Yugoslav and Swiss Governments in the *Losinger* case, the French and Italian Governments in the *Phosphates in Morocco* case, the Lithuanian and Estonian Governments in the *Panevezys-Saldutiskis* case, the Iranian and British Governments in the *Anglo-Iranian Oil Company* case, the United States and Swiss Governments in the *Interhandel* case, the Bulgarian Government and the United States and Israeli Governments in the *Aerial Incident of 27 July 1955* case⁸ had all recognized the existence of that principle as a rule of general international law.

⁶ *Ibid.*, paras. 73-75.

⁷ *Ibid.*, para. 84.

⁸ *Ibid.*, para. 87.

22. The positions taken by Governments parties to disputes referred to other international tribunals were equally conclusive. The Bulgarian and Greek Government in the *Central Rhodope Forests* case, the British and Iranian Governments in the *Anglo-Iranian Oil Company* case, and the Finnish and British Governments in the *Finnish Vessels Arbitration* case⁹ had all recognized that the principle of the exhaustion of local remedies was an undisputed principle of general international law.

23. It had been said that the principle had come into being with the development of rules which imposed obligations on the State in regard to the treatment of foreigners. However, the question arose whether there was a risk of going both too far and not far enough if the application of the principle was generally linked to the breach of obligations concerning the treatment of foreigners: too far, because it might be asked whether international law itself did not provide for exceptions to the applicability of the principle to the treatment of foreign natural or legal persons; not far enough, because it might also be asked whether the rule of the exhaustion of local remedies should not be extended to other subjects, in particular to natural or legal persons who were nationals of the obligated State.

24. He stressed that the question arose solely in connexion with general international law. It was true that international conventions sometimes restricted the principle of the exhaustion of local remedies or extended it to other spheres or provided for special arbitration procedures designed to take the place, in certain particular cases, of the normal system of internal legal proceedings, thus limiting the scope of application of the principle. But such conventional limitations were not within the competence of the Commission, which must only concern itself with the application of the principle of the exhaustion of local remedies as received in general international law.

25. The principle of the exhaustion of local remedies had its origin in the commonest case—that in which the obligation imposed on the State required it to accord certain treatment to foreign nationals in regard to an activity carried on in its territory. It might, however, be asked whether that principle applied when the breach of the obligation occurred outside the territory of the State, for example, on the high seas. That possibility was, in fact, rather limited since it was not certain that local remedies always existed in such cases. Where such remedies did exist, however, he did not see why the principle concerning their exhaustion should not apply.

26. It might also be asked whether the principle of the exhaustion of local remedies as a condition to be met applied to foreigners who were not resident in the territory of the State. Again, he saw no reason for not applying the principle in that case, since the fact that the foreigner was or was not resident in no way changed the obligation of the State concerning the treatment of that person. It was also obvious that, if the injured person usually resided very far from the country in question and consequently could not comply with the time-limits for the institution of proceedings, the condition would not apply in that

⁹ *Ibid.*, para. 88.

particular case since the remedies must be adequate and effective. But the effectiveness of remedies must be judged in each particular case. Thus, it was preferable not to introduce into the general statement of the principle in article 22 detailed exceptions designed to take account of all the special cases that might arise, but to leave it to international jurisprudence to settle those cases as and when they arose.

27. Where the injury caused to a foreigner was the result of open animosity or of a discriminatory intent on the part of the State against the nationals of a particular country, it was again the principle of the adequacy and effectiveness of local remedies that applied, for, if exhaustion of local remedies was not required in such a case, it was because those remedies would clearly not be effective.

28. Where the injured person had no voluntary link with the State whose remedies had to be used—for instance, in the case of the El Al aircraft shot down by Bulgarian anti-aircraft fire because it had entered Bulgarian air-space by mistake, or where injury was caused to a foreigner brought into the territory of a State against his will, or in transit through it by air or land—the problem that arose was once again that of the real availability of effective local remedies. It should be clearly indicated in the text or in the commentary that that meant the real possibility of using such remedies. But the draft article should not contain a list of exceptions to the general principle of the exhaustion of local remedies, and it should be left to treaty law to specify, when States judged it necessary, the conditions in which that principle must or must not apply.

29. It might also be asked whether application of the principle of the exhaustion of local remedies should not be extended to spheres other than that of the treatment of foreign individuals. He emphasized that there could be no question of extending the principle to cases of injury suffered by foreigners acting in a country as organs of the State of which they were nationals. It was true that, in its resolution of 1956,¹⁰ the Institute of International Law had declared, rather casually, that an exception should be made to the rule of exhaustion of local remedies for foreigners enjoying special international protection in a country, in other words, primarily for diplomatic and consular agents. Diplomatic and consular agents were not, however, private individuals; they were organs of the State they represented. The rule of exhaustion of local remedies could not then apply to them when they suffered injury in the performance of their duties; it could apply only if they suffered injury while acting as private individuals. Although their immunity from jurisdiction prevented them from being defendants, it did not prevent them from being plaintiffs.

30. He did not think that an exception to the rule of exhaustion of local remedies should be made in the case of a foreign private company with public capital participation, since what mattered was not the more or less public character attributed to the legal person by the legal system to which it belonged, but the kind of activity it carried

on in foreign territory. There was no reason why the condition of the exhaustion of local remedies should not be applied even to a foreign company financed mainly by public capital if it acted as a purely private person in the territory of the State.

31. In fact, therefore, the question of a possible extension of the rule of exhaustion of local remedies arose only in regard to a category of private persons with whom international law was becoming increasingly concerned and who were nationals of the State itself. That was a limited problem because, despite the growing importance they were assuming, the rules relating to the treatment of nationals were almost exclusively rules of treaty law. The question to be decided was whether the principle of the exhaustion of local remedies, hitherto limited only to foreigners, should also be applied to nationals when the State had an international obligation relating to their treatment. If it was a treaty obligation, the treaty would usually provide the answer to that question. Should the principle of the exhaustion of local remedies nevertheless be established to provide for the possibility that a customary rule might be established on the subject? Should the principle therefore be applied to all individuals—foreigners and nationals—or should cases concerning the treatment of nationals be excluded on the ground that they were fully covered by treaty law? If the second solution was adopted, a problem might arise if an international convention for the protection of human rights did not expressly stipulate the prior exhaustion of local remedies. That condition would then apply to foreigners, but not to nationals. He had therefore considered it advisable to include in the rule stated in article 22 the case of a breach by the State of an international obligation concerning the treatment of its own nationals, but it was for the Commission to decide whether provision for that case should be retained.

32. The real *raison d'être* of the principle of the exhaustion of local remedies was to enable the State to avoid the breach of an international obligation by rectifying, through subsequent conduct adopted on the initiative of the individuals concerned, the consequences of an initial course of conduct contrary to the result required by the obligation. If the injured person had failed to exhaust the remedies available to him, there was negligence on his part and no breach occurred.

33. The mere fact that remedies existed, however, did not mean that the injured persons were obliged to use them. The forms of remedy varied considerably from one legal system to another and their use should not be assessed in the abstract but, in each specific case, by the criterion of effectiveness.

34. It could be concluded, first, that, in principle, all available remedies capable of rectifying the situation complained of must be used and that all appropriate legal grounds for securing a favourable decision must be invoked; and, secondly, that a remedy should be used only if it held out real prospects of success and if the success to which it might lead was not merely a matter of form, but could actually produce the result originally required by the international obligation or, if that was no longer possible, a truly equivalent alternative result.

¹⁰ *Yearbook ... 1969*, vol. II, p. 142, document A/CN.4/217 and Add.1, annex IV.

35. Lastly, it might be asked whether the principle of the exhaustion of local remedies should be maintained in general international law in its existing form. That principle, which followed logically from the nature and purpose of certain international obligations, did not have only advantages. Practice showed that it sometimes also had disadvantages, particularly that of a long delay before action could be taken at the international level. Some investing States were justifiably concerned about the serious prejudice that might be suffered by those of their nationals who carried on activities in a foreign State and whose capital, skills and work benefited the economy of that State. But, in fact, means of avoiding such prejudice were available to those States, since treaty law provided for systems (global compensation, arbitration, etc.) which were designed precisely to overcome the most serious disadvantages of the application of the principle of the exhaustion of local remedies.

36. On the other hand, it would be wrong to ignore the concern of the countries invested in, which had often been subjected to excessive pressure in the past to make them transfer directly to the international level matters which should and could have been settled at the internal level. It was to the advantage of those States to settle certain questions internally if they wished to avoid having to appear before an international tribunal to be tried for a breach which they could have avoided through the action of their own domestic courts.

37. It was therefore necessary to establish a balance between points which, more than points of law, were above all points of justice. For justice required that individuals who carried on an activity in a foreign State should be protected because that activity was supposed to benefit the State in whose territory it was carried on. But justice also required that the States in which foreign individuals carried on their activities should be protected—especially if those individuals were nationals of powerful States—against attempts to transform into international cases matters which had at first been purely internal and should remain so.

38. He therefore believed that there was no reason to depart from existing international law for the sake of an alleged progressive development which would be unacceptable to a large proportion of States and which they might regard as detracting from respect for their sovereignty, independence and sovereign equality. The rule stated in article 22 should define the principle of the exhaustion of local remedies as it was in the present state of international law, formulating it flexibly enough to be adaptable to the different situations that arose in practice.

The meeting rose at 1 p.m.

1464th MEETING

Wednesday, 20 July 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis,

Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta

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

1. The CHAIRMAN invited the Commission to consider the draft report on the work of its twenty-ninth session, paragraph by paragraph, beginning with chapter IV.

CHAPTER IV. Question of treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/L.261 and Corr.1 and Add.1-2)

A. Introduction (A/CN.4/L.261)

Paragraph 1

Paragraph 1 was approved.

Paragraph 2

2. The CHAIRMAN suggested that in the first sentence, the words "at least in part", which were somewhat deprecatory, should be replaced by the words "in large measure".

It was so agreed.

Paragraph 2, as amended, was approved.

Paragraph 3

3. In reply to a question put by Mr. ŠAHOVIĆ, Mr. REUTER (Special Rapporteur) reminded the Commission that it had been decided not to change the numbering of the articles on first reading in order to keep them in line with the articles of the Vienna Convention on the Law of Treaties.

Paragraph 3 was approved.

Paragraph 4

Paragraph 4 was approved.

Paragraph 5

4. The CHAIRMAN suggested that, in the penultimate sentence of the English text, the words "at the cost of" should be replaced by the word "by".

It was so agreed.

Paragraph 5, as amended, was approved.

Paragraphs 6-14

Paragraphs 6-14 were approved

Paragraph 15

5. The CHAIRMAN suggested that, at the end of the paragraph, the words "owing to lack of time" should be replaced by the words "in the time available".

It was so agreed.

Paragraph 15, as amended, was approved.

Section A as a whole, as amended, was approved.

B. Draft articles on treaties concluded between States and international organizations or between international organizations (A/CN.4/L.261 and Corr.1 and Add.1-2)

TEXTS OF ARTICLES 19, 19bis, 19ter, 20, 20bis, 21-23, 23bis, 24, 24bis, 25, 25bis AND 26-34 AND OF ARTICLE 2, PARAGRAPH 1 (j), AND COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS TWENTY-NINTH SESSION (A/CN.4/L.261 and Corr.1 and Add.1-2)

ARTICLES 19-26 (A/CN.4/L.261)

Commentary to article 19 (Formulation of reservations in the case of treaties between several international organizations)

The commentary to article 19 was approved.

Commentary to article 19bis (Formulation of reservations by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States)

Paragraphs (1)-(3)

Paragraphs (1)-(3) were approved.

Paragraph (4)

6. The CHAIRMAN suggested that, in accordance with established practice, the titles of the organizations referred to in paragraph (4) should be given in full.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

7. Mr. REUTER (Special Rapporteur) proposed that the first foot-note be supplemented by a reference to paragraphs 32-45 of the legal opinion which had been prepared for the Under-Secretary-General for Inter-Agency Affairs and Co-ordination on the representation of national liberation movements in United Nations organs, and which was quoted in the United Nations *Juridical Yearbook, 1974*,¹ since that opinion was entirely in keeping with what was said in the foot-note.

It was so agreed.

8. Mr. RIPHAGEN proposed that, in the last sentence of the same foot-note, the reference to "conventions" should be in the singular.

9. The CHAIRMAN suggested that, in order to take account of the suggestion by Mr. Riphagen and of the fact that there might eventually be more than one convention on the law of the sea, the words "the conventions" should be replaced by the words "a future convention or future conventions".

It was so agreed.

10. The CHAIRMAN suggested that the last part of the first sentence of paragraph (5), following the reference to foot-note 28, should be amended to read: "it seems open to question how far the régime established by article 19bis, paragraph 3, would have practical effect". Such wording would make it clear that the Commission regarded article 19bis as being of practical value.

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

11. Mr. USHAKOV said that he would like paragraph (6) to be replaced by a new paragraph explaining his

position and giving the reasons why the Commission had not accepted it. He was willing to draft that paragraph himself and to submit it to the Commission for approval.

12. He would also like paragraph 1 of his proposal for article 19 to be reproduced in the foot-note to paragraph (6).

13. The CHAIRMAN asked the Special Rapporteur whether he accepted Mr. Ushakov's requests.

14. Mr. REUTER (Special Rapporteur) pointed out that only the Commission was competent to decide on the prominence to be given to the position taken by one of its members.

15. Mr. TSURUOKA proposed that the words "which did not adopt his proposal" should be deleted from the first sentence, for the phrase "different ideas" itself showed that the Commission had not accepted the system in question.

It was so agreed.

16. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to suspend consideration of paragraph (6) and, consequently, to defer approval of the commentary to article 19bis as a whole until Mr. Ushakov had submitted his alternative text.

It was so agreed.

Commentary to article 19ter (Objection to reservations)

The commentary to article 19ter was approved.

Commentary to article 20 (Acceptance of reservations in the case of treaties between several international organizations)

The commentary to article 20 was approved.

Commentary to article 20bis (Acceptance of reservations in the case of treaties between States and one or more international organizations or between international organizations and one or more States)

Paragraph (1)

17. The CHAIRMAN suggested that, at the beginning of the English text, the words "reason of" should be inserted after the word "by".

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were approved.

The commentary to article 20bis as amended, was approved.

Commentary to article 21 (Legal effects of reservations and of objections to reservations)

The commentary to article 21 was approved.

Commentary to article 22 (Withdrawal of reservations and of objections to reservations)

The commentary to article 22 was approved.

Commentary to article 23 (Procedure regarding reservations in treaties between several international organizations)

The commentary to article 23 was approved.

Commentary to article 23bis (Procedure regarding reservations in treaties between States and one or more international organizations or between international organizations and one or more States)

The commentary to article 23bis was approved.

¹ United Nations, *Juridical Yearbook, 1974* (United Nations publication, Sales No. E.76.V.I), pp. 154-156.

Commentary to article 24 (Entry into force of treaties between international organizations)

The commentary to article 24 was approved.

Commentary to article 24bis (Entry into force of treaties between one or more States and one or more international organizations)

The commentary to article 24bis was approved.

Commentary to article 25 (Provisional application of treaties between international organizations)

The commentary to article 25 was approved.

Commentary to article 25bis (Provisional application of treaties between one or more States and one or more international organizations)

The commentary to article 25bis was approved.

Commentary to article 26 (Pacta sunt servanda)

18. The CHAIRMAN suggested that it might be advisable to delete the word "minor" at the end of the paragraph because the differences in question might in future be greater than the Commission had anticipated.

It was so agreed.

The commentary to article 26, as amended, was approved.

ARTICLE 2, PARAGRAPH 1 (j), AND ARTICLE 27 (A/CN.4/L.261/Add.1)

Commentary to article 2, paragraph 1 (j) (Use of terms)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

19. Mr. JAGOTA said that it appeared from the proposals which had emerged from the sixth session of the Third United Nations Conference on the Law of the Sea that the operations of the possible international sea-bed authority would be governed not only by the convention on the law of the sea, which would be the authority's "constituent instrument" proper, but also, as in the case of other international organizations, by annexes to that instrument and rules and regulations, applicable to agreements concluded between the authority and the producers of sea-bed minerals. It seemed to him, therefore, that the present reference to the "constituent instruments, relevant decisions and resolutions ..." was too restrictive and should be amended to read "the constituent instruments and annexes thereto, rules and regulations, relevant decisions and resolutions ...".

20. The CHAIRMAN explained that it was because the Commission had very much had in mind the possible consequences of a future convention on the law of the sea and similar questions that it had decided to adopt only provisionally the definition of the expression "rules of the organization" which it currently proposed. That definition would be reviewed when all the uses to which the term was to be put in the Commission's draft articles were clear.

21. Mr. USHAKOV said that he had some difficulty in accepting the second sentence of paragraph (3), which implied the questioning of a definition already adopted in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

22. In the third sentence of the paragraph, reference should be made not merely to article 27 but to the draft

articles as a whole, for the comment cited also applied to article 6.

23. Mr. REUTER (Special Rapporteur) proposed that, in order to meet Mr. Ushakov's point, the second sentence of the paragraph be reworded to read: "The transposition of this definition to the draft articles as a whole already raises certain questions which will have to be clarified at a later stage."

24. In his view, it would be sufficient to refer, in the third sentence, to the commentary to article 27. The sentence would then read:

Some members of the Commission pointed out, in particular, that in the context of the present draft articles it was not perhaps quite correct to place the constituent instrument and other rules of an organization on the same footing, as appears from paragraph (5) of the commentary to article 27 below.

25. Mr. RIPHAGEN suggested that the last sentence of the paragraph should be made clearer by a reference to the commentary to article 27 or an explanation of why some members of the Commission had felt it necessary to refer to that article.

26. Mr. CALLE Y CALLE agreed with Mr. Ushakov that the Commission must be careful in referring to a definition adopted by the United Nations Conference on the Representation of States in their Relations with International Organizations. The convention adopted by that Conference was a codifying instrument, and the Conference had felt it necessary to define the expression "rules of the organization" because it had gone into questions such as the treaty-making power of an organization and the constitutionality of the treaties which an organization concluded. The Commission therefore should add to the commentary what the Special Rapporteur had said in paragraph (4) of the commentary to article 27 proposed in his fourth report² and, when recommending its present definition to the General Assembly, it should indicate the context in which that paragraph had been drafted.

27. The CHAIRMAN suggested that the second sentence of the paragraph should be amended as proposed by Mr. Reuter and that the third sentence should read:

"Some members of the Commission pointed out, in particular, that in the context of the present draft articles it was not perhaps quite correct to place the constituent instrument and other rules of an organization on the same footing, as appears from the commentary to article 27 below."

It was so agreed.

Paragraph (3), as amended, was approved.

The commentary to article 2, paragraph 1 (j), as amended was approved.

Commentary to article 27 (Internal law of a State, rules of an international organization and observance of treaties)

Paragraph (1)

Paragraph (1) was approved.

² Yearbook ... 1975, vol. II, p. 40, document A/CN.4/285.

Paragraph (2)

28. Mr. SCHWEBEL proposed the addition, at the end of the paragraph, of a sentence reading:

“Another member did not accept the foregoing line of argument, but maintained that international organizations are no less bound by their treaties than are States and that, consequently, international organizations are not free to amend their resolutions or take other measures which absolve them of their international obligations without engaging their responsibility under international law.”

29. Mr. AGO questioned whether the amendment of a resolution really constituted a breach of an international obligation of an organization.

30. Mr. SCHWEBEL explained that he had made his proposal not because he did not agree that international organizations should be able to amend their resolutions but because it would be unacceptable for them to have the right to repudiate their treaties by making such amendments.

31. The CHAIRMAN said, that if there was no objection, he would take it that the Commission approved the amendment proposed by Mr. Schwebel.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were approved.

Paragraph (5)

32. Mr. REUTER (Special Rapporteur) pointed out that the penultimate word of the penultimate sentence should be amended to read “potestative”.

33. The CHAIRMAN suggested that the Secretariat be asked to find a more appropriate English translation of the term *clause potestative* than the one given.

34. Mr. SCHWEBEL proposed that, in the sixth sentence, the word “some” be replaced by the word “the”.

It was so agreed.

35. Mr. USHAKOV suggested that the word “constitutional” should be deleted from the fourth sentence for the limits to the treaties which an international organization might conclude were not necessarily constitutional.

36. The CHAIRMAN suggested that, if there was no objection, the words “constitutional limits” could be replaced by the words “certain limits”.

It was so agreed.

37. Mr. USHAKOV also proposed that the fifth sentence should be deleted since it prejudged the Commission’s decision on the validity of treaties, a matter it had not yet taken up.

38. Mr. AGO said that, if an international organization concluded a treaty which exceeded the organization’s appointed limits, that treaty might be void. That did not mean, however, that a treaty was void whenever an international organization exceeded certain limits, for the constitutional limits applicable to an international organization were not always very precise. Nor could it be said that a treaty was valid if those limits were not

transgressed for it might be void for other reasons. In his opinion, therefore, the second part of the fifth sentence might be deleted.

39. Mr. REUTER (Special Rapporteur) agreed that the fact that certain limits had been exceeded did not necessarily entail the invalidity of a treaty; yet, the question of the invalidity of the treaty did none the less arise. He saw no problem in deleting the second part of the fifth sentence, as suggested by Mr. Ago.

40. Mr. AGO proposed that the first part of the fifth sentence should be replaced by a sentence reading: “If those limits are overstepped, the question of the validity of the treaties will arise”. It should be stated in a foot-note that the Commission would study the matter at a later stage.

It was so agreed.

41. The CHAIRMAN suggested that a reference to a new foot-note be added at the end of the fifth sentence and that the foot-note read: “This is a matter for future study by the International Law Commission”.

It was so agreed.

Paragraph (5), as amended, was approved.

The meeting rose at 1 p.m.

1465th MEETING

Wednesday, 20 July 1977, at 4 p.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Draft report of the Commission on the work of its twenty-ninth session (*continued*)

CHAPTER IV. Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/L.261 and Corr.1 and Add.1-2)

B. Draft articles on treaties concluded between States and international organizations or between international organizations (*continued*) (A/CN.4/L.261 and Corr.1 and Add.1-2)

TEXTS OF ARTICLES 19, 19*bis*, 19*ter*, 20, 20*bis*, 21-23, 23*bis*, 24, 24*bis*, 25, 25*bis*, 26-34, AND OF ARTICLE 2, PARAGRAPH 1 (j), AND COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS TWENTY-NINTH SESSION (*continued*) (A/CN.4/L.261 and Corr.1 and Add.1-2)

ARTICLE 2, PARAGRAPH 1 (j), AND ARTICLE 27 (*concluded*) (A/CN.4/L.261/Add.1)

Commentary to article 27 (Internal law of a State, rules of an international organization and observance of treaties) (*concluded*)

Paragraph (6)

Paragraph (6) was approved.

Paragraph (7)

1. Mr. USHAKOV said that the commentary to article 27 did not, as a whole, place enough stress on the basic question raised in paragraph 2 of the article, in particular by the words "according to the intention of the parties", namely, the question whether, as the result of the conclusion of a treaty, an international organization might have to amend its rules, including its constituent instrument. A State certainly had to change its internal law if that law was not in conformity with its international treaty obligations since international law took precedence over internal law. That was not true, however, of an international organization, and treaty law did not take precedence over the rules of an organization.

Paragraph (7) was approved.

The commentary to article 27, as amended, was approved.

ARTICLES 28-34 (A/CN.4/L.261/Add.2)

Commentary to article 28 (Non-retroactivity of treaties)

The commentary to article 28 was approved.

Commentary to article 29 (Territorial scope of treaties between one or more States and one or more international organizations)

2. Mr. USHAKOV said he was surprised that the commentary to article 28 was so short and the commentary to article 29 so long. Article 29 required few explanations since it enunciated a rule which applied to States and was already in the Vienna Convention on the Law of Treaties, whereas article 28 contained a new rule which was of great importance to international organizations.

The commentary to article 29 was approved.

Commentary to article 30 (Application of successive treaties relating to the same subject-matter)

The commentary to article 30 was approved.

General commentary to section 3: Interpretation of treaties (articles 31-33)

The general commentary to section 3 was approved.

Commentary to article 34 (General rule regarding third States and third international organizations)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

3. The CHAIRMAN suggested that the end of the first sentence should be amended to read: "examined on first reading but which, in the time available, were not examined by the Drafting Committee". Obviously, if articles 35 *et seq.* had not been examined by the Drafting Committee, they could not be adopted on second reading.

It was so agreed.

4. The CHAIRMAN suggested that the commentary should not end with the word "etc. ...".

5. Mr. NJENGA suggested that, in the last part of the sentence, the words "for example" should be inserted between the words "to" and "the" and that the word "etc. ..." should be deleted.

It was so agreed.

Paragraph (2), as amended, was approved.

6. Mr. USHAKOV said that, in his view, the commentary to article 34 did not really reflect the basic problem dealt with in the article. The fact that, according to

paragraph 2, a treaty between one or more States and one or more international organizations did not create either obligations or rights for a third organization without the consent of that organization meant that the organization in question was invited to assume an obligation which did not derive from its own rules. If it accepted the obligation, it would have to amend its constituent instrument or any other applicable rules. It was therefore questionable whether an international organization should really be invited to assume, even with its consent, an obligation which did not derive from its rules. He did not object to article 34, paragraph 2, but he would like the commentary to explain that it contemplated the case in which a collateral treaty gave rise to the amendment of the rules of an international organization.

The commentary to article 34 as a whole, as amended, was approved.

With the exception of paragraph (6) of the commentary to article 19bis,¹ chapter IV as a whole, as amended, was approved.

State responsibility (continued)*
(A/CN.4/302 and Add.1-3)
[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL
RAPPORTEUR (continued)

ARTICLE 22 (Exhaustion of local remedies)² (continued)

7. Mr. REUTER said that he had submitted to the Special Rapporteur a text which was intended to replace the proposed text of article 22 but made no changes in the substance of the provision. The new text was based on the ideas, solutions and language employed by the Special Rapporteur. As appeared essential, it consisted of a single sentence. It was not a formal proposal, only a drafting suggestion.

8. The text of article 22 and the Special Rapporteur's written and oral commentaries had left him confused because the article suddenly posed an enormous problem. It followed two articles relating to the effects of the nature of the international obligation on the determination of a breach of the international obligation. Although article 20 had been accepted without too much difficulty, article 21, paragraph 2, had shown that there might subsequently be some complications. The Special Rapporteur was now proposing an article 22 designed to make the specific case of an obligation ultimately involving co-operation by private persons part of the breach of an international obligation. In so doing, the Special Rapporteur was bringing the formidable question of the treatment of private persons into the sphere of responsibility.

9. In the final analysis, the question of injuries suffered indirectly by a State but directly by private persons might be of historical interest only, having played an important

* Resumed from the 1463rd meeting.

¹ See 1464th meeting, para. 16.

² For text, see 1463rd meeting, para. 1.

role in the nineteenth and twentieth centuries until the end of the Second World War. Moreover, since the question of the treatment of aliens posed particular problems, the Commission had decided to leave it aside throughout the formulation of the draft articles on State responsibility. Now, article 22 suddenly brought the subject to the fore again. Doubtless the question was only one aspect of the problem that had to be faced in determining a breach of an international obligation. Even if that was the Special Rapporteur's intention, however, the fact remained that the questions touched on so far went beyond the limited framework of the determination of a breach of an international obligation. He had derived that impression particularly from the ideas the Special Rapporteur had expressed about exhaustion of local remedies in the case of investments made abroad.

10. It therefore seemed to him that the whole question of the treatment of aliens had now been raised, in which case it should be discussed in depth, taking into account all its implications. On the strength of his arbitration experience, he would be reluctant to advise a State to waive by treaty the rule of exhaustion of local remedies. Such a waiver might in some cases result in the speedier settlement of disputes but it could also give rise to enormous difficulties. Although he did not have any strong objections to article 22 as proposed by the Special Rapporteur, he feared that the Commission would not have time to discuss it with the thoroughness it required. For the time being, he would merely point out some of the difficulties to which the article gave rise.

11. As the Special Rapporteur had very rightly noted, the problem was not one of trying to determine whether the rule of exhaustion of local remedies was substantive or procedural. The mere fact that everything had already been said on that subject and that some writers had not hesitated to contradict themselves clearly showed that the problem should not be viewed from that angle. What was certain was that responsibility was engaged only at a particular time, but it did not necessarily follow that there was no adumbration of responsibility before local remedies had been exhausted, as was shown in article 18, paragraph 5³ and in other provisions. In that connexion, the Special Rapporteur appeared to treat the alternatives rather lightly when he said that a breach of an international obligation either existed or it did not. It was in fact conceivable, as the United Kingdom Government had held at the Conference for the Codification of International Law (The Hague, 1930), that a breach could exist without, however, being definitive. The notion of suspension had been widely employed in the Vienna Convention⁴ in the matter of treaties. Until then, it had been applied only to the effects of war on treaties; it could however very well be extended to State responsibility, the argument being that the responsibility of a State existed at a certain time but that its effects were suspended.

12. The article under consideration raised another general but nevertheless fundamental question, namely, what law applied to aliens in the absence of treaty

provisions? At the 1930 Codification Conference, many States had maintained that, in respect of treatment of aliens, the only obligation under general international law was the obligation not to deny them justice. If the Commission endorsed that view, it would end up with an article 22 that was even more rigorous than the one proposed by the Special Rapporteur. The contents of the article would then depend on the position which the Commission adopted on the general question of treatment of aliens. He wondered, however, whether Governments would allow the Commission to deal with that question outright in article 22.

13. The solution to another substantive problem, that of the *tempus commissi delicti* would also depend on the Commission's decision concerning the role played by the rule of exhaustion of local remedies in the determination of a breach of an obligation. The Special Rapporteur had indicated that an article would be devoted to that question later and that it would have to be drafted in the light of article 18, paragraph 5. His own opinion was that it would be very awkward to take a decision at present on the abstract question dealt with in article 22 unless all its practical consequences could be assessed.

14. The problem of the existence of injury might also complicate the formulation of an article relating to exhaustion of local remedies. According to the Special Rapporteur, that problem was secondary to the problem of responsibility. Even so, the question of injury was intimately linked to the contents of article 22 and should have been taken into consideration in a number of the cases already mentioned in the discussion. For example, several members of the Commission had expressed the view that there could not have been any injury if a law had been enacted but not applied. At least in market-economy countries, however, the mere enactment of a law could have immediate effects on the value of property and thus cause injury. Perhaps the wrongful act was not complete in such a case, but he was not sure. In any event, none of those problems could be considered in isolation.

15. He felt also that the points mentioned so far in respect of investments belonged to the past. The developing countries were now masters of their own destiny and relatively free to decide how to deal with former investments. Moreover, they could either accept—and negotiate the conditions for—or refuse new investments. He therefore considered that the investments problem was not of direct concern to the Commission. It would, however, be advisable for the Commission to consider the frequent case in which private persons suffered injury directly and the State suffered it indirectly, and the case in which the State suffered injury directly. In the former case, the question arose whether one kind of injury took precedence over the other.

16. In the *Aerial Incident of 27 July 1955* case, which had been brought before the International Court of Justice and was mentioned by the Special Rapporteur in paragraph 100 of his report (A/CN.4/302 and Add.1-3), he wondered what would have happened if the Israeli aircraft had been shot down in Greek or Yugoslav air space rather than in Bulgarian air space. Would it then have been maintained that the victims should have exhausted Bulgarian local remedies or that Bulgaria had

³ See 1454th meeting, foot-note 2.

⁴ See 1456th meeting, foot-note 6.

committed an act that went beyond the normal scope of its "jurisdiction"? It might also have been claimed that the Greek Government or the Yugoslav Government had been guilty of a serious breach of an obligation. In the *Certain Norwegian Loans* case, the French Government had maintained that the principle of exhaustion of local remedies was not applicable in cases of injury caused to non-resident foreigners.⁵ During the events preceding Algeria's accession to independence, however, France had stopped and searched foreign commercial vessels; doubtless the French Government had then required the owners concerned to exhaust French local remedies first. Such incidents were obviously of concern not only to the private persons directly injured; they also had an impact on international insurance and on freight rates. Consequently, a State other than the one whose nationals were involved might very well have a separate right of action.

17. In the case of transboundary pollution causing injury to private persons, would the State charged with responsibility maintain that no claim could be advanced until the local remedies had been exhausted? If the Commission found that the rule of exhaustion of local remedies applied in regard to pollution, States would have to sign conventions undertaking to grant national treatment to aliens in case of transboundary pollution. The injured aliens could then apply to the local courts and there would no longer be any question of international responsibility. States would thereby show that they had enough confidence in one another to disregard problems of international responsibility and apply private international law solutions. He was not certain, however, that such an arrangement would be satisfactory, particularly in cases of pollution covering broad areas, such as had occurred in the Pacific.

18. In conclusion, he would be prepared to follow the Special Rapporteur's path provided the Commission succeeded in producing an article whose text was in keeping with the preceding articles and did not prejudice any of the important questions involved in the determination of a breach of an international obligation in the light of the rule of exhaustion of local remedies.

19. The CHAIRMAN said that it might be appropriate if he were to indicate how he, as Chairman, viewed the situation regarding article 22. Problems of two kinds were involved in the article: problems of theory, which were the subject of controversy among the writers, and marginal problems, in which the interests of the State and private interests were to some extent interlocked. He did not think that at its current session the Commission would be able to solve the problems of doctrine or even all the marginal problem. What it could do, however—perhaps using techniques somewhat similar to those employed in the Vienna Convention in regard to fundamental change of circumstances—was to draft an article which would give the essential rules while leaving the door open for any future discussion of points of doctrine. On that basis, it seemed to him that the main task would be for the Drafting Committee at the current session. Unless the Commission approached article 22 in that

spirit at the current session, it might find itself in difficulties.

20. Mr. AGO (Special Rapporteur) said he had the impression that Mr. Reuter had perhaps exaggerated the importance of the points which he had raised. He would reply to them at the following meeting. In the meantime, he agreed with the Chairman that the Commission should simply draft a general rule and not seek solutions to all the problems which could arise.

21. Mr. USHAKOV said he thought that it was necessary to establish whether or not the rule of exhaustion of local remedies was applicable to the matter in hand, but without trying to find solutions for specific cases and without dealing with primary rules.

22. Mr. FRANCIS asked whether the Chairman was suggesting that the general debate be postponed until the following year. For his part, he hesitated to enter into a discussion on such an important matter when he had not had time to digest the Special Rapporteur's report fully.

23. The CHAIRMAN said his suggestion was that the Commission should have a brief general debate and then refer the essential rules to the Drafting Committee for early consideration. That was the only way for it to deal with the essence of the problem at that session.

24. Mr. JAGOTA agreed with Mr. Ushakov that the Commission was not concerned, in the present instance, with the material law relating to treatment of aliens and property of aliens or primarily with diplomatic protection, but basically with the question of responsibility, as was clear from the formulation proposed by the Special Rapporteur. Admittedly, the inclusion in draft article 22 of the phrase "namely, to accord certain treatment to individuals, natural or legal persons" indicated that exhaustion of local remedies was being considered within a particular context, but the Commission should bear in mind both the contemporary and the future aspects of the question of treatment of aliens and their property and proceed a little more slowly on that point.

25. In view of the crucial importance of the article and the need to present the Sixth Committee of the General Assembly with a text which would provide a sound basis for its deliberations, the matter required close examination before it was referred to the Drafting Committee, and members should be given time to read and ponder the Special Rapporteur's lengthy report.

26. The crucial issue, as Mr. Reuter had stated, and one on which both doctrine and State practice were divided, was whether responsibility was generated before or after the exhaustion of local remedies. If before, then exhaustion of local remedies would be a procedural device that was essential to make the claim ripe. Mr. Reuter, however, seemed confident that responsibility was in fact generated after the exhaustion of local remedies. Since the reference in draft article 22 to "initial conduct" implied recognition of incipient responsibility, the dichotomy of an initial act which gave rise to responsibility and the final act which took place after the local remedies had been exhausted required careful consideration.

27. An article on exhaustion of local remedies (article 14) had been included in the "informal single negotiating

⁵ *I.C.J. Pleadings, Certain Norwegian Loans*, vol. I, pp. 182-186.

text", in the chapter "Settlement of disputes", in connexion with the jurisdiction of the law of the sea tribunal to be established under the convention on the law of the sea.⁶ That article had, however been omitted in the "informal composite negotiating text" currently under consideration.⁷ He mentioned that fact to indicate the need for caution in developing a theoretical assumption, and on that basis a substantive rule, that no question of responsibility would arise, irrespective of the facts of the case, unless the local remedies had been exhausted. It was always dangerous to go to extremes. For instance, as Mr. Reuter had questioned, would the rule of exhaustion of local remedies also apply in the case of responsibility towards a third party in a third country? Recent examples of State practice indicated that it would be going too far to say that no responsibility would be generated until all the local remedies had been exhausted. Possibly, therefore, the best solution would be for the Commission to state the principle without taking a final position on the matter.

28. In conclusion, he considered that the Commission should devote one or two meetings to a substantive discussion of the question before referring it to the Drafting Committee.

29. The CHAIRMAN pointed out that the Commission had very little time. If the general debate was prolonged by more than one day, the Commission could not physically complete its work before the closing of the session on 29 July 1977. In view of the importance of the article, he considered that two meetings would be required for the general debate. He suggested that they take place the following day so that the matter could be referred to the Drafting Committee before the end of the week.

30. Mr. ŠAHOVIĆ said that, although he shared Mr. Reuter's concern, he thought the Commission had reached a point where it had to take a decision on the inclusion of the rule of exhaustion of local remedies in the draft articles. Article 22 was the logical consequence of the two preceding articles. The Commission therefore might discuss the exhaustion of local remedies but it should express a general reservation in the commentary to the article.

31. Article 22 raised the question of the nature of the rule of exhaustion of local remedies. On that point the Commission was on solid ground. As clearly shown in the report under consideration, there was no doubt that the rule was one of customary international law. The Special Rapporteur had dealt with the question of the limits of the rule, paying due regard to the literature, international jurisprudence and State practice. The text he proposed was perfectly in keeping with his analysis, and the limits he placed on the rule of exhaustion of local remedies reflected accurately the present stage of development of international law.

32. It was obvious that the article proposed by the Special Rapporteur left a number of questions un-

answered, but he saw no danger in that. For the time being, it was important for the Commission to produce a draft article and a commentary which would give Governments an opportunity to indicate their views on the question. If the Commission became involved in a long and thorough discussion of all the problems to which the article could give rise, it might be unable to take a decision on the article at the current session and would thus fail in its duty.

33. In formulating draft article 22, the Special Rapporteur had endeavoured to reconcile the sovereign interests of the State charged with responsibility and those of the State of which the injured private persons were nationals. In addition, he had taken into consideration the various legal solutions which had recently been devised, particularly in the area of human rights, and which might one day be part of customary international law.

34. As a whole, the proposed article was therefore acceptable, having regard to the drafting problems involved in a provision of that kind and the theoretical difficulties which the Commission would not fail to encounter if it now tried to solve all the problems which the article posed.

35. Mr. SCHWEBEL said that he was unwilling to express his views on such an important article until he had had time to digest in full the Special Rapporteur's report. He therefore considered that members should be allowed time to study the report.

36. Mr. TABIBI too thought that members should be given time to read and reflect on the Special Rapporteur's report. The Commission should, however, devote as many meetings as necessary to the formulation of an article that would be acceptable to the Sixth Committee of the General Assembly.

37. Mr. USHAKOV, Mr. SETTE CÂMARA and Mr. QUENTIN-BAXTER agreed with the procedure outlined by the Chairman.

38. After an exchange of views, the CHAIRMAN suggested that the Commission devote two meetings on the following day to the general debate on draft article 22, and that the morning meeting be postponed until 11 a.m. to give members a little more time for reading. He further suggested that, on conclusion of the general debate, draft article 22 should immediately be referred to the Drafting Committee.

It was so agreed.

The meeting rose at 6.15 p.m.

1466th MEETING

Thursday, 21 July 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-

⁶ *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. V (United Nations publication, Sales No. E.76.V.8), p. 185, document A/CONF.62/WP.9/Rev.1.

⁷ *Ibid.*, vol. VII (Sales No. E.77.V.10), document A/CONF.62/WP.10.

Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

**Draft report of the Commission on the work
of its twenty-ninth session (continued)**

CHAPTER IV. Question of treaties concluded between States and international organizations or between two or more international organizations (concluded) (A/CN.4/L.261 and Corr.1 and Add.1-2)

B. Draft articles on treaties concluded between States and international organizations or between international organizations (concluded) (A/CN.4/L.261 and Corr.1 and Add.1-2)

TEXT OF ARTICLES 19, 19bis, 19ter, 20, 20bis, 21-23, 23bis, 24, 24bis, 25, 25bis, 26-34, AND OF ARTICLE 2, PARAGRAPH 1 (j), AND COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS TWENTY-NINTH SESSION (concluded) (A/CN.4/L.261 and Corr.1 and Add.1-2)

ARTICLES 19-26 (concluded)* (A/CN.4/L.261)

Commentary to article 19bis (Formulation of reservations by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States) (concluded)*

Paragraph (6) (concluded)*

1. The CHAIRMAN announced that paragraph (6) of the commentary to article 19bis would remain as amended at the 1464th meeting.¹

The commentary to article 19bis, as amended, was approved.

State responsibility (continued)
(A/CN.4/302 and Add.1-3)

[Item 2 of the agenda]

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

ARTICLE 22 (Exhaustion of local remedies)² (continued)

2. Mr. AGO (Special Rapporteur) said that articles 20, 21 and 22 formed a whole and that the rule in article 22 simply represented the application to a special case of the fundamental principle stated in article 21, paragraph 2. There were, of course, two categories of international obligation: obligations which required a State to adopt a particular course of conduct, either an action or omission—for example, an obligation to refrain from entering the territory of another State by armed force or from sending police into the premises of an embassy—and obligations which required a State to achieve a certain result, while leaving it free to choose the means of doing so.

3. Obligations relating to the treatment of aliens usually belonged to the second category. If there was an assault on a foreign official dignitary, the State had a duty to

arrest and punish the perpetrator. If the local police failed to arrest him but the national police later intervened and succeeded in doing so, there was no breach of the obligation for the required result was achieved. Similarly, if the guilty party was acquitted by a lower court but subsequently, on appeal by the government authority charged with prosecution, was convicted by a higher court, the obligation was discharged. Likewise, in the case of an obligation to extradite, the result was achieved and there was no breach if, after a lower court had refused extradition, a higher court granted it. On the other hand, the fact that the first organ to deal with the matter acted in a manner consistent with the required result did not suffice to discharge the obligation, for a second body might overturn its decision. If, for instance, a lower court inflicted a penalty and its decision was subsequently quashed and the culprit acquitted by a higher court, there would be a breach of the obligation if the required result had been the punishment of the guilty party, and it would be the decision of the higher court which would mark the commencement of the process of breach. In that particular case, the State acted through a number of organs and it was not until the last body competent in the matter had given its decision that it could be said definitively that the obligation had been either discharged or breached.

4. In such an instance, the action of the State came within the category of complex acts mentioned in article 18, paragraph 5³ for it comprised a series of separate actions by various of the State's organs in the same specific case. It would therefore be a mistake to equate the act of the State with its first or last action in a case of that kind. It was not true that everything came down to the action of the first or the last organ to intervene in the matter. It was the totality of the acts of the State which constituted the performance or the breach of the obligation. Clearly, therefore, if it was concluded in a given case that there had been a breach of the obligation because the State had failed to achieve the required result by any of the means at its disposal, the wrongful act in question was one which extended over a period of time and embraced both the first and the last of the State's actions in the matter, with all the consequences which that might entail.

5. He would return to the notion of the complex act when he took up the question of the duration of the wrong. The content of the article he intended to devote to that question would necessarily derive from the content of article 18, paragraph 5, and article 22. It was obvious, in fact, that for a complex wrongful act the *tempus commissi delicti* was the entire duration of the breach, from the first to the last act.

6. Article 21, paragraph 2, took account of that situation and showed that, when an international obligation required the State to achieve a particular result, a breach of the obligation could not be said to be complete so long as an organ of the State could still act to achieve that result. Only when no organ of the State could take any further action to ensure the performance of the obligation could it be said that a breach definitively existed and that responsibility was generated.

* Resumed from the 1464th meeting.

¹ See 1464th meeting, paras. 15 and 16.

² For text, see 1463rd meeting, para. 1.

³ See 1454th meeting, foot-note 2.

7. What marked the situation contemplated in article 21, paragraph 2, was the fact that the initiative in bringing in a new organ to correct the result produced by the conduct of the first organ lay with the State. It was obvious that, if a lower court acquitted the murderer of a foreign dignitary who had been on an official visit to the country, it was the State itself which must take steps to obtain the reversal of that verdict by a higher court. In such a situation, it was for the State to choose the means of producing the required result, as it was for it to correct the action of a lower body by that of a higher one.

8. The obligation to which article 22 referred constituted a special case of the obligations of result discussed in article 21. It required the State to ensure certain treatment for private persons. It might, for example, require that foreigners be permitted to exercise a certain profession or activity within the territory of the State, that they be granted recourse to domestic courts under the same conditions as nationals, that there be no interference with their property, and that they be given adequate compensation if subjected to measures of expropriation in the public interest.

9. The principle requiring the exhaustion of local remedies took precisely into account the fact that obligations of that nature were established for the benefit of certain persons and that it was normal for such persons to co-operate in achieving the result required by the international obligation. Thus, if a foreigner wished to exercise a profession or work a mining concession in a given State, he would have to begin by seeking permission from the competent authority. If such permission was refused, he would have to go to a higher authority to obtain a reversal of the decision of the first. Thus, the beneficiaries of the obligation must collaborate in the State's action to ensure its discharge. The principle of exhaustion of local remedies was therefore designed to ensure the intervention of all the organs of the State which actually had the possibility of securing the result required by the obligation. That principle however only derived logically from the principle which lay at the basis of the distinction between obligations of conduct and obligations of result.

10. If it was accepted that the principle of exhaustion of local remedies was related above all to the performance of the obligation, it became clear that a breach of the obligation could not be said to exist so long as the result which the obligation required could still be achieved. Consequently, international responsibility could not be said to exist and could not be invoked in an international forum or asserted through diplomatic protection. That was why, when opposing diplomatic claims, the respondent State generally relied on the principle of the exhaustion of local remedies to show that the obligation had not been breached because not all the available means of recourse had been exhausted.

11. He reminded the Commission that neither in practice nor in jurisprudence was there a single case justifying an assertion that the rule of exhaustion of local remedies was not linked mainly with the performance of international obligations of result concerning the treatment of private persons and, consequently, with the require-

ment that the breach be complete. In some cases, practice and jurisprudence had shed light on the effects of that rule on the generation of responsibility, while in others, as was natural in the case of international courts, they had shown its effects on the admissibility of a claim. But in no instance had they called in question the link which existed between the exhaustion of local remedies and the breach of the obligation.

12. Accordingly, all the practical problems which arose had to do with the limitation of the scope of the principle. There was a temptation to restrict the value of the condition of exhaustion of local remedies to the breach of obligations pertaining to aliens residing in the territory of the State and injured by acts committed in that territory. However, to do that would be to exclude all the other cases of application of the principle, thereby imposing on the State excessive responsibility and transforming in effect a whole series of obligations of result into obligations of conduct.

13. It was, of course, necessary to exclude cases in which the State had caused injury to aliens because they were aliens or because they were nationals of a particular country. For example, if a State decided to expel all the nationals of a certain country from its territory without warning, it was clear that the requirement of exhaustion of local remedies would not come into play for the remedies would have no effect. In such a case, the breach of the obligation existed and the responsibility of the State was engaged from the moment the measure in question was taken and applied.

14. The real problem arose with aliens who had no voluntary link with the State or who were victims of an act which occurred outside the State's territory. However, whatever the situation in question, there were always marginal cases in which the application of the chosen criterion would fail to produce satisfactory results—that of course was why there were so many appeals to international courts and arbitral settlements. In his view, it would be impossible to select a criterion which would eliminate all those marginal cases. He did not think that a limitation of the scope of the principle of exhaustion of local remedies to acts committed in the territory of the State was logically justified. Moreover, in neither the *Finnish Vessels* case nor the *Ambatielos* case⁴ had either the arbitrators or the parties themselves attempted to oppose the application of the rule of exhaustion of local remedies by invoking the fact that the act complained of had occurred outside the territory of the State.

15. On the other hand, in the case of the vessels stopped and searched by France during the Algerian war, mentioned by Mr. Reuter,⁵ the problem of the applicability of the condition of exhaustion of local remedies had arisen, the reason having been that, in the eyes of the French authorities, the war had not been a legitimate one between two subjects of international law and the efficacy of recourse to the French courts had therefore been in doubt. Similarly, it was perfectly obvious that, when a foreigner was the victim of an assault in the territory of a State

⁴ For references, see A/CN.4/302 and Add.1-3, foot-notes 148 and 195.

⁵ 1465th meeting, para. 16.

with which he had no link or when he was brought by force into the territory of a State, there could be no question of requiring the exhaustion of local remedies since it was already certain that those remedies would be ineffective. In every case, however, the criterion to be applied was that of the real efficacy of the internal remedies, which must not be merely formal but capable of actually bringing about the required result.

16. He considered that in the special situation cited by Mr. Reuter, where there was infringement both of the rights of a State and of the rights of foreign private persons, it was generally the infringement of the rights of the State which took precedence. That explained why he had not mentioned that situation in his report. For example, if a foreign warship carrying private individuals was sunk in a State's territorial sea, the infringement of the rights of the State would take precedence over that of the rights of the individuals, and it was probable in such a case that the parties would settle the whole affair, including the question of possible compensation of the individuals, as a single matter. However, it was not impossible that the settlement reached in a case of that kind would dissociate the two aspects of the affair and provide for the application of the principle of exhaustion of local remedies to the individuals.

17. He believed, however, that it would not be wise to make provision for cases of that type in the context of the general problem of determining the conditions of breach of international obligations, and to attempt to settle them in article 22. It would be better, in his view, to lay down a fundamental rule and not try to take into account all the possible special cases. The main thing was to stress that the principle of the exhaustion of local remedies, which was the fundamental condition for the co-operation of private persons in achieving the result required by the international obligation, was applicable only if those remedies were effective. If the local remedies were not effective—in other words, if it was in effect impossible to obtain the required result by their use—the principle would not apply for it would be clear that the result could not be achieved. When that was so, the non-performance of the obligation became definitive and international responsibility was generated.

18. Mr. FRANCIS expressed his appreciation of the Special Rapporteur's further clarifications.

19. After seeing the wealth of examples which the Special Rapporteur cited in his sixth report in connexion with article 22, it became impossible to deny his conclusion that the rule of exhaustion of local remedies was firmly established and universally recognized. He was gratified by the Special Rapporteur's recognition of the fact that the rule had procedural aspects, for in his opinion they were obvious: for example, the State whose nationals alleged that they were victims of a breach of an international obligation might wish to know what remedy they had employed, the State accused of the breach might reply that adequate local remedies had existed but had not all been exhausted, and the international tribunal to which the matter was ultimately referred might want to know whether in fact the local remedies had all been tried. The Special Rapporteur was absolutely right to assert that the rule was also a substantive one and that

international responsibility was engaged from the point when recourse to the last locally available remedy had failed to produce the required result. Given the new material which had become available since the 1930 Conference for the Codification of international Law, in the form of practice and jurisprudence, the Commission would be failing in its duty if it did not move forward from the position adopted on the subject then and accept the Special Rapporteur's view.

20. The Special Rapporteur had emphasized in his report the importance of co-operation by the private victim in setting in motion the machinery for remedying the situation. With regard to the operation of that machinery, article 22 must be seen in conjunction with article 21, and particularly paragraph 2 of the latter, which afforded the State whose initial conduct had been at fault the time to choose new means of fulfilling its obligations and—a point which was of particular importance in relation to article 22—to assess the likely efficacy of such means. Consequently, the relationship of the rule of the exhaustion of local remedies to the rationale behind article 22 made inescapable the Special Rapporteur's conclusion that the rule of exhaustion of local remedies was a substantive one, generating State responsibility at the international level.

21. Despite the Special Rapporteur's comments at the present meeting in response to the points made by Mr. Jagota about article 22 (1465th meeting), he continued to feel that the last sentence of the article might be dangerous if adopted without qualification. He had in mind in that connexion, on the one hand, the fact that, as the Special Rapporteur had acknowledged in discussing article 21, States might deliberately attempt to frustrate the fulfilment of an international obligation incumbent upon them and, on the other, the conclusion the Special Rapporteur had drawn in his report to the effect that a remedy should not be used unless it held out genuine prospects of producing either the result originally required by the obligation or an equivalent outcome. In the light of those considerations, there seemed to be a clear need for an exception to the rule stated in the last sentence of article 22, which might otherwise open the way to international disputes by leaving a State free to argue that its international responsibility did not arise until local remedies—the success or use of which it might itself be preventing—had been exhausted.

22. The Special Rapporteur had quoted several instances in which the rule of exhaustion of local remedies had been applied in respect of events which had occurred outside the jurisdiction of the State which had been under an international obligation, but he wondered whether the cause for action in those cases might not have rested on a conventional basis or some express provision of municipal law. It was, after all, a fact that, in many countries, the moving of a court on an issue rested on the jurisdictional basis of the cause. Since the matter of jurisdiction was delicate, it might be best to seek the views of Governments before attempting to formulate a progressive and positive rule in that respect.

23. Similarly, it would seem prudent to examine the extent to which multilateral instruments such as the International Convention on the Elimination of All

Forms of Racial Discrimination and the International Covenant on Civil and Political Rights had been ratified and were applied before taking the step, in a codifying instrument, of extending the rule of exhaustion of local remedies to nationals of a State to which responsibility for the breach of an obligation might be attributable.

24. He had no objection to the referral of article 22 to the Drafting Committee.

25. Mr. RIPHAGEN said that, the Special Rapporteur's excellent report and impressive statements notwithstanding, he doubted whether the Commission could deal adequately with the question of exhaustion of local remedies in the time remaining to it. It seemed to him that, if the Commission was to adopt an article such as article 22, the limits of application of the rule should be dealt with, at least in the commentary. Perhaps, indeed, the question posed by the rule was so important as to require a number of articles.

26. So far as he could see, article 22 was based both on the notion that international obligations requiring a State to accord certain treatment to private persons were always obligations of result, and on the notion that it was the duty of the victims of improper treatment to co-operate in achieving the result required by the obligation in question by exhausting local remedies. It seemed to him that the second of those ideas went much further than the civil law concept of contributory negligence from the victim. There were also other questions which arose out of the dual conceptual basis of the article.

27. For example, the Special Rapporteur had given the impression that he felt the rule of exhaustion of local remedies was not applicable to cases falling under article 20. His own view, however, was that there could conceivably be obligations which came under that article but, at least to some extent, had a connexion with the treatment of private persons. Perhaps that point could be discussed in the commentary. Another question which necessarily arose from the dual conceptual basis of the article and which it might also be appropriate to clarify in the commentary was that of the relationship between article 22 and the subject dealt with in article 19, namely international crimes and international delicts. Not only had Mr. Reuter mentioned the matter at the previous meeting in relation to environmental damage, but there had already been discussion elsewhere of the question whether equal access for foreign interests to national procedures and substantive rules relating to the prevention of and reparation for environmental damage would entail the need to exhaust local remedies in cases of transboundary pollution.

28. With regard to the question of the duty of the victim to co-operate in ensuring the achievement of a result required by an international obligation, he said that he had some difficulty in seeing why there would be such a duty to co-operate where a State had acted outside the scope of its jurisdiction under international law. Although the limits of such jurisdiction were not entirely clear, it was generally agreed that they did exist. It therefore seemed to him that, if a State acted outside the scope of its jurisdiction, the victim of such action could not reasonably be asked to co-operate, through the exhaustion

of local remedies, in ensuring the fulfilment of the State's obligation. Indeed, there was a clear analogy between cases in which a State acted outside the scope of its jurisdiction and cases in which the action of one State damaged the interests of another State which, because of State immunity, was not required to exhaust local remedies, even though such remedies existed.

29. Another aspect of the duty of the victim to co-operate had attracted his attention when he had read the last sentence of paragraph 108 of the Special Rapporteur's report, which stated: "It should be emphasized that, if the individual fails to advance in the course of the internal proceedings an argument which might have won him the case and if that omission is later revealed by the use of that argument before an international court, the court may find that the requirement for exhaustion of local remedies has not been duly met". In his opinion, that statement went a bit far for in a case of that kind it could be said that the individual had in fact co-operated by employing local remedies. Moreover, the arguments advanced in an international court would, of course, be arguments advanced by the State involved. In addition it would be pure speculation for an international court to say that, if the arguments in question had been advanced in the internal proceedings, they would have won the case. Indeed, it would have been more the fault of the lawyers in the case than of the victim if the best arguments had not been advanced in the internal proceedings. Thus, if the Commission carried the duty of the victim as far as the Special Rapporteur had indicated in his passage of his report, it would be overstepping the limits of what could reasonably be asked of the victim of an action by a State.

30. Another point of concern to him was that, in a case where a private person had a duty to co-operate in ensuring the achievement of an internationally required result, there could be no certainty that the result to be achieved through the exhaustion of local remedies would be the same as the result originally required by the international obligation. For instance, account had to be taken of the fact that, in most cases, the result achieved through international litigation would be only the economic equivalent of the originally required result. Account also had to be taken of a purely practical consideration, namely, that local remedies might be useless in cases where local courts were not empowered to apply the rules of international law, particularly if such rules were contrary to municipal law. In such cases, the exhaustion of local remedies could hardly be expected to produce exactly the same result as the one required by an international obligation. He was not therefore in favour of the broad application of the rule of exhaustion of local remedies.

31. Mr. EL-ERIAN said he had no difficulty in agreeing with the Special Rapporteur that the rule of exhaustion of local remedies was a rule of customary and conventional international law. With regard to the question whether it should be regarded as a substantive rule or as a rule of procedure, however, some doubts had formed in his mind when he had first read paragraph 51 of the report because he belonged to the school that considered it to be a rule of procedure relating to the international law

of claims, under which an individual must have sought redress before the municipal courts of the State before his claim could be espoused by his own State at the international level.

32. On reflection, however, he had decided that his initial doubts were unfounded. He could therefore accept the Special Rapporteur's approach to the particular situations with which article 22 was designed to deal and agree with him that the rule of exhaustion of local remedies was a substantive rule of international law, which applied in cases where a State was required to produce a particular result in the treatment of private persons, whether natural or legal, and where an action or omission leading to a situation incompatible with the required result would entail the international responsibility of the State if the person in question had previously exhausted local remedies without success.

33. His support of article 22, in its present form and in its present place in the draft articles, would nevertheless depend on whether the Commission was given another opportunity to consider the relationship between article 22 and all the other articles of the draft. In that connexion, he noted that the question of the existence of international responsibility was closely linked to the question of exhaustion of local remedies as had been shown in the Special Rapporteur's discussion, in paragraph 56 of his report, of the formula adopted by the 1930 Hague Codification Conference concerning the question whether international responsibility came into being before or after the exhaustion of local remedies. The Special Rapporteur had also discussed the relationship between those two questions in paragraph 71 of his report, in which he had described the background to the decision by the European Commission of Human Rights to the effect that "... the responsibility of a State under the Human Rights Convention does not exist until, in conformity with article 26, all domestic remedies have been exhausted ...".

34. Also, the Commission should consider the relationship between article 1, which provided that "Every internationally wrongful act of a State entails the international responsibility of that State", and the principle of exhaustion of local remedies since, in cases of a breach of the rules of international law governing the treatment of private persons, it was conceivable that international responsibility might exist even before local remedies had been exhausted. Indeed, in such cases, the State which had committed the breach might decide to compensate the person whose rights had been infringed even before he had resorted to the local courts. There were thus three possibilities: the wrongful act could be remedied either by the State, through the payment of immediate compensation; by the local courts, through the exhaustion of local remedies; or, failing those two means, through an international claim.

35. Mr. SCHWEBEL said that he fully agreed with the Special Rapporteur that the rule of exhaustion of local remedies was, and should continue to be, a rule of customary and conventional international law, even though it offered both advantages and disadvantages, as the Special Rapporteur had noted in paragraph 111 of his report. Such disadvantages could, however, be over-

come by special arrangements that expressly or tacitly precluded the application of the requirement of exhaustion of local remedies. In that connexion, the Special Rapporteur had referred to the example of the inclusion in contracts between States and foreign private companies of arbitration clauses in place of provision for recourse to local courts. Generally speaking, however, both the sensitivity of States about the use of their internal legal processes and the desirability of settling disputes without raising them to the international plane were powerful arguments for maintaining the rule of exhaustion of local remedies. There was moreover no doubt, as the Special Rapporteur had so clearly shown in his commentary, that the rule had behind it a great weight of practice and that there were many cogent considerations of principle in support of its maintenance.

36. It was generally agreed that, where effective local remedies existed, an alien must exhaust them before the State of which he was a national could espouse his claim. Indeed, the Special Rapporteur had stressed the importance of the effectiveness of local remedies, noting, for example, that, in a legal system where the decrees enacted by a State were not subject to challenge, there would be no effective local remedies which the alien could be required to exhaust if, for example, the State enacted a decree violating the rights guaranteed to aliens under customary or conventional law. In that case, the international responsibility of the State which had enacted the decree would be engaged and the State of which the alien was a national could, if it so wished, espouse the alien's claim. In that connexion, he noted that the concept of "espousal of a claim" had been clearly explained in the judgment of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case.⁶

37. He was, however, of the opinion—and he hoped that the Special Rapporteur would agree with him—that the alien's Government might legitimately address the problem of an alleged violation of the alien's rights under international law at an earlier stage, before it was entitled to espouse the alien's claim and before international responsibility had been engaged. An example of such a situation could be found in the case of *Asakura v. City of Seattle*,⁷ which had arisen out of a treaty of friendship, commerce and navigation between the United States and Japan, providing that the nationals of those two countries could engage in certain professional activities in the territory of both States. In that case, the city of Seattle had enacted an ordinance which had had the effect of preventing Mr. Asakura from exercising a professional activity guaranteed by the treaty in question. Although the ordinance had not been an *ad hominem* law, it had still not been very attractive because its purpose had been clearly xenophobic, if not racist. There had nevertheless been ample room for resort to local remedies, which Mr. Asakura had successfully exhausted, and the ordinance had been overturned. However, he did not think that, at the time when the city of Seattle had enacted the ordinance, the Government of Japan

⁶ For reference, see A/CN.4/302 and Add.1-3, foot-note 189.

⁷ *Annual Digest of Public International Law Cases, 1923-1924* (London, 1933), vol. 2, case No. 182, p. 314.

could not have reminded the Government of the United States of the relevant treaty provisions, which the action by the city of Seattle had plainly contravened. Thus, an expression by Japan of concern, and of confidence that the United States authorities would take the appropriate steps to remedy the situation, would not have amounted to espousal of Mr. Asakura's claim.

The meeting rose at 1 p.m.

1467th MEETING

Thursday, 21 July 1977, at 3.10 p.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Yankov.

State responsibility (*continued*) A/CN.4/302 and Add.1-3 [Item 2 of the agenda]

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

ARTICLE 22 (Exhaustion of local remedies)¹ (*continued*)

1. Mr. SCHWEBEL, continuing his statement said that another example of a situation such as that in the case of *Asakura v. City of Seattle*, could be found in the case of the refusal of the New York Port Authority to grant landing rights to the *Concorde*. In that case, the very highest officials of the United Kingdom and France, although not espousing the claims of their nationals on the ground of a United States breach of an obligation engaging its international responsibility, had voiced great concern at what they regarded as the infringement of a treaty right given to their nationals. He hoped that the Special Rapporteur would agree that such expressions of concern were legally permissible. The question to be decided was whether there had been, in the case of *Asakura v. City of Seattle*, or whether there was, in the *Concorde* case, a breach of international law by violation of a treaty. Assuming, *arguendo*, that there was such a violation, was there then a breach of international law even before the exhaustion of local remedies and before international responsibility arose, with the resultant right to espouse a claim? The Special Rapporteur seemed to argue that, even if there was an apparent or actual breach of a treaty, there was no violation of international law until local

remedies had been exhausted, because until that time there was an act which a State might correct. The Special Rapporteur argued that the State should not be held responsible until it had been definitely established that it would not correct its transgression.

2. He had no quarrel with that argument. Where he had a doubt was on the question whether there was not a breach of international law when the breach of a treaty took place, even though State responsibility had not been incurred. The Special Rapporteur said that there was no such breach and the reasons he had marshalled in support of his argument were plausible. Nevertheless, at the current stage of the Commission's consideration of the subject, his (Mr. Schwebel's) doubts persisted.

3. In the *Concorde* case, for example, local remedies had clearly not been exhausted; clearly, nationals of the United Kingdom and France had certain landing rights in New York by treaty; clearly, the United Kingdom and French Governments were of the view that those treaty rights comprehended the *Concorde*; and, clearly, Air France and British Airways argued a current violation of treaty rights. Did that not suggest that, from the point of view of the individual who set about exhausting his local remedies, the Special Rapporteur's analysis was not wholly satisfactory? The Special Rapporteur argued that, in exhausting local remedies, the alien was acting simply on the internal plane. Could he also argue that there could not be a breach of an international obligation without incurring international responsibility? Did that not also suggest that, if British Airways and Air France lost in the United States courts, and the United Kingdom and France brought a claim for damages as well as specific performance, their claim might date from the time of initial denial, not from the time of the Supreme Court's decision.

4. The individual, in exhausting local remedies, was, of course, acting on the internal plane, but was that the same as saying that he sought to bring about observance only of internal law? When a treaty between two States gave rights to the individual, were not those rights his rights, as well as being the rights of the State in certain circumstances? In the *Asakura v. City of Seattle* case, Mr. Asakura had been able to show that the treaty of friendship, commerce and navigation between Japan and the United States gave him rights that he could assert. Those rights became part of the internal law of the United States because in the United States international law was part of the law of the land. Thus, as Mr. Asakura had shown, treaty law overrode municipal ordinances. Mr. Asakura had also argued that municipal as well as international law was being transgressed. Surely, persons the world over, finding themselves in a situation similar to that of Mr. Asakura, could also argue that they were invested with rights by treaties. Would such an argument be premature? Was it premature to maintain that breach of a treaty was a breach of international law even though, by subsequent internal acts precipitated by the exhaustion of local remedies, the breach might be cured? The Special Rapporteur argued that it would be premature, because it was impossible to conceive of a wrongful act not engendering responsibility. He wondered, however, whether there could not be an act which was wrongful under

¹ For text, see 1463rd meeting, para. 1.

international law but which did not give rise to responsibility until the exhaustion of local remedies. Surely local remedies could apply and realize international legal claims.

5. Similarly, he did not agree with the statement made by the Special Rapporteur in foot-note 100 of his report (A/CN.4/302 and Add.1-3), that international law would never provide for the generation of a responsibility without another State having the faculty to enforce it as soon as it became apparent. International law and life were littered with rights available to States under international law which the States were unable to enforce. The Special Rapporteur maintained that breach of an international obligation and the genesis of international responsibility must be concurrent and coincidental. For the reasons he had indicated, he had some doubts on that point. Could it not be maintained that, when a treaty right was in the first instance denied, there was a breach of an international obligation, but that international responsibility was not generated until local remedies had been exhausted? He recognized that article 21 had implications for article 22. He also recognized all the force of the Special Rapporteur's arguments on the point.

6. Textual expression could be given to his doubts if, in the text of article 22 proposed by the Special Rapporteur the word "definitive" was inserted before the word "breach" at the beginning, the words "be and would" were inserted between the words "would" and "continue" near the end of the first sentence, and the words "in violation of international law" were inserted after the word "omission" in the second sentence.

7. He wondered, too, whether provision should not be made in the text for limits on the rule of exhaustion of local remedies. In that connexion, he supported the points made by Mr. Riphagen, in the 1466th meeting.

8. Mr. TABIBI said that article 22 was the most important article before the Commission. The differences between it and articles 20 and 21 were set out in paragraphs 47 and 48 of the Special Rapporteur's report. The rule proposed covered both the breach and the fulfilment of obligations of result. The Special Rapporteur seemed to be arguing that the principle of the exhaustion of local remedies was closely bound up with the development of international obligations regarding the treatment to be accorded by States to foreign, natural or legal persons, and to their property, and that a breach of an international obligation could not be established until the individuals who considered themselves injured by being placed in a situation incompatible with a result which the State was internationally required to achieve, had failed to get the situation rectified, even after exhausting all local remedies. He supported that approach. He also supported the draft article proposed by the Special Rapporteur, for recognition of the principle of the exhaustion of local remedies would afford protection both to the injured individual and to the State in whose territory the injury had occurred, and would prevent a recurrence of the situation which had prevailed when, on the pretext of defending the rights of their citizens abroad, the colonial Powers had committed grave crimes in Asia, Africa and Latin America.

9. He realized, however, that situations could arise in which application of the principle would be difficult. For example, which local remedies would have to be exhausted by an individual suffering an injury on the high seas? It was also possible that the process of exhaustion of local remedies would be deliberately delayed, for political reasons, either by the State concerned or by the home State of the injured person. It would also be necessary to consider whether the principle could be applied to diplomatic or consular agents in cases where the activities of such agents were neither wholly official nor wholly personal. Finally, there could be cases in which a State enacted a law violating rights guaranteed to an alien under customary or treaty law; in such cases, there would obviously be no local remedies to exhaust.

10. Referring to paragraph 111 of the report, he observed that it was not only individuals from rich and strong countries who required protection. Individuals from third world countries—the OPEC countries, for example—made considerable investments abroad and it was essential that their rights and property be protected.

11. In conclusion, he suggested that, at the present stage, the Commission should concentrate on stating a clear, simple principle. Later, when the views of Governments were known, the principle could be amplified to take account of contemporary international law. It should be noted that the cases referred to by the Special Rapporteur dated mainly from the 1930s and 1940s. As Mr Riphagen had said, what was needed was a series of articles covering the interests of all the parties concerned and meeting the requirements of modern international law. He agreed that the text prepared by the Special Rapporteur should be referred to the Drafting Committee so that a rule on exhaustion of local remedies could be formulated. He hoped, however, that later it would be possible to amplify the rule.

12. Mr. SETTE CÂMARA said that in his report the Special Rapporteur had developed a rationale which proved beyond doubt that local remedies must be exhausted before State responsibility could be established, and that the rule of exhaustion of local remedies should appear in the Commission's draft articles.

13. The exhaustion of local remedies often appeared as an exception to the application of international law somewhat in the same way as the domestic jurisdiction exception. However, whereas the domestic jurisdiction exception completely excluded international jurisdiction, the exhaustion of local remedies exception proclaimed the subsidiary character of international jurisdiction, thereby affirming its existence. It was interesting to note that in many cases, including the *Certain Norwegian Loans* case,² the *Aerial Incident of 27 July 1955* case³ and the *Interhandel* case,⁴ parties had invoked both the exception of domestic jurisdiction and the exception of the exhaustion of local remedies. That approach was contradictory because to invoke the rule of exhaustion of local remedies implied acceptance of the existence of international jurisdiction, but it had been adopted

² *I.C.J. Pleadings, Certain Norwegian Loans*, vols. I and II.

³ *Ibid.*, *Aerial Incident of 27 July 1955*.

⁴ *Ibid.*, *Interhandel*.

by States. Both the exception of exhaustion of local remedies and the exception of domestic jurisdiction had originated as devices for safeguarding State sovereignty. From the point of view of international law, it was preferable to accept the solution of exhaustion of local remedies rather than that of domestic jurisdiction, which simply did away with international jurisdiction.

14. With regard to the Special Rapporteur's draft, he agreed that an article on the exhaustion of local remedies should be included. It would be for the Drafting Committee to examine the wording thoroughly and produce a clear formulation. A question to be decided was whether the Commission should depart from past practice, as the Special Rapporteur advocated, and assume that the principle of the exhaustion of local remedies was applicable not only to the treatment of foreigners but also to the treatment of nationals. It must be borne in mind that a question of codification was involved and that the practice advocated by the Special Rapporteur was completely contrary to the historical origins of the clause, which had been designed to protect national sovereignty. He did not think the notion that the nationals of a State should be subject to international jurisdiction in certain cases would find wide acceptance. Personally, he would recommend adherence to the traditional view that the principle was applicable only in cases relating to the treatment of foreigners.

15. If the Commission shared his view, the question of the position of the article would arise. As proposed by the Special Rapporteur, article 22 followed naturally on articles 20 and 21 but, if application of the principle was limited to the treatment of foreigners, the article should appear either in a special chapter or as a subparagraph to paragraph 1 of article 21. That was a matter to be decided by the Drafting Committee.

16. Mr. USHAKOV said that, despite the Special Rapporteur's oral explanations, there remained a certain number of difficult legal and political questions to be settled. The article under study concerned a special category of obligations of result. When the international responsibility of a State was engaged, it was generally towards another State which had been injured by the breach of an international obligation. In the event of a breach of a fundamental principle of international law, however, a State could be held responsible towards the whole international community. Thus, an act of aggression harmed not only the State against which it was directed but the international community as a whole. Article 22 concerned a particular case of responsibility of a State towards another: the breach of an obligation of result pertaining to the treatment of foreigners. There existed, in that sphere, a number of obligations deriving from rules which were of a primary nature and with which the Commission was therefore not concerned at the moment.

17. The institution of diplomatic protection had its origin in the link which bound a State and its nationals, even when the latter were in the territory or under the jurisdiction of another State. That other State, for its part, was bound by customary or conventional international obligations to accord certain treatment to foreign natural and legal persons. If the other State harmed

foreigners, it was considered that the State of which they were nationals had also been harmed and that it had a subjective right to make a claim. Nevertheless, it was only as from a certain moment that a State could intervene to protect its nationals within the limits recognized by international law.

18. From the point of view of the State in whose territory the foreigners were, the situation was that those foreigners were protected by certain rules of international law and by the international obligations assumed by that State in regard to the treatment of foreigners. Nevertheless, since the events liable to injure the foreigners occurred in the territory and under the jurisdiction of that State, another principle came into play, namely, that of non-interference in the internal affairs of States. That was what explained, both politically and historically, the existence of the rule of the exhaustion of local remedies.

19. The rule derived from the fact that small and weak countries had felt the need to defend themselves against large and powerful ones, which had tried to protect their nationals by means which were now prohibited. The result was that a State could not take up the cause of its nationals as soon as they had suffered injury because an authority of another State had acted towards them in a manner incompatible with an international obligation incumbent on that State with respect to the treatment of foreigners. The injured party, whether a natural or a legal person, must first apply to a higher administrative or judicial authority. At that stage, the link between the State of which the injured person was a national and that person himself did not count.

20. One must not be led astray by the special case of international obligations relating to human rights. By those obligations, States undertook to adopt internal measures to accord certain treatment for their own nationals. When such persons instituted legal proceedings, they invoked an international obligation of the State of which they were nationals and it was the rule in article 20 which then applied. It was incumbent on that State to adopt the conduct required by the instrument relating to human rights from which the international obligation in question derived, or to remedy the situation created by its initial conduct if the obligation was one of result. The international responsibility of that State might be engaged, but another State would never be entitled to interfere in its internal affairs; special machinery existed for verifying the discharge of international obligations relating to human rights.

21. Presented in that way, the rule of exhaustion of local remedies was easy to understand; it was no doubt more difficult to state it in an article and even more difficult to enforce it. Clearly, there could only be internal remedies when the law of the accused State contained a rule relating to the treatment of foreigners and that rule had been broken by an organ of the State. No remedy was possible in the absence of such a rule. And it was only when the highest authority of the State in question had refused to give satisfaction to the injured person that the international responsibility of that State was engaged and the State of which the injured person was a national could intervene at the international level. If the latter

State took action earlier, it would be guilty of gross interference in the internal affairs of another State.

22. With regard to the wording of article 22, he intended to submit to the Drafting Committee a text reading:

“A breach by a State of an international obligation requiring it to accord certain treatment to foreign individuals, whether natural or legal persons, exists only if, after conduct of that State not in conformity with the international obligation, the said individuals have exhausted without the desired result the remedies which were available to them under the internal law of that State to obtain the required treatment or appropriate compensation.”

23. The text showed that the internal obligation must be considered as having been breached when no remedy was available to the individuals concerned under the internal law of the State in question. It was important to make it clear that, in the case covered by article 22, a rule of internal law had been broken but it was still possible to remedy the resultant situation by appealing to another authority.

24. The “desired result” referred to in the text he proposed could be partial. In the last analysis, the questions whether remedies were available and whether the desired result had been achieved should be decided according to the circumstances of each particular case but, for the moment, the Commission must avoid setting concrete cases.

25. Mr. JAGOTA reminded the Commission that, in his preliminary remarks at the 1465th meeting, he had emphasized that, in draft article 22, the Commission was required to deal with the application of State responsibility to a specific aspect of the obligations of States. It was not required to consider the substantive rules relating to the treatment of foreign individuals and their property, the enforcement of responsibility through diplomatic channels or adjudication, and the protection of human rights. He had therefore been concerned to ensure that the Commission’s work on responsibility did not adversely affect or prejudice the law being developed on those matters in other forums and in other contexts. There was also the question of jurisdiction. In the case of human rights, for example, exhaustion of local remedies was still a matter for domestic jurisdiction, and in his view it was a little too soon to require countries to accept compulsory international jurisdiction. For those reasons, he considered that the expression “individuals, natural or legal persons”, in draft article 22, which the Special Rapporteur had defined to mean not only foreigners but also nationals, should be modified so that it applied to foreigners only.

26. He fully agreed with the Special Rapporteur that the rule of exhaustion of local remedies was a part of general international law, whether customary or conventional, and that the application of the rule could be restricted, or even superseded, by provision for arbitration or by compensation agreements, as stated in paragraph 111 of his report.

27. With regard to the nature of the rule, the Special Rapporteur had stated, in paragraph 92 of his report, that the rule consisted of a main proposition and a

corollary. The corollary was that, unless and until the local remedies had been exhausted without satisfaction, there could be no enforcement either at the diplomatic level or through adjudication. He accepted that aspect of the rule and the reason for it, namely, the sovereignty of the State. The beneficiaries under the rule had an obligation to respect the system which they alleged had violated international law and to seek a remedy under it, thereby giving the State a chance to rectify the allegedly unlawful act by compensation or some other means.

28. He could not altogether accept, however, although he did not reject it outright, the main proposition which related to the establishment of responsibility. The essence of draft article 22 was to be found in the last sentence: while he approved of the words “possibility of enforcing it”, he considered that the provision that international responsibility for the initial act or omission was not established until after local remedies had been exhausted without satisfaction required further examination. It might happen that the initial act was not in conformity with the requirements of international law, in which case there would be a *prima facie* breach of the international obligation, entailing responsibility. If the rule of exhaustion of local remedies was then applied, the effect might be to extinguish or dilute the responsibility.

29. The Commission should guard against such an eventuality by providing for a clear exception, which would dispel much of his concern. The Special Rapporteur however, argued that there was no need for such an exception because of the twin elements of the rule, namely, availability of the remedy and effectiveness of the remedy: if the initial act was discriminatory or if the treatment of foreigners was prejudicial to them or if no remedy or forum was available, clearly the rule would not apply. That might indeed be so, but the rule could lend itself to interpretation as to the nature of the remedy available, which could in turn become a matter of dispute. Admittedly, assuming that a local court in a country which did not apply international law, acting under a statute by which it was bound, expropriated foreign interests without the payment of compensation, the application of the rule of exhaustion of local remedies would be a mere formality; consequently, no effective remedy would be available and the rule would not apply by virtue of its own terms. To avoid any controversy, however, it would be far better to provide expressly for an exception. He would therefore advocate some form of wording to ensure that the application of the rule did not dilute responsibility for a patently unlawful act. That element of responsibility, which was the corner-stone of co-operation in regard to the treatment of individuals, was the concern of the material law on the subject.

30. He considered that the question of the point at which responsibility should be established—whether before or after the exhaustion of local remedies—required further consideration. Should the Commission decide otherwise, however, he would not raise any objection.

31. Apart from the question of nationals, he agreed with the Special Rapporteur regarding the scope of the article and the question of territoriality. More attention could, however, be paid to the question of privileged persons, which was increasing in importance by reason

of the participation of State bodies and State funds in economic development and the advent of mutual co-operation agreements. The procedural aspects of questions relating to restricted immunity likewise required further examination: in such cases, the rule of exhaustion of local remedies must obviously apply where there was no immunity from local laws.

32. Lastly, he fully agreed with the Special Rapporteur's remarks, in paragraph 100 of his report, about the need to ascertain whether a person had entered a country by accident or against his will. However, in view of the questions of jurisdiction involved, he considered that those remarks should be qualified by a reference to the requirement of some nexus based, for example, on residence, location of property or a contract.

33. The CHAIRMAN said that, as he saw it, the draft article should state the central rule embodying the concept of exhaustion of local remedies and the need for those remedies to be available and effective, which was probably the essence of the matter. So far as limitations to the rule were concerned, they could either be stated in the draft article or explained in the commentary.

34. Mr. NJENGA said he had studied the Special Rapporteur's excellent report with great interest and endorsed much of its content.

35. The rule that local remedies must be exhausted before the State could intervene was certainly substantive and not procedural. It was based on sound and judicious principles, designed to prevent unnecessary intervention in the domestic affairs of States, and was borne out by State practice and jurisprudence. Two types of right were involved: private rights and rights of the State. The latter, however, could be infringed only as a result of an injury suffered by the private person; until that happened, and in the absence of other remedies, it could not be argued that the State should intervene to protect him. Any other attitude would mean that there would be no end to intervention by States on behalf of their nationals who, in most cases, voluntarily chose to live in a particular jurisdiction for their own benefit. By so doing, they placed themselves under the sovereignty of the State in question and could not therefore turn to their own State every time they suffered injury, instead of availing themselves of local remedies.

36. One point on which he had some misgiving, and which might perhaps be examined on second reading or possibly by the Drafting Committee at the present session, was that the rule was stated in such categorical terms. In his view, whenever it was clear that no effective remedies existed, a proviso should be available to meet the situation. There was no point in laying down a rule and making it subject to the existence of effective remedies for, in the proved absence of such remedies, there would have to be some mechanism for settling disputes.

37. For example, where an injurious act was performed outside the territory of the State, it would be difficult to apply the rule because the State's jurisdiction in the matter was limited. The Commission should therefore see whether an exception, or at least a qualified exception, could be made to cover cases where there was no jurisdiction.

38. A more serious situation arose where the subsidiary organs of a State were not in a position to provide local remedies. If, for example, there was discrimination against foreigners and their property as a matter of State policy, an attempt to exhaust the local remedies would be a meaningless exercise. That situation too should therefore be made the subject of an exception.

39. Another situation calling for an exception was where law and order had broken down in a country and foreign nationals suffered infringement of rights and serious loss as a consequence. If they were required to return to the country in question in order to exhaust the local remedies, they might well be in jeopardy. Kenyan nationals had been in that position and had not been required to exhaust the local remedies, because the Kenyan Government had felt that the States in question had broken their obligations, thereby incurring international responsibility, and it had decided that it was its duty to protect the rights of its nationals.

40. There was also the case of non-resident aliens, which the Special Rapporteur did not consider should be the subject of a specific exception. There were, however, cases known to him of seamen, hired in foreign ports to serve on ships sailing under a foreign flag or a flag of convenience, who had suffered an infringement of their rights, entailing international responsibility. It would obviously be quite impossible to require those seamen to go to the country where the vessel was registered and exhaust the local remedies there before their case could be taken up by the State. In such a situation, local remedies were ineffective and a proviso to the rule should be available.

41. Perhaps the Special Rapporteur might explain why he was so opposed to any proviso, since the rule would in fact be strengthened if it contained exceptions or restrictions instead of relying on the "necessary effectiveness" of the local remedies.

42. Lastly, he realized that it would be premature to extend the rule to nationals and that its application should therefore be confined to the treatment of foreigners.

43. Mr. QUENTIN-BAXTER said that he had derived great benefit from his reading of the Special Rapporteur's comprehensive report and such difficulties as he saw tended to be at the level of expression and drafting rather than at that of principle.

44. He had been struck by the enormous range of the subject; in his view, the Special Rapporteur's discussion of the authoritative opinions brought home the fact that the question was not ripe for detailed treatment. At the same time, the Commission had recognized that the rule of exhaustion of local remedies was a sub-rule; consequently, there was a problem of reconciling a particular and a general point of view. The very first lesson to be drawn from experience, or so it seemed to him, was that in such very general articles the Commission was, to a certain extent, adopting a negative technique and ensuring above all that the positive steps it took did not have unforeseen consequences for other aspects of the law. The primary purpose of the Special Rapporteur's study was not to enable the Commission to codify the

principles and issues that emerged from it but rather to make certain that what it did codify did not conflict with principles that properly belonged to a more detailed and specialized study of the rule.

45. Like most of his colleagues, he had no doubt that the rule was a substantive rule of law, which bulked quite large in the practice of States in their conception of their relationship to other States. In the final analysis, however, obligations were always measured in terms not of substance and procedure but rather of primary and secondary rules. For many, there was a substantive primary element in the rule of exhaustion of local remedies, and any reference to exhaustion of local remedies as the genesis of responsibility implied that the obligation was breached by a complex act which was not complete until the rule had been applied and had failed to produce the correct result. That was a perfectly valid point of view because, in certain cases, the whole conception of the rule of exhaustion of local remedies was, in a sense, a counterpart to the conception of State sovereignty and the responsibility of the State arising through the actions of each of its government organs; in other words, respect for the sovereignty of the State in matters linked to the internal order of that State permitted it to be judged not by what was done initially or by any one organ but only by the test of whether every means at the disposal of the State under its internal order had been applied.

46. There was another important corollary in comprehending the place of the rule in the draft. If he had understood the Special Rapporteur rightly, the rule was not intended to limit the obligations of States which arose in some other way. For example, the breach of a treaty obligation might immediately give rise to international responsibility vis-à-vis the other State concerned, regardless of whether nationals of that other State had suffered from the breach and whether, if they had pursued any local remedies available, the first State was liable on that count too. That seemed to be quite clear as a matter of doctrine and from the presentation of the report, but in the actual drafting of the rule care should be taken not to suggest that it evacuated some responsibility towards another State which existed independently of the rule.

47. He had no real difficulty regarding the relationship of the rule to article 20. Once it had been agreed, under a different kind of obligation, which might well be one of conduct, to carry out the specific terms of a treaty requirement, that obligation could exist quite independently of the question of responsibility to achieve a given result in regard to the private persons affected.

48. He was, however, a little concerned about the relationship of the rule to article 21. He noted in that connexion that the Special Rapporteur had referred to the rule as being in a sense a sub-aspect of article 21, as indeed it was. At the same time, he was pleased to see the rule appear as a separate provision for he did not think it could appropriately form part of article 21. The Commission was bound to leave open the question of the moment at which international responsibility arose and, in that respect, there must be a significant difference in the drafting of the two articles.

49. With regard to the State itself, the Special Rapporteur had referred in paragraph 103 of his commentary

to the modern tendency for States to participate more directly in commercial concerns. The Commission's discussions on succession to State property and debts suggested that it should go even further than was suggested there, since all members had apparently been willing to contemplate the circumstance that an international person—a sovereign State or international organization—could, if it chose, accept obligations at the domestic level under the internal law of another State and that, if it did so, the procedures applicable to its legal remedies were the same as for private persons. He saw no reason in principle why the rule of exhaustion of local remedies should not apply to a Government which, for example, chose to buy bonds issued by another Government on terms regulated by the latter's internal law. That seemed a perfectly reasonable extension of the application of the rule.

50. At the present stage, the rule had little to do with nationals, although the Special Rapporteur had rightly drawn attention to the treaty provisions relating to the rule.

51. He was somewhat concerned also about the statement in the commentary that obligations in regard to nationals were for practical purposes of a conventional nature only. It was necessary to bear in mind the shadowy borderline between what belonged to the treaty itself and what belonged to the common heritage of received law arising under the United Nations Charter. It was also necessary to recognize that the Commission was at present drafting secondary rules and was not advancing by one iota any obligations whatsoever of the State towards its own nationals but simply providing a matrix against which positive obligations could be measured.

52. Lastly, the distinction between aliens and nationals should not receive undue emphasis in the draft since that would simply lead the Commission back to some of the difficulties which had beset Mr. García Amador's draft long before. It would be wiser to rest on the general proposition that the Commission's work on the present draft had nothing to do with the making of primary rules and was solely concerned with drawing up a system of secondary rules which would not in any way constrain or prejudice developments in the primary field.

The meeting rose at 6.15 p.m.

1468th MEETING

Friday, 22 July 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Yankov.

State responsibility (continued)
(A/CN.4/302 and Add.1-3)
 [Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL
 RAPPORTEUR (concluded)

ARTICLE 22 (Exhaustion of local remedies)¹ (concluded)

1. Mr. TSURUOKA said there was no doubt that the rule of exhaustion of local remedies was a well-established rule of customary international law, which was recognized not only in international jurisprudence and doctrine but also in State practice. However, while he could fully accept the Special Rapporteur's explanations on that point, he found it less easy to share his opinion concerning the reason for the rule and the scope of its application.

2. The Special Rapporteur saw in the rule no more than a rule of substance making it possible to establish the existence of the breach of an international obligation; he did not think it was in any way procedural. In his own view, however, that opinion was too rigid. At first sight, the question might seem too abstract for study by the Commission, but it was of some practical importance, especially for the determination of the point at which the wrongful act occurred. For the Special Rapporteur, it was in particular to the collaboration of the injured persons that one must look to determine whether there had been a breach by the State of an international obligation requiring it to grant certain treatment to aliens. If the person concerned had obtained the required or equivalent treatment after exhaustion of the local remedies, there was no breach of the obligation. The Special Rapporteur further claimed that there was no such breach if the injured person made no use of the local remedies.

3. It was on those points that he did not altogether agree with the Special Rapporteur. As the Special Rapporteur indicated in paragraph 40 of his report (A/CN.4/302 and Add.1-3), in certain cases the State failed irremediably in its duty and there was no possibility of using any subsequent means to restore the situation *ab initio* in conformity with the internationally required result. That was the case when a State clearly breached the customary international obligation requiring it to take minimum preventive measures to protect foreigners against attacks due, for example, to an outbreak of xenophobia. It was so in the case considered in article 21, paragraph 1, namely, when the breach of the international obligation was definitive. It did not matter whether the victim had been given financial compensation or an equivalent result had been produced. Subsequent action of that kind could not erase the breach of the international obligation. Indeed, when private persons had recourse to internal remedies, it was not in order to erase the breach of an obligation but to obtain compensation or reparation. It seemed that, even in cases of that kind, the rule of exhaustion of local remedies prevented the State whose nationals had been injured from making a claim on the State charged with responsibility so long as the injured persons had not exhausted all the internal remedies.

4. If that was so, he was inclined to think that, in such cases, the rule of exhaustion of local remedies was not a substantive rule, which determined the existence of the breach, but a procedural one. In support of that view, he quoted the opinion of Schwarzenberger:

"The rule does not mean that, until it has been complied with, no international tort has been committed. Clearly, at this stage, an international obligation has been broken. Yet until ... the foreign national has done everything in his power to obtain redress 'through the ordinary channels', his home State lacks the requisite legal interest in taking up the claim on the international level. ... the function ... of the local remedies rule is to establish whether the point has been reached at which the home State may actively intervene and raise the issue on the international level."²

5. Consequently, he did not think the Special Rapporteur could deny that there was any procedural aspect to the rule of exhaustion of local remedies. Admittedly, the rule sometimes made it possible to determine the existence of a breach of an international obligation, particularly when a dispute was brought before the courts. However, the breach was not truly established until the last court rendered its verdict. If it was right to speak of the rule of exhaustion of local remedies as a substantive rule in relation to the article under study, it would none the less have to be considered as a procedural rule in the part of the draft dealing with the implementation (*mise en oeuvre*) of the international responsibility of States.

6. The existence of a link between the injured person and the injuring State seemed essential for the application of the rule of exhaustion of local remedies. It would, for example, be wrong to require a person injured by a soldier of an occupying Power to exhaust the local remedies of that Power. Similarly, a fishing vessel stopped and searched on the high seas by a vessel of a State other than its own should not be obliged to exhaust the remedies available in that State. An equitable balance must be maintained in the protection of the interests of the two parties involved. The foundation of the rule was certainly respect for the sovereign jurisdiction of the State, which should have an opportunity to remedy the situation by its own means, within the framework of its own internal law, as the International Court of Justice had recognized in the *Interhandel* case.³ Consequently, he felt that the scope of the rule of exhaustion of local remedies should be limited to cases in which the individual in question had voluntarily placed himself under the jurisdiction of the injuring State. The applicability of the rule should not depend solely on the existence or absence of internal remedies.

7. He considered the greatest caution was necessary in asserting that the rule in question was applicable to the nationals of the injuring State. Application of the rule to a State's own nationals was a very recent phenomenon, which almost always originated in conventional rules and was found essentially in the sphere of human rights.

¹ For text, see 1463rd meeting, para. 1.

² G. Schwarzenberger, *International Law*, 3rd ed. (London, Stevens, 1957), vol. I, pp. 603-604.

³ *I.C.J. Reports* 1959, p. 27.

8. From the drafting angle, he suggested that, since article 22 concerned essentially the breach of the obligation and not the generation of responsibility, its second sentence should be deleted.

9. Mr. DADZIE said that the wide variety of sources on which the Special Rapporteur had based his views concerning the rule of exhaustion of local remedies, and which he had taken from conventional and customary law, jurisprudence and State practice, provided ample evidence both of the complexity of the topic and of the fact that it might not be ripe for codification. However, the Commission had a duty at least to begin its study of the topic and to deal as thoroughly as possible with all the material provided by the Special Rapporteur.

10. He fully agreed with the Special Rapporteur that the rule of exhaustion of local remedies was a rule of general international law. He nevertheless considered that the importance of that rule had until now been apparent mainly in cases involving the protection of the economic interests of weaker States. It was thus a rule with strong political overtones.

11. In general, he approved the Special Rapporteur's treatment of the topic under consideration, but he did not think the Special Rapporteur had taken sufficient account of the fact that the rule of exhaustion of local remedies could be a prerequisite for the existence of international responsibility. Accordingly, an international tribunal seeking to do justice had to determine whether all the remedies locally available to an injured person had in fact been exhausted before it could say that international responsibility was engaged.

12. He could not support the Special Rapporteur's view that the rule of exhaustion of local remedies should apply to international obligations of the State concerning the treatment to be accorded to its own nationals. Indeed, if the scope of application of the rule was extended beyond the scope of application of the provisions of existing international human rights conventions, relating to the obligation of States to guarantee the human rights of their nationals, there might, in his view, be interference in the internal affairs of States.

13. He was also concerned by the fact that article 22 did not provide either for cases in which local remedies were ineffective or unavailable or for the case in which the State was so obviously at fault that it was prepared to take immediate action to compensate the individual whose rights or interests had been infringed. He therefore hoped that the Drafting Committee would take account of such cases when it considered article 22.

14. Mr. USHAKOV pointed out that there were two categories of indemnification: indemnification in consequence of international responsibility and indemnification in consequence of a primary rule. In the example quoted by Mr. Tsuruoka, indemnification was one of the forms taken by international responsibility.

15. If a State had breached an international obligation with respect to the treatment of aliens and an international tribunal had held it responsible in that connexion, the State would have to indemnify the victims of the breach because its responsibility had been engaged, and the

amount of compensation would be fixed by the tribunal. In such a case, the indemnification formed part of the process of implementation of the State's responsibility. On the other hand, if an agreement provided that aliens resident in a State were to be compensated in the event of nationalization of their property, the indemnification represented merely the application of a primary rule. The distinction was very important for, in the first case, the indemnification was procedural while in the second it was not.

16. Mr. AGO (Special Rapporteur) noted that the Commission was unanimous in recognizing that the principle which required the exhaustion of local remedies by private beneficiaries of certain international obligations did not have a purely conventional origin but was of long standing and had arisen in general international law at the same time as certain rules concerning the treatment of aliens. Mr. Francis had rightly pointed out the link which existed in that respect between the rule stated in article 22 and those in articles 20 and 21.

17. Contrary to what Mr. Tsuruoka had gathered, he had never denied that the rule of exhaustion of local remedies had also procedural aspects. Indeed, he had said in paragraph 51 of his report that no one could dispute "that the principle has an obvious impact on the possibility of utilizing the procedure for implementing responsibility" and that the "undeniable impact of the principle of these different procedures is a corollary, and a logical one, of the principle in question". He had added, however, that "this does not warrant the conclusion that the principle itself is merely a 'practical rule' or a 'rule of procedure', as some contend".

18. The principle of the exhaustion of local remedies did not arise from treaties, even if some treaties did reflect the principle, whereas international procedure was always based on treaties. How then could a rule which had arisen in international custom at the same time as the primary rules concerning the treatment of aliens in the national territory of a State be merely a rule of procedure? It was perfectly clear that the principle was linked in the first place to the performance and possible breach of obligations concerning the treatment of aliens, even though it necessarily had implications for the procedures in respect of implementation (*mise en oeuvre*) of responsibility. That was why the definition of the principle in question was to be found in article 22. Articles 20, 21 and 22, which formed an organic whole, sought to show how the performance and breach of the various international obligations differed according to their nature. As had been seen, there were, undoubtedly, international obligations which required the State to adopt a specific conduct, which might be an action, an omission or a series of actions or omissions. In that case, if the required action or omission did not occur, there was an immediate breach of the obligation, whatever the sphere of international law concerned by the obligation.

19. However, along with those obligations concerning means, there existed obligations which required the State merely to produce a certain result. That result might have to do exclusively with relations between States, as in the case dealt with in article 21, or with relations between a

State and private persons, as in the case covered in article 22. If, in the latter instance, an international obligation required for example that aliens be permitted to engage in a certain commercial activity on the same footing as nationals of the State, the mere fact that the first local authority from which an alien sought the necessary authorization refused it would not justify the conclusion that the result required by the obligation would not be achieved if, in the internal legal order of the State in question, any person considering himself injured by a decision of a local authority could appeal to a higher body. In such a case, the co-operation of the individual was inherent in the discharge of the obligation.

20. Even in the specific area of treatment of aliens, the principle of exhaustion of local remedies did not always apply. There were cases in which the breach of the obligation was immediate, and those were of two types. The first, obviously, was where obligations were not of result but of conduct or means. For example, if one State had undertaken in a bilateral agreement to enact a law extending a certain treatment to the nationals of another State, its failure to enact that law entailed an immediate breach of the obligation, and the question of exhaustion of local remedies did not arise. Thus, the rule in article 20 could in certain cases apply to the treatment of aliens, as Mr. Riphagen had pointed out at the 1466th meeting.

21. The breach of the obligation could also be immediate if it was obvious from the time of the State's initial action or omission that the required result had not been achieved and never would be. For example, the characteristics of the internal law of a State or political circumstances might be such that it would be absurd to speak of exhausting local remedies because such remedies were inexistent or inaccessible. The breach would then be immediate because the State's first action or omission would reveal the total and definitive impossibility of achieving the required result.

22. Similarly, it was clear that, in States where domestic law took precedence over international law and where the legislation in force conflicted with the result required by an international obligation, it would be pointless for an individual to appeal to other national bodies after the first administrative or judicial authority he had approached had denied a right which should be his according to international law, for those bodies would always apply the domestic law, which itself would be contrary to the requirements of the international obligation. Nor was there any question of applying the condition of exhaustion of local remedies in a case where action against a private person was part of a deliberate policy of hostility towards all the nationals of a certain country. In all such cases, the breach was immediate because internal remedies were inexistent or ineffective.

23. Rather than saying, like Mr. Tsuruoka and Mr. Dadzie, that the rule of exhaustion of local remedies was sometimes substantive and sometimes procedural, he would prefer to say that it was both at the same time. It was a rule of substance because its principal premise was linked to the performance and the possible breach of an international obligation; it was a rule of procedure in that it undoubtedly entailed consequences for the procedure of claims. But it would be absurd to say, as

certain writers had, that exhaustion of local remedies must be considered a procedural rule when the first action of the State was that of an administrative organ, and a substantive rule when the first action was that of a judicial organ. If it was accepted that, when a lower court dismissed an alien's claim, no breach existed so long as the supreme court of the State concerned had not given a ruling, there was no reason to consider the breach immediate where the first action was that of an administrative organ which refused an alien permission to engage in a particular activity. The rule of exhaustion of local remedies unquestionably had procedural aspects, but they were always linked to the substance of the rule, which set out a condition for the breach to be considered complete and definitive.

24. He was grateful to Mr. Ushakov for having drawn attention to what was a frequent source of confusion in speaking of indemnification, compensation or reparation. When the obligation had an economic content, it was indeed easy to confuse its performance with the consequences of responsibility for its non-performance.

25. Where an international obligation bound a State to expropriate aliens for reasons of national interest only and to pay them adequate compensation if it did so, it was clear that, if the State did expropriate an alien for such a reason—for example, to build a road across his land—and paid him adequate compensation, that payment itself represented the discharge of the initial obligation and not compensation for an international wrongful act. Provided that it paid him satisfactory compensation, there was no breach of an obligation by the State in expropriating an alien for reasons of national interest.

26. If, however, the expropriating State did not give the alien the required compensation, there would be a breach of the international obligation. In that case, the State of which the alien was a national would intervene at the level of diplomatic protection to seek reparation from the expropriating State, but it would then be reparation for an internationally wrongful act. The compensation might be identical from the practical aspect, but the reasons why it was given would be entirely different. That distinction was very important for the exhaustion of local remedies did not concern reparation for a breach but performances of an obligation. It concerned a phase prior to the wrongful act.

27. As Mr. Schwebel had pointed out (1466th and 1467th meetings), it was not always necessary, procedurally, to wait until responsibility had been generated before intervening at the diplomatic, and even, in some instances, at the judicial levels. That was so because interventions of that kind—for example, when the claimant State addressed itself to an arbitral tribunal in order to obtain a purely declaratory judgment—were not always aimed at denouncing a wrongful act, but were sometimes purely preventive, being designed to draw a State's attention to the economic or other damage which might result from its conduct. Consequently, it should not be thought that there was always a direct link between the existence of a breach—and therefore of responsibility—and the possibility of intervening on the diplomatic or judicial planes.

28. To conclude with regard to that aspect of the problem, he hoped that Mr. Tsuruoka would not insist on relegating the rule of the exhaustion of local remedies to part 3 of the draft since what was in effect important was to stress in part 1 that aspect of the rule which related to the performance or breach of an international obligation.

29. However, the real problem, and the one on which Mr. Jagota and Mr. Njenga (1467th meeting) and Mr. Dadzie had dwelt, was that of the limits of the principle of exhaustion of local remedies. In general, the Commission did not seem favourably disposed towards the automatic extension of the principle to nationals. Yet the principal conventions on human rights provided for its application to nationals, in order to protect the State by limiting international interventions with respect to violations of human rights. Most members of the Commission seemed, however, to feel that human rights were governed by purely conventional rules, and that it was better to leave it to treaties to develop in that respect the principle of exhaustion of local remedies. It should therefore be stated in the commentary that the Commission had studied the matter; that it considered that the application of the principle of exhaustion of local remedies to the treatment of nationals seemed to come more within the sphere of conventional rules; and that it had felt it inappropriate to consider that application as also provided for by general international law, and had decided to take into account only that aspect of the principle which concerned the treatment of aliens.

30. The most difficult problem, and one to which Mr. Tsuruoka had reverted, was the territorial aspect of the question: should the application of the condition of exhaustion of local remedies be limited to acts which had occurred in the territory of the State and to private persons residing in that territory? The consequences of such a limitation might be very serious since that would amount to considering any act committed by any organ outside the boundaries of the territory or to the prejudice of a non-resident as making the result required by the international obligation definitively inaccessible and, finally, transforming virtually all obligations of result into obligations of conduct in such cases. It might be preferable to state in the commentary that the Commission had decided to await the comments of Governments on those points before taking a final stand on the matter.

31. In his view, the Commission need devote no more time to the case in which there was simultaneous injury to a State and to private persons for, in such an instance, it was normal for the injury caused directly to the State to absorb the private injury and generate immediate responsibility. As Mr. Ushakov had pointed out, that was yet another area where there was often confusion between the exhaustion of local remedies as a condition for the generation of international responsibility and the fact of applying to national courts to obtain reparation.

32. He considered that the essential problem was to avoid creating a situation in which the guilty State could use recognition of the principle of exhaustion of local remedies as a pretext for its inaction. In his opinion, it would be best not to venture into an enumeration of exceptions to the rule but merely say that the remedies must be real, in other words, actually exist at the internal

level; be effective, that is, be capable of producing the result required by the international obligation; and be accessible to private persons, for if remedies existed in internal law but private persons could not use them in concrete cases, that would be tantamount to their being non-existent.

33. Mr. FRANCIS, referring to the Special Rapporteur's comments concerning exceptions to the rule of exhaustion of local remedies, said he feared that, if the last sentence of article 22 was retained, it might provide an escape mechanism for States to claim that their international responsibility was not established until after local remedies had been exhausted without satisfaction. He therefore suggested that if, for technical reasons, the Drafting Committee could not enumerate in article 22 the basic exceptions to the rule, it should at least add a general proviso to the article in order to make it clear that the rule of exhaustion of local remedies was without prejudice to the responsibility of States where exceptions to that rule actually existed.

34. Mr. RIPHAGEN, referring to the question of exceptions to the rule of exhaustion of local remedies in cases where States acted outside the scope of their jurisdiction, said that, while he agreed with the Special Rapporteur that it was difficult to know what the exact limits of national jurisdiction were, his opinion was that such limits existed. He therefore expressed the hope that, in considering article 22, the Drafting Committee would take account of the fact that the rule of exhaustion of local remedies should not apply in cases where States acted outside the scope of their jurisdiction.

35. The CHAIRMAN said that the comments made by Mr. Francis and Mr. Riphagen would be taken into account by the Drafting Committee.

36. If there was no objection, he would take it that the Commission decided to refer article 22 to the Drafting Committee.

*It was so agreed.*⁴

The meeting rose at 11.50 a.m.

⁴ For the consideration of the text proposed by the Drafting Committee, see 1469th meeting, paras. 11 *et seq.*

1469th MEETING

Tuesday, 26 July 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Castañeda, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

State responsibility (concluded)
(A/CN.4/302 and Add.1-3, A/CN.4/L.263/Add.1)
 [Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING
 COMMITTEE (concluded) *

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the revised text of article 20 and the texts of articles 21 and 22 proposed by the Committee (A/CN.4/L.263/Add.1), which read:

Article 20. Breach of an international obligation requiring the adoption of a particular course of conduct

There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation.

Article 21. Breach of an international obligation requiring the achievement of a specified result

1. There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation.

2. When the conduct of the State has created a situation not in conformity with the result required of it by an international obligation, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the State also fails by its subsequent conduct to achieve the result required of it by that obligation.

Article 22. Exhaustion of local remedies¹

When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or legal persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, adequate compensation.

2. Mr. TSURUOKA (Chairman of the Drafting Committee) said that the Drafting Committee had found it necessary, in the light of the articles subsequently referred to it on the topic of the breach of an international obligation, and particularly article 21, to review the text of article 20 which it had originally submitted to the Commission and which, subject to some oral amendments, had been approved by the Commission at its 1462nd meeting. In doing so, the Drafting Committee had had in mind the terms under which articles 20 and 21 had been referred to it by the Commission and its wide mandate under the Commission's established practice. Bearing in mind article 21, which referred to the "conduct" of the State, and also article 18, paragraph 4,² which provided for the case where the act of the State was composed of a "series of actions or omissions", the Committee had, in the title and text of its proposed new article 20, replaced the words "action or omission" by the words "course of

conduct", which was the term originally suggested by the Special Rapporteur in the version of article 20 given in his sixth report (A/CN.4/302, and Add.1-3, para. 13).

3. The text of article 21 corresponded to the wording which had been proposed by the Special Rapporteur in paragraph 46 of his report and had been referred to the Committee at the 1461st meeting. The changes that had been made were of a purely drafting nature and were intended to bring out the meaning of the provision more clearly while maintaining the necessary degree of concordance with the language of other related provisions of the draft. Paragraph 2 in particular had been worded in such a way as to emphasize the fact that it concerned a particular instance of the application of the general rule stated in paragraph 1, namely, the case where the result required by an international obligation or an equivalent result could be achieved by subsequent conduct of the State.

4. Article 22 (Exhaustion of local remedies) reproduced the substance of the text which had been proposed by the Special Rapporteur in paragraph 113 of his report and had been referred to the Drafting Committee at the 1468th meeting. Some drafting changes had been made in the light of comments by members of the Commission and concrete proposals submitted by some of them for the attention of the Committee. The text proposed by the Committee had been drafted so as to show clearly that the case contemplated by article 22 was related to the case envisaged in article 21, paragraph 2. The word "aliens" was used in order to limit the scope of the article. Also, the Drafting Committee had decided, in order not to overburden the text, that a definition of the expression "local remedies" should be inserted in the commentary to the article. For the moment, the definition selected by the Committee appeared in the foot-note to the title of the article. It referred to "natural or legal persons" in general, without specifying whether aliens or nationals were concerned. The new text of the article maintained the references to effectiveness and availability of the local remedies, since several members of the Commission attached importance to those points. The final sentence of the original text had been omitted, the Committee having felt that it was unnecessary and might give rise to problems of interpretation.

ARTICLE 20³ (Breach of an international obligation requiring the adoption of a particular course of conduct)

5. The CHAIRMAN observed that the use in the English version of the article of the term "course of conduct", which implied continuity, could be interpreted as excluding conduct comprising a single act from the scope of the article. Since it was clear from the versions in the other languages that such an interpretation was not the Drafting Committee's intention, the Commission should say so in its commentary and give thought to the possibility of revising the English text on the second reading of the draft articles.

6. If there was no objection, he would take it that the Commission adopted, on that understanding, the title

* Resumed from the 1462nd meeting.

¹ Definition of "local remedies" to be inserted in the commentary to article 22:

"Local remedies" means those remedies that are open to natural or legal persons under the internal law of a State.

² See 1454th meeting, foot-note 2.

³ See 1462nd meeting, paras. 18 *et seq.*

and text of article 20 proposed by the Drafting Committee.

It was so agreed.

ARTICLE 21⁴ (Breach of an international obligation requiring the achievement of a specified result).

7. Mr. JAGOTA, referring to paragraph 2 of the article, said that the emphasis added by the word “only” was unnecessary. That word, and consequently the word “also”, should be deleted.

8. Mr. USHAKOV said that in his view the word “only” was essential in order to show that the initial conduct of the State was not enough to bring about a breach of the obligation.

9. Mr. AGO (Special Rapporteur) said that, although the word “only” had not appeared in his original draft, after hearing Mr. Ushakov’s comment, he felt it should be retained in order to dispel any possible doubt as to the meaning of the rule stated in article 21, paragraph 2. He considered the word “also” to be absolutely essential since it created the link between the initial and subsequent conduct of the State, on the basis of which it could be definitely concluded whether or not there had been a breach of the obligation. It should not be forgotten that there was a breach only if both the initial and the subsequent conduct had failed to produce the required result.

10. The CHAIRMAN said that, if there was no objection, he would take it that the Commission adopted the title and text of article 21 proposed by the Drafting Committee, subject to further consideration, on the second reading of the draft articles, of the points raised at the present meeting.

It was so agreed.

ARTICLE 22⁵ (Exhaustion of local remedies)

11. Mr. RIPHAGEN said that article 22 had been drafted so as to show that it referred to a special subcategory of the obligations dealt with in article 21, paragraph 2. However, he found the words used to describe that subcategory somewhat unsatisfactory since, in some legal systems, the expression “natural or legal persons” was interpreted so widely as to include States and subsidiary organs of States which had legal personality. He therefore considered it necessary to state in the commentary that the expression as used in article 22 and in the accompanying definition of the term “local remedies” had a more limited meaning.

12. Since article 22 dealt with the case where subsequent conduct of the State could produce either the treatment required by an international obligation or “an equivalent result”, it seemed illogical to say that the purpose of the exhaustion of local remedies was to secure the required treatment or “adequate compensation”. While it might

be held, in respect of certain particular international obligations, that “adequate compensation” was in fact “an equivalent result”, the Commission should not assert *a priori*, as it seemed to be doing, that such was always the case. That being so, the words “or, where that is not possible, adequate compensation” should be either deleted or replaced by the words “or an equivalent result”.

13. While the article already made it clear that the aliens concerned must co-operate in achieving the result required by the international obligation, it did not mention another essential point, the question of the limits of the jurisdiction of the State. That omission might be remedied by the addition to the text, after the words “whether natural or legal persons”, of the words “in accordance with its internal law” or “within its jurisdiction”.

14. Mr. AGO (Special Rapporteur), replying to the comments by Mr. Riphagen, said that he felt the word “aliens” was sufficiently clear, particularly as it was a direct translation of the unambiguous French expression *particuliers étrangers*.

15. He would not be against the incorporation in the article of a reference to the jurisdiction of the State but he felt that, if the Commission was to adopt such a suggestion, the words “within its jurisdiction” or “in accordance with its internal law” should be inserted after the word “accorded”.

16. With reference to the amendment suggested by Mr. Riphagen to the end of the article, he said that the existing text distinguished between what the obligation required of the State, namely, the achievement of a “result”, and what the alien could expect to receive from the State or one of its judicial organs, namely, the required “treatment” or a substitute treatment. In that connexion, it should be noted, as Mr. Riphagen had pointed out, that, with respect to the result to be achieved, some obligations openly offered States an alternative, others did not. For example, an obligation might bind a State either to refrain from confiscating the property of an alien or, if it did confiscate it, to pay proper compensation. The payment of such compensation could be considered to represent a result equivalent to the primary result required but either would constitute the alternative envisaged by the first obligation. However, in the case of an obligation binding a State not to re-arrest an alien, it was obvious that the first obligation indicated only one result to be achieved, and not two results considered as equally normal. That would not prevent the adequate compensation offered by the State to the arrested alien from being exceptionally considered to be a treatment equivalent to that required by the first obligation if the latter had become unrealizable.

17. Mr. USHAKOV said that the text made it quite clear that the treatment to be accorded to aliens was treatment within the limits of the jurisdiction of the State. In his opinion, that point did not have to be expressly stated in the draft article, the wording of which could not be interpreted in any other way.

18. Mr. QUENTIN-BAXTER said that the discussion about the possibility that the expression “aliens, whether natural or legal persons” might include foreign States had made him realize how specific the corresponding

⁴ For the consideration of the text originally submitted by the Special Rapporteur, see 1456th meeting, paras. 37 *et seq.*, 1457th, 1460th and 1461st meetings.

⁵ For the consideration of the text originally submitted by the Special Rapporteur, see 1463rd meeting, 1465th meeting, paras. 7 *et seq.*, 1466th meeting, paras. 2 *et seq.*, 1467th and 1468th meetings.

French term was on that point. When the Commission had considered the original text of article 22, he had made the point that there were cases where even States submitted themselves to the internal law of another State.⁶ It was therefore undesirable, and might even be dangerous, to formulate the rule in article 22 in such a way as to exclude any possibility of its application to foreign States. However, it seemed that Mr. Riphagen, in raising the question, had had a different purpose in mind, namely, to ensure that article 22 should not seem to be imposing any additional requirement on foreign States in the much commoner class of cases where there was no obligation to exhaust the local remedies. He believed that, in both contexts, the addition to the article of an expression of the kind suggested would be helpful.

19. To some extent, he shared the view of Mr. Ushakov concerning the use of the phrase "within its jurisdiction" for, as all members of the Commission were aware, it was extremely difficult in the present state of the law to give any concrete description of the limits of the jurisdiction of a State. However, he could see no objection to the insertion, after the words "whether natural or legal persons", of an expression such as "under its internal law".

20. Mr. AGO (Special Rapporteur) said that, in his commentary to article 22, he had described the differences of opinion which had emerged, in both doctrine and practice, on the question whether the rule of exhaustion of local remedies should apply to the case in which the State acted as a private person.⁷ He had reached the conclusion that the Commission was not required to take a decision on that question and should leave it to be settled through practice.

21. Mr. YANKOV said that the addition to the article of a reference to the "internal law" or "jurisdiction" of the State would only complicate matters and would in fact be superfluous, for in no event could the article be interpreted as requiring the State to accord treatment which it was not within its power to provide. Consequently, either the article should be left unchanged or, at the most, the words "by it" should be inserted after the word "accorded".

22. Mr. DÍAZ GONZÁLEZ said that the problem under discussion seemed to have been solved already, for the article referred to "local remedies" and that expression was defined as meaning remedies "open to natural or legal persons under the internal law of a State".

23. Mr. RIPHAGEN said that he would not insist on the change he had suggested but he was still convinced that the article should be more explicit.

24. Mr. USHAKOV said that he opposed Mr. Riphagen's suggestion because he thought that, although there could be a second result equivalent to the result originally required, there could be only one treatment. For example, if a State decided to expropriate an alien in order to build a road across land belonging to him, there were two possible results: non-expropriation of the alien or, if expropriation was justified in the public

interest, compensation of the alien in an equitable manner. In such a case, however, there was only one possible treatment. If the initial result had not been achieved—in other words, if the State had expropriated the alien in question—all it could do would be to compensate him in an equitable manner.

25. Mr. JAGOTA welcomed the fact that the scope of application of article 22 was now confined to aliens as several members of the Commission had requested. He would like it to be made clear, by the addition of the words "within its jurisdiction" after the words "whether natural or legal persons", that the aliens in question were not only those who had placed themselves under the territorial jurisdiction of the State but also those who, through circumstances such as business relationships or residence, had links with it. For the time being, however, he would accept the text as it stood.

26. The words "but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State" were taken from article 21, paragraph 2, in order to show that the obligations referred to in article 22 were a subcategory of those dealt with in article 21, as mentioned by Mr. Riphagen. Logically, article 22 should have been divided into two paragraphs, like article 21, with the second paragraph showing clearly that, where the obligation allowed the State to discharge its undertaking through subsequent conduct, it was breached only if that subsequent conduct, with the local remedies exhausted, failed to produce the desired result.

27. The word "only" added an emphasis which could be interpreted as implying that the responsibility of the State would not arise until or unless something happened, a matter the Commission should not judge at the present stage. From the legal point of view, nothing would be lost if the word was deleted. In the English version, the use of the word "adequate" would undoubtedly lead to controversy, particularly since the compensation concerned would be due mainly in cases of expropriation of aliens' property. The Commission should use instead the word "appropriate", which had appeared in the earlier version of the article and was also to be found in the Charter of Economic Rights and Duties of States.⁸

28. Mr. AGO (Special Rapporteur) observed that Mr. Jagota had objected (1467th meeting) to the original text of article 22 on the ground that there might be obligations which specifically required the State to extend certain treatment to private persons by its initial conduct. With that objection in mind, the Drafting Committee had altered the article to make it clear that it referred only to cases in which the obligation permitted the State to achieve the required result by either its initial or its subsequent conduct. He reiterated his wish that the word "only" be retained. He would have no objection, however, to the replacement in the English version, of the word "adequate" by the word "appropriate", since that would not alter the meaning.

29. Mr. SUCHARITKUL said that, in view of the sensitive nature of the questions of treatment of aliens

⁶ 1467th meeting, para. 49.

⁷ See A/CN.4/302 and Add.1-3, particularly paras. 103-104.

⁸ General Assembly resolution 3281 (XXIX).

and exhaustion of local remedies, the Commission should try to maintain a balance in article 22 between the interests of all sovereign States, for every State had the duty both to accord certain treatment to aliens and to protect the interests of its own citizens abroad. The Commission should, however, bear in mind that, in matters of protection of the interests of their citizens abroad, States were not really equal, either in law or in practice. The law must therefore be designed to assist the smaller States, which were less able than the larger ones to protect the interests of their citizens abroad.

30. The Commission should also remember that, although the question of treatment of aliens had once again become topical, it was no longer the same as in the past, when aliens were accorded far better treatment than nationals in receiving States. Indeed, in many cases aliens had not even been subject to local jurisdiction and had benefited greatly from extra-territorial privileges. In the light of those considerations, he had no difficulty in agreeing to the suggestion that the Commission should include in the text of article 22 the words "within its jurisdiction", which suitably reflected the current circumstances of aliens.

31. The question of compensation was also a sensitive one which the Commission might do best to avoid for the time being if it did not wish to hamper the efforts of the many third world countries, which were concerned with the matter in an attempt to secure a development of international law more in keeping with their own development needs. In that connexion, he feared that the words "adequate compensation" at the end of article 22 would give rise to considerable difficulties. If the Commission could not find a better formula, it should either delete the expression or replace it by the words "compensation under international law".

32. Mr. ŠAHOVIĆ said he regretted that article 22 as reformulated applied only to aliens. The Special Rapporteur had rightly extended the scope of the article to cover nationals but the majority of the Commission had expressed a preference for a more restrictive provision. Yet the Commission must always have the development of international law in mind, and it was conceivable that the rule stated in article 22 would come to apply more and more to nationals. He asked that his point of view should be reflected in the Commission's report.

33. Mr. SCHWEBEL said he doubted whether the Commission would be able to improve on the wording of article 22 as proposed by the Drafting Committee, but he could nevertheless agree to the addition of the words "within its jurisdiction". He would be unable, however, to support Mr. Jagota's suggestion that the words "adequate compensation" should be replaced by the words "appropriate compensation" in the English version. If any change was to be made at the end of article 22, the suggestion by Mr. Sucharitkul should be adopted, but the best course would be to leave the article in its present form on the understanding that the suggestions and views expressed during the discussion would be fully reflected in the commentary to article 22 and in the summary record of the meeting.

34. Mr. EL-ERIAN said that, although he had no difficulty in supporting the wording and content of article

22, he thought that the Commission would have to give further consideration to the place of the article in the draft.

35. He supported Mr. Jagota's suggestion that the words "adequate compensation" should be replaced by the words "appropriate compensation" in the English version, since the latter were used in article 2, paragraph 2 (c), of the Charter of Economic Rights and Duties of States.

36. Mr. NJENGA said that he also supported Mr. Jagota's suggestion that the wording at the end of article 22 should be brought into line with the wording of article 2, paragraph 2 (c), of the Charter of Economic Rights and Duties of States.

37. In his opinion, the definition of "local remedies" to be inserted in the commentary to article 22 would be clearer if the words "and that offer a meaningful opportunity for redress of their alleged wrong" were added at the end of the definition.

38. Mr. AGO (Special Rapporteur) said that Mr. Njenga's view that the local remedies to be employed must be remedies which offered the claimant a real possibility of obtaining the treatment called for by the international obligation was already reflected in the text of article 22 through the use of the words "effective local remedies". That view would also be reflected in the commentary to the article.

39. Mr. SETTE CÂMARA said that he fully supported the text of article 22 approved by the Drafting Committee since it took account of the points of view of all members of the Commission. In addition, he was glad that the Commission had decided that the definition of "local remedies" would appear only in the commentary to article 22 because, in his opinion, there was something of a discrepancy between the definition and the text of the article. In particular, the definition referred to "natural or legal persons" whereas article 22 was rightly confined to the treatment of "aliens, whether natural or legal persons". He therefore suggested that, in order to bring the wording of the definition into line with that of the article, the words "aliens, whether" should be added before the words "natural or legal persons" in the definition. He was thinking, for example, of the cases, now very common, in which aliens in a particular country were forbidden to own immovable property.

40. Mr. USHAKOV said that he wished to make a distinction between the rules of international responsibility and the primary rules which determined whether, for example, the property of foreigners could be nationalized with or without compensation. In his opinion, compensation was not mandatory in general international law. In the case under discussion, it was a question not of compensating aliens by applying a primary rule, such as a treaty provision by which a State agreed to pay compensation to aliens whose property it had nationalized, but of it no longer being possible to obtain the required treatment. Examples of that were where a person had been wrongly arrested and then released or where a State had not fulfilled its obligation to prevent an attack in which a person had lost his life. It was therefore important to distinguish between the primary rule and the rule of international law that applied in respect of responsibility.

41. Mr. SCHWEBEL said he agreed with Mr. Ushakov that the Commission should not engage in a discussion of the measure of compensation due in cases of nationalization. He did not feel that article 2, paragraph 2 (c), of the Charter of Economic Rights and Duties of States, an instrument which did not have the force of law and had been voted against by many States, could be considered as an instructive or useful basis for the wording at the end of article 22. Since the article dealt solely with the question of exhaustion of local remedies, the Commission would be wise to keep to the text proposed by the Drafting Committee.

42. Mr. VEROSTA said that he found the draft article prepared by the Drafting Committee entirely acceptable at the first reading stage. In order to avoid any misunderstanding concerning the scope of the provision, which related to a specific case of breach of an international obligation of result, the Commission might even make it paragraph 3 of article 21 later on.

43. Mr. EL-ERIAN said that, while he agreed with Mr. Ushakov and Mr. Schwebel that, technically, the question of compensation had no place in the current discussion, he thought the Commission should take account of the very important psychological and political factors involved in the questions of treatment of aliens and exhaustion of local remedies. Although he also agreed with Mr. Schwebel that the Charter of Economic Rights and Duties of States was not an internationally binding instrument, the fact remained that it had been adopted by a large majority of the international community.

44. Mr. SUCHARITKUL said he was glad that Mr. Ushakov and Mr. Schwebel agreed that the Commission's current task was not to discuss the problem of compensation in cases of nationalization. He personally supported Mr. Riphagen's view that there was no need to refer to the question of compensation in article 22 at all.

45. Mr. USHAKOV said that, while he had no objection to the use, in the English version, of the words "appropriate compensation", he thought that the problem to which the discussion of the words "adequate compensation" had given rise was one of substance and not one of terminology.

46. Mr. SCHWEBEL said that in the light of the discussion, in which several members had referred to the Charter of Economic Rights and Duties of States, he opposed the suggestion that, in the English version, the words "adequate compensation" should be replaced by the words "appropriate compensation". He himself suggested that the Commission should either delete the reference to compensation entirely or replace the words "adequate compensation" by the words "equivalent treatment".

47. Mr. RIPHAGEN said that a logical solution to the problem would be to follow Mr. Schwebel's suggestion to replace the words "adequate compensation" by "equivalent treatment", a term which would make it clear that article 22 did not and could not set out to define what an international obligation allowed or what was meant by an equivalent result.

48. The CHAIRMAN, speaking as a member of the Commission, said he thought that the inclusion of the

words "adequate compensation" in article 22 might give rise to considerable difficulties because it was not certain, in every case where it proved impossible to exhaust the effective local remedies available, that reparation would take the form of compensation. There were many other kinds of remedy which the Commission had not considered in its discussion. It would therefore be unwise to limit the scope of article 22 by referring only to compensation. In any case, if the Commission discussed the question of compensation in greater depth at a later stage, it would also have to discuss the primary rule and to qualify the compensation in some way. In that connexion, he doubted whether compensation could be "appropriate" if it was not "adequate". He therefore supported Mr. Schwebel's suggestion that, in order to avoid the problem to which the discussion of the question of compensation had given rise, the Commission should replace the words "adequate compensation" by the words "equivalent treatment".

49. Mr. AGO (Special Rapporteur) said that he too favoured the deletion of the word "compensation" since everyone interpreted it in his own way. In that connexion, he wished to point out that there was absolutely no question of taking into consideration the primary rules relating to the treatment of aliens. He also stressed the fact that compensation did not necessarily have an economic value. For example, the family of a person who had been killed as a result of an omission by a State might request the posthumous award of a decoration or other mark of honour instead of financial compensation. It would therefore be best to avoid the term "compensation" and have recourse to the notion of "treatment". The concluding portion of article 22 might therefore be amended to read "without obtaining treatment compatible with that called for by the obligation."

50. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to amend the wording at the end of article 22 to read: "without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment."

It was so agreed.

51. The CHAIRMAN suggested that, in accordance with normal English usage, the words "natural or legal persons" in the English version of article 22 and of the definition of "local remedies" should be replaced by the words "natural or juridical persons". If there was no objection, he would take it that the Commission agreed to that.

It was so agreed.

52. The CHAIRMAN said that, if there was no objection, he would take it that the Commission adopted the title and text of article 22, as amended, and the text of the definition of "local remedies", as amended, on the understanding that the definition would be inserted in the commentary to article 22.

It was so agreed.

The meeting rose at 12.45 p.m.

1470th MEETING

Wednesday, 27 July 1977, at 10.10 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Bedjaoui, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Co-operation with other bodies (concluded)*

[Item 10 of the agenda]

1. Mr. EL-ERIAN said that, in accordance with the decisions taken by the Commission at its twenty-eighth session, he had attended the twenty-sixth session of the European Committee on Legal Co-operation, held at Strasbourg (France) in December 1976, and the eighteenth session of the Asian-African Legal Consultative Committee, held at Baghdad (Iraq) in February 1977.
2. The items on the agenda of the European Committee on Legal Co-operation could be divided into three groups: (a) questions relating to co-operation in legal fields, such as family law, legal representation and custody of minors, and obstacles to civil proceedings; (b) questions relating to academic co-operation, in particular with regard to fellowships for European legal studies and research and work on fundamental legal concepts; and (c) questions relating to international law and the activities of international organizations, such as acquisition of nationality, legal aspects of the protection of the environment, legal problems relating to stateless nomads, and the work of international organizations and bodies such as the European Communities and the United Nations (more especially, the International Law Commission, with particular reference to its draft articles on succession of States in respect of treaties).
3. He had made a statement to the Committee in which he had reviewed the Commission's work at its twenty-eighth session. In the ensuing exchange of views, he had been gratified to note that many members of the Committee had shown great interest in the three main items on the Commission's agenda, namely, the most-favoured-nation clause, succession of States in respect of matters other than treaties, and State responsibility. With regard to the last topic, the Commission would be pleased to know that, in response to the conviction expressed by the Commission in its commentary to article 19,¹ the Committee had devoted particular attention to that article, which concerned international crimes and international delicts.
4. It was quite natural that, as the legal organ of the Council of Europe, the Committee should continue to

be interested in the Commission's work. In that connexion, Mr. Golsong, Director of Legal Affairs of the Council of Europe, had prepared a number of reports on the Commission's activities, which had been of great assistance to the members of the Committee.

5. The first item on the agenda of the eighteenth session of the Asian-African Legal Consultative Committee had related to matters arising out of the work of the International Law Commission and, in particular, to the draft articles on succession of States in respect of treaties, some of which he had been able to explain to the Committee during its exchange of views on the subject.

6. The Committee's agenda had also included such international law topics as the law of the sea, including questions relating to the sea-bed and ocean floor, reciprocal assistance in respect of economic offences, international commercial arbitration, international shipping legislation and environmental law. The Committee had had a useful discussion on the law of the sea in preparation for the sixth session of the Third United Nations Conference on the Law of the Sea.

7. The Asian-African Legal Consultative Committee had been especially gratified that observers from Europe, the United States, the Soviet Union, Australia and Latin America had attended its eighteenth session. During the discussions at that session and through the personal contacts he had made, he had seen that the Committee which had previously emphasized work on matters of private international law, was now showing increasing interest in questions of public international law and particularly in the activities of the International Law Commission.

8. With regard to the work of the Inter-American Juridical Committee, which held two sessions every year, he had been unable to attend the first of the 1977 sessions, but he hoped to be able to attend the summer session.

9. The CHAIRMAN said that, since co-operation with other bodies was a very important aspect of the Commission's work, it was a matter for regret that representatives of the European Committee on Legal Co-operation and the Asian-African Legal Consultative Committee had been unable to attend the Commission's current session. In those circumstances, the statement by Mr. El-Erian had been of great interest.

10. The Enlarged Bureau had considered the question of co-operation with other bodies when it had discussed the Commission's programme of work. It had been the general view of the Bureau that the agendas of the bodies with which the Commission regularly co-operated might be a useful source of information for the Commission and that they should therefore be made available to all its members in a document to be circulated at the beginning of the next session.

11. Mr. TABIBI said he would appreciate it if the Secretariat would explain why the statement he had made as the Commission's representative at the seventeenth session of the Asian-African Legal Consultative Committee in June-July 1976 had not been reproduced in the *Yearbook* of the Commission.

* Resumed from the 1437th meeting.

¹ *Yearbook ... 1976*, vol. II (Part Two), p. 122, document A/31/10, chap. III, sect. B, subsect. 2, art. 19, para. 73 of the commentary.

12. Mr. RYBAKOV (Secretary to the Commission) said that, unfortunately, the Budget Division and the Department of Conference Services had decided that, for financial reasons, the practice of reproducing statements *in extenso* in the *Yearbook* of the Commission was to be avoided wherever possible.

Draft report of the Commission on the work of its twenty-ninth session (continued) *

CHAPTER I. Organisation of the session (A/CN.4/L.258)

13. The CHAIRMAN invited the Commission to consider, paragraph by paragraph, chapter I of the draft report, concerning the organization of the session (A/CN.4/L.258).

Paragraphs 1-6

Paragraphs 1-6 were approved.

Paragraph 7

14. Mr. ŠAHOVIĆ said that it was not the Commission's practice to devote a separate section of its report to the Enlarged Bureau. Since the Bureau was convened by the officers and its task was to allow for informal consultations, the fact that a separate section was devoted to it might have certain implications, particularly at the institutional level. He wished to point out that he was in no way questioning the usefulness of the Enlarged Bureau.

15. Mr. BEDJAOUI (Rapporteur) said that the Enlarged Bureau, like the Planning Group, had never been institutionalized. In order to follow the customary practice, it would be best if sections B and C, concerning the officers and the Enlarged Bureau respectively, were combined into a single section on the officers of the Commission, who were a recognized body.

16. Mr. TABIBI said that, while he was not opposed to the solution proposed by the Rapporteur, it was time to mention the existence of the Enlarged Bureau, which had been operating for some years and had proved extremely useful.

17. Mr. SETTE CÂMARA said he wondered whether it was really correct, in a section entitled "Officers", to deal with both the officers of the Commission and the membership of the Enlarged Bureau and the Planning Group.

18. The CHAIRMAN speaking as a member of the Commission and commenting on the remark by Mr. Tabibi, said that it was time to recognize the existence of the Enlarged Bureau but it should not be treated as a separate organ as the Drafting Committee was. The solution proposed by the Rapporteur therefore seemed the best.

19. Mr. ŠAHOVIĆ said that he too was in favour of that solution. The point raised by Mr. Tabibi deserved some thought. The end of the session was not a suitable time to consider a matter that involved the balanced representation of the members of the Commission as a whole.

20. The CHAIRMAN suggested that sections B and C

should be combined into a section B entitled "Officers" and that the words "of the Enlarged Bureau" should be deleted from the phrase "a Planning Group of the Enlarged Bureau", since at least one member of the Planning Group had not been a member of the Enlarged Bureau at the current session and such a situation might occur again.

It was so agreed.

Paragraph 7, as amended, was approved.

Paragraphs 8-12

Paragraphs 8-12 were approved.

Chapter I as a whole, as amended, was approved.

CHAPTER V. Other decisions and conclusions of the Commission (A/CN.4/L.262 and Add.1)

21. The CHAIRMAN invited the Commission to consider, paragraph by paragraph, the parts of chapter V of its draft report appearing in documents A/CN.4/L.262 and Add.1, namely, sections A, B, C, D, G, H, I and J.

A. Most-favoured-nation clause

Section A was approved.

B. The law of the non-navigational uses of international watercourses

Section B was approved.

C. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier

Section C was approved.

D. Second part of the topic "Relations between States and international organizations"

Section D was approved.

G. Date and place of the thirtieth session

22. The CHAIRMAN said that the Enlarged Bureau had decided the previous day to recommend that the thirtieth session of the Commission should be held at Geneva from 8 May to 28 July 1978. The blanks in section G should be filled in accordingly. The thirtieth session would thus commence one week after the probable end of the second session of the Conference on Succession of States in respect of Treaties and would overlap the seventh session of the Conference on the Law of the Sea, to be held at Geneva in the spring of 1978, by only one week.

Section G, as thus completed, was approved.

H. Representation at the thirty-second session of the General Assembly

Section H was approved.

I. Gilberto Amado Memorial Lecture

23. The CHAIRMAN said that, in view of the difficulties encountered at the present session, the Enlarged Bureau had suggested that Mr. Elias, a judge at the International Court of Justice, should be invited straight away to give the Gilberto Amado Memorial Lecture at the next session. He proposed that the invitation should be mentioned in section I.

It was so agreed.

Section I was approved, subject to amendment to that effect.

* Resumed from the 1466th session.

J. International Law Seminar

24. The CHAIRMAN suggested that, in its report, the Commission should henceforth express its thanks to the Director of the Seminar, Mr. Raton, and his assistant, Miss Sandwell, for the effective organization of the Seminar.

It was so agreed.

Paragraph 17

25. Mr. EL-ERIAN said he did not think that it was necessary to specify the amounts of the fellowships offered by the individual countries. He therefore suggested that the wording of paragraph 17 should be modelled on that of paragraph 201 of the Commission's report on the work of its twenty-eighth session, which stated, *inter alia*, that "fellowships ranging in value from \$2,000 to more than \$4,000 were awarded to 14 candidates".²

26. The CHAIRMAN, speaking as a member of the Commission, said that he supported the suggestion made by Mr. El-Erian because, in his view, mentioning the amount of each contribution in the report would not help the Commission to obtain increased financial assistance from Governments for the travel and living expenses of Seminar participants.

27. Mr. TABIBI said that, in his opinion, the amounts of contributions by Governments to the Seminar should be mentioned in the Commission's report, if only in a foot-note. The names of the countries that had actually contributed to the Seminar and the amounts of their contributions would show that none of the great Powers seemed to attach much importance to the role of the Seminar as a training course for young jurists from developing countries.

28. Mr. NJENGA said that he also agreed with Mr. Tabibi on the importance of contributions by Governments to the Seminar. An indication of the amounts of the fellowships offered might encourage Governments to contribute or to increase their contributions.

29. Mr. DADZIE said that, in his view, mentioning the contributions to the Seminar in the report would encourage donor States, which would know that the Commission appreciated their contributions, and might induce other States to follow suit. The indication of the amounts of contributions could serve as a guide to those other States in deciding how much they might contribute themselves.

30. Mr. NJENGA suggested that, as a compromise, the Commission should follow the suggestion made by Mr. El-Erian, on the understanding that its representative at the thirty-second session of the General Assembly, Sir Francis Vallat, would bring the question of contributions to the Seminar to the attention of the Sixth Committee.

31. Mr. QUENTIN-BAXTER said that he supported the compromise suggestion made by Mr. Njenga. In his opinion, the Commission should ask Sir Francis Vallat, who would represent it at the General Assembly, to point out to the Sixth Committee that, in discussing that section of the report, the Commission had expressed concern that contributions to the Seminar were not being made by a wider range of Governments.

32. Mr. CASTAÑEDA said that he also supported the compromise suggestion made by Mr. Njenga.

33. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to model the wording of paragraph 17 on that of paragraph 201 of its report for 1976, on the understanding that he, as the Commission's representative at the General Assembly, would refer to the amounts of the contributions made as a basis for an appeal to Governments either to increase their contributions or to contribute to the Seminar for the first time.

It was so agreed.

Paragraph 17, as amended, was approved.

Section J, as amended, was approved.

CHAPTER III. Succession of States in respect of matters other than treaties (A/CN.4/L.260 and Add.1-3)

A. Introduction (A/CN.4/L.260)

Section A was approved.

B. Draft articles on succession of States in respect of matters other than treaties (A/CN.4/L.260 and Add.1-3)

1. TEXT OF ALL DRAFT ARTICLES ADOPTED SO FAR BY THE COMMISSION (A/CN.4/L.260)

Subsection 1 was approved.

2. TEXT OF ARTICLES 17-22, WITH COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS TWENTY-NINTH SESSION (A/CN.4/L.260/Add.1-3)

Commentary to article 17 (Scope of the articles in the present Part) and to article 18 (State debt) [A/CN.4/L.260/Add.1]

Paragraphs (1)-(6)

Paragraphs (1)-(6) were approved.

Paragraph (7)

34. Mr. QUENTIN-BAXTER proposed that, in the last sentence of the English text, for reasons of clarity, the words "only one of them is legally 'involved' ...: the predecessor State" should be replaced by the words "only the debts of one of them are legally 'involved' ...: those of the predecessor State."

It was so agreed.

Paragraph (7), as amended in the English version, was approved.

Paragraphs (8)-(14)

Paragraphs (8)-(14) were approved.

Paragraph (15)

35. Mr. SETTE CÂMARA proposed that the word "State" should be added to the list in the fourth sentence.

36. Mr. BEDJAOUI (Special Rapporteur) said that the use of "and so on" showed that the list in the fourth sentence was not restrictive. The word "State" might give rise to confusion for there were unitary States as well as federal states. He therefore proposed that the enumeration should begin with the words "federal unit" in order to avoid any ambiguity.

It was so agreed.

Paragraph (15), as amended, was approved.

² *Ibid.*, p. 154.

Paragraph (16)

37. Mr. SCHWEBEL proposed that, in the English text, the word "internationalists" should be replaced by the word "commentators", since "internationalist" did not signify a specialist in international law but an advocate of internationalism.

38. Mr. BEDJAOUÏ (Special Rapporteur) proposed that, in view of the problem posed by the translation of the word *internationalistes* into English, it should be replaced by the expression "authors on international law".

It was so agreed.

Paragraph (16), as amended, was approved.

Paragraphs (17)-(38)

Paragraphs (17)-(38) were approved.

Paragraph (39)

39. Mr. YANKOV proposed that, at the end of the last sentence, the word "independent" should be inserted before the word "State".

It was so agreed.

Paragraph (39), as amended, was approved.

Paragraphs (40)-(46)

Paragraphs (40)-(46) were approved.

Paragraph (47)

40. Mr. SCHWEBEL said that paragraph (47) did not take sufficient account of the views expressed by the many members of the Commission who had opposed the inclusion of the word "international" in the text of article 18. He therefore proposed that the paragraph should be amplified by the replacement of the first sentence by the following text:

"On the other hand, most members of the Commission did not favour inclusion of the term 'international' since, in their view, international law, including that of State succession, has been and quite rightly remains concerned with the interests of aliens as well as of States. No question of interference in a State's internal affairs arose. It was pointed out that the use of the word 'international' in the text would be contrary to the practice of States, which contained thousands of cases of succession of States to debts which were not debts on an inter-State or international plane but were State debts whose creditors were alien individuals or corporations. A great part, if not the bulk, of credit currently extended to States derives from foreign private sources, and it would be a regressive rather than progressive development if such credit were to be excluded from the Commission's draft."

41. His proposed amendment sought to emphasize, on the one hand, that international law did not take into account simply the interests of foreign States but also the interests of foreign individuals and, on the other hand, that a great part of the credit extended to States derived from foreign private sources.

42. Mr. BEDJAOUÏ (Special Rapporteur) said that he saw no major difficulty in accepting the text proposed by Mr. Schwebel. The two ideas introduced were important, if not for most of the members of the Commission, at

least for some of them. Mr. Schwebel was right to emphasize that international law was not concerned exclusively with States and that its ultimate beneficiary was the individual, who was the corner-stone of every society. Mr. Schwebel was also right to emphasize the importance of private credit, which fed the international financial market and enabled the countries of the third world to obtain the resources necessary for their development. However, too much emphasis should not be placed on the latter idea, for the stage at which newly independent States sought to benefit from international credit derived from private sources came after the stage of decolonization and State succession. The argument that the sources of credit open to developing countries should not be restricted had no point inasmuch as the question of international credit to newly independent States arose after the question of State succession and had no bearing on it.

43. Mr. YANKOV proposed that, in the first sentence of the text proposed by Mr. Schwebel, the words "most members" should be replaced by "several members". Again, the words "a great part" in the fourth sentence should be replaced by "an important part" and the words "if not the bulk" should be deleted, together with the clause "and it would be a regressive rather than progressive development if such credit were to be excluded from the Commission's draft", which seemed to introduce a subjective element.

44. Mr. USHAKOV supported the first of Mr. Yankov's proposals. The Commission's report should always say "a member" or "several members", and never "most members", as it was impossible to determine the exact number of members of the Commission who had supported a particular view.

45. Mr. TABIBI said that, in the fourth sentence of the text proposed by Mr. Schwebel, the expression "a great part" over-emphasized private sources of international credit to the detriment of two other equally important sources, namely, international organizations and States. In Afghanistan and most other Asian countries and in Africa, credit was essentially in the form of inter-State loans.

46. Mr. SCHWEBEL agreed to the change proposed by Mr. Yankov. Nevertheless, he would prefer the words "most members" to be replaced by "many members".

It was so agreed.

The alteration proposed by Mr. Schwebel, as amended, was approved.

Paragraph (47), as amended, was approved.

The commentary to articles 17 and 18, as amended, was approved.

The meeting rose at 1.10 p.m.

1471st MEETING

Thursday, 28 July 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian,

Mr. Francis, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

**Draft report of the Commission on the work of its
twenty-ninth session (continued)**

**CHAPTER III. Succession of States in respect of matters
other than treaties (continued) (A/CN.4/L.260 and Add.1-3)**

- B. Draft articles on succession of States in respect of matters other than treaties (continued) (A/CN.4/L.260 and Add.1-3)**
2. TEXT OF ARTICLES 17-22, WITH COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS TWENTY-NINTH SESSION (continued) (A/CN.4/L.260/Add.1-3)

Commentary to article 19 (Obligations of the successor State in respect of State debts passing to it) (A/CN.4/L.260/Add.2)

1. Mr. RIPHAGEN said that he had certain doubts about the practical application of articles 19 and 20. Taken alone, article 19, which by implication concerned creditors, seemed to answer in the affirmative the question whether succession of States affected their rights. Paragraph 1 of article 20, however, answered that question in the negative, as did the first proposition in paragraph 2 of that article, relating to agreements between predecessor and successor States. In both those cases, there was no extinction or arising of obligations so far as creditors were concerned. On the other hand, as was clear from article 20, paragraph 2 (a), the agreement could be invoked against a creditor who had accepted it.

2. Moreover, he did not really see how the proviso in article 20, paragraph 2 (b), could be applied to the case covered by article 21, namely, transfer of part of the territory of a State. Article 21, paragraph 1, implied that, in the case contemplated by that article, the consequences of an agreement between the predecessor and successor States would necessarily be "in accordance with the other applicable rules of the articles in the present Part"; even on the basis of a less literal interpretation, however, and assuming that article 20, paragraph 2 (b), referred to some principle underlying the agreement, such a principle could be discerned only in article 21, paragraph 2, which applied in the absence of an agreement. The combined effect of article 19, article 20, paragraph 2 (b), and article 21, paragraph (2), therefore seemed to be that any agreement between the predecessor and successor States regarding the transfer of a part of the territory could be invoked against a creditor who had not accepted it, provided that the agreement had had as its consequence the passing of an equitable proportion of the State debt of the predecessor State to the successor State.

3. His remarks were not made with a view to the amendment of the text of article 19 or the commentary thereto, and were simply food for thought.

The commentary to article 19 was adopted.

Commentary to article 20 (Effects of the passing of State debts with regard to creditors) (A/CN.4/L.260/Add.2)

4. Mr. USHAKOV reiterated the reservations that he had expressed during the consideration of article 20,¹ particularly with regard to paragraph 2 (a). As to the drafting, he questioned the meaning of the word "other" in the expression "other applicable rules" in paragraph 2 (b).

Paragraphs (1)-(9)

Paragraph (1)-(9) were approved.

Paragraph (10)

5. Mr. SCHWEBEL, referring to the penultimate sentence, said that he was not altogether clear as to the meaning of the phrase "or, if appropriate, private or juridical persons under the jurisdiction of predecessor or successor States". What was the exact meaning of the words "if appropriate", and was the expression "private or juridical persons" meant to cover aliens as well as nationals? In his view, either the whole phrase should simply be deleted or else its meaning should be made clear.

6. Mr. BEDJAOUI (Special Rapporteur) said that he thought the text should stay as it was. The words "if appropriate" gave the sentence the flexibility which Mr. Schwebel desired.

7. The CHAIRMAN suggested that, in the English version, the words "if appropriate" should be replaced by the words "when appropriate", which was closer to the French expression *le cas échéant*.

It was so agreed.

Paragraph (10), as amended, was approved.

Paragraph (11)

8. Mr. QUENTIN-BAXTER said that, in his view, the word "other" in article 20, paragraph 2 (b), had an essential function, which could be illustrated in particular by relating article 20 to article 21. His understanding of the first of the two propositions in article 21 was that the creditor was bound by an agreement between the predecessor and successor States if he had accepted it. The word "other" in article 20, paragraph 2 (b), therefore referred to the "applicable rules of the articles in the present Part" other than the rule that the predecessor and successor States should settle questions concerning the passing of State debts by agreement. To omit the word "other" would be tantamount to treating as a residuary rule the rule that the predecessor and successor States should conclude an agreement, with the result that there would be a kind of perpetual *renvoi* from one rule to another. To make the meaning clearer, he proposed the addition of the following words at the end of the penultimate sentence of paragraph (11) of the commentary: "that is, with the applicable rules of the present Part other than the rule that questions relating to succession should be settled by agreement between the predecessor and successor States".

9. Mr. BEDJAOUI (Special Rapporteur) endorsed Mr. Quentin-Baxter's proposal. He reminded the Commission that there were two kinds of rules: the rules which the predecessor State and the successor State freely imposed

¹ 1447th meeting, para. 28.

on themselves by agreement and the residuary rules which the Commission was seeking to bring out in the draft articles.

The proposal by Mr. Quentin-Baxter was approved.

Paragraph (11), as amended, was approved.

Paragraph (12)

Paragraph (12) was approved.

The commentary to article 20, as amended, was approved.

Introductory commentary to section 2 (Provisions relating to each type of succession of States) (A/CN.4/L.260/Add.2)

The commentary to section 2 was approved.

Commentary to article 21 (Transfer of part of the territory of a State) (A/CN.4/L.260/Add.2)

The commentary to article 21 was approved.

Commentary to article 22 (Newly independent States) (A/CN.4/L.260/Add.3)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

10. Mr. SCHWEBEL said that the paragraph omitted to state that the dependence of one economy on another was not an exclusive characteristic of former colonial territories. In the modern world, economies were typically interdependent although, in the case of former colonial territories, dependence might be particularly marked. He therefore proposed, with regard to the ninth sentence of the paragraph, that the word "particularly" should be inserted after the word "remain"; that the full stop should be replaced by a comma; and that the words "even taking account of the fact that the economies of nearly all countries are interdependent" should be added at the end of the sentence.

11. Mr. BEDJAOUI (Special Rapporteur) said that he was grateful to Mr. Schwebel for pointing out that all countries were economically interdependent. However, equality before the law often went hand in hand with *de facto* inequality and, just as some countries were more equal than others, some countries were more dependent than others. He could none the less agree to Mr. Schwebel's proposal, which strengthened his own position.

The proposal by Mr. Schwebel was approved.

Paragraph (2), as amended, was approved.

Paragraphs (3)-(10)

Paragraphs (3)-(10) were approved.

Paragraph (11)

12. Mr. SCHWEBEL said that the commentary seemed to suggest that "odious debts" would normally be excluded from the succession, which was not consistent with the fuller exposition of that subject in the report. He therefore proposed the deletion of the whole of the last sentence of the paragraph or, alternatively, of the phrase reading "which would normally be excluded from succession as 'odious debts'."

13. Mr. BEDJAOUI (Special Rapporteur) agreed to Mr. Schwebel's proposal to delete the last sentence of paragraph (11).

The proposal by Mr. Schwebel was approved.

Paragraph (11), as amended, was approved.

Paragraphs (12)-(38)

Paragraphs (12)-(38) were approved.

Paragraph (39) (and paragraphs (40)-(51))

14. Mr. SCHWEBEL proposed the addition of some wording along the following lines at the end of the paragraph: "That situation is characterized in many cases by an extremely heavy and rapidly increasing burden of external debt". That would summarize what he understood to be the gist of paragraphs (40) to (51), namely, the considerable indebtedness of many newly independent States.

15. He further proposed the deletion of paragraphs (40) to (51), first, because they consisted largely of an economic analysis, which was not really within the Commission's sphere of competence. Economists often arrived at widely differing conclusions on the basis of identical data and, while not himself an economist, he regarded the analysis as debatable in several respects. Second, those paragraphs were of questionable relevance since they mainly described a situation that had arisen since States had achieved independence. Third, the account of the financial situation of newly independent States was disproportionately long by comparison with the commentaries to other draft articles.

16. Mr. BEDJAOUI (Special Rapporteur) said that he strongly opposed the deletion of paragraphs (40) to (51), as Mr. Schwebel proposed. In the commentary to article 22, he had referred to the disastrous financial situation of the newly independent States because the Commission had placed great emphasis on the debt burden of the third world and because some of its members had demanded that the debts of newly independent States should be completely wiped out. A further reason had been to call the attention of the Sixth Committee of the General Assembly to the importance of the matter. It was not an economic analysis, as Mr. Schwebel maintained, but a factual presentation of official United Nations, IBRD and UNCTAD figures, which were not open to dispute. The problem of third world indebtedness lay at the core of all the multilateral talks that had taken place and were still taking place, both in the United Nations and in the specialized agencies and at conferences such as the Conference on International Economic Co-operation or "North-South Conference", to which the United States had made an important contribution. He therefore urged Mr. Schwebel not to press for the deletion of paragraphs (40) to (51), which represented the least that could be said on the matter in the commentary.

17. The argument that those paragraphs dealt with a situation that had arisen since the accession of third world States to independence in no sense contradicted his position; on the contrary, it strengthened it. For the commentary, by indicating that the newly independent countries wanted the debts that they had contracted as sovereign States since their accession to independence to be wiped out, highlighted the need for the application, *a fortiori*, of the clean-slate principle to debts contracted on behalf of those countries by the metropolitan country.

18. Mr. DADZIE said that the figures quoted by the Special Rapporteur served to illustrate the importance of a subject that had engaged a great deal of the Com-

mission's attention, and would bring home forcefully to others who were also not economists the issues involved. He therefore considered that paragraphs (40) to (51) should be retained, and he appealed to Mr. Schwebel not to press his proposal.

19. Mr. FRANCIS said that, for reasons of both principle and procedure, it would be unwise to delete paragraphs (40) to (51) at that juncture. In the general debate, some members had expressed alarm at the disturbing situation revealed by the Special Rapporteur's report, and the Sixth Committee would undoubtedly wish to have the information in question at its disposal when it came to consider article 22. He therefore favoured the retention of paragraphs (40) to (51) and appealed to Mr. Schwebel to withdraw his proposal.

20. Mr. SCHWEBEL said that, if the Commission wished to retain paragraphs (40) to (51), he would have certain changes to suggest and would also request that his views on the matter should be included in the report. A further, albeit secondary consideration, was that some of the material in those paragraphs had not been examined by the Commission before.

21. The CHAIRMAN invited the Commission to resume its consideration of the commentary to draft article 22, paragraph by paragraph, and to examine Mr. Schwebel's points as he raised them.

Paragraph (39) was approved.

Paragraph (40)

22. Mr. YANKOV proposed that the word "so-called" in the second sentence should be deleted.

It was so agreed.

23. Mr. SCHWEBEL proposed the addition, at the end of the first sentence, of the words "and to meet current expenses" to take account of the fact that countries now borrowed money not only to pay for development but also to meet other expenditure.

24. Mr. BEDJAOU (Special Rapporteur) said that he would be glad to agree to the addition proposed by Mr. Schwebel, which emphasized further the seriousness of the financial situation of many newly independent States, but he feared that the words in question might be misinterpreted. In the 1930s, when the League of Nations had considered the question of attainment by Iraq of independence, it had taken the view that a country should fulfil a number of conditions to attain independence. More particularly, it should have the requisite financial capacity to meet its administrative expenses. A statement in the commentary that sovereign States had had to contract loans not only in an attempt to overcome their underdevelopment but also to meet their current expenses would certainly highlight the financial straits of a large number of newly independent States, but it might also give the impression that those States were incapable of governing themselves since they could not even meet their current administrative expenses. Consequently, he could not agree to Mr. Schwebel's proposal, which might be interpreted unfavourably.

25. Mr. DADZIE said that paragraph (40) reflected a certain understanding which all members of the Commission had shared. Mr. Schwebel's suggested wording

might create confusion and he therefore appealed to him not to press his proposal.

26. Mr. SCHWEBEL said that his suggestion simply expressed an incontrovertible fact. If that was the wish of the Commission, however, he would not press the matter.

27. The CHAIRMAN said that Mr. Schwebel's position might be reflected later by the addition of a foot-note to the effect that one member of the Commission had stated that he found paragraphs (40) to (51) unacceptable.

Paragraph (40), as amended, was approved.

Paragraphs (41) and (42)

Paragraphs (41) and (42) were approved.

Paragraph (43)

28. Mr. SCHWEBEL said that his concern about the inclusion of paragraphs (40) to (51) was particularly brought out by paragraph (43), which referred to the increase in inflation without discussing the reasons for it and stated that the prices of manufactures exported by the developed countries had increased "at an unprecedented rate". He wondered what precedents had been taken into account and how far back they went. Further, the reference to deterioration in terms of trade, whether correct or not, was an analytical statement and not simply a factual observation. The remark about that process having taken place "to the detriment" of the developing countries apparently encompassed all such countries and might therefore be open to question. In order to save time, however, he would not seek the amendment of the paragraph and would have his position reflected by the insertion of a foot-note, as suggested by the Chairman.

29. The CHAIRMAN suggested that the word "unprecedented" in the last sentence should be replaced by the words "exceptionally high".

It was so agreed.

Paragraph (43), as amended, was approved.

Paragraphs (44)-(47)

Paragraphs (44)-(47) were approved.

Paragraphs (48)-(51)

30. Mr. SCHWEBEL said that paragraphs (48) to (51) were not a matter of economic exposition or analysis; they dealt with means of remedying the dramatic situation of developing debtor countries. Action to that end was at present being discussed in several international forums but was not the concern of the Commission. He therefore suggested that paragraphs (48) to (51) should be deleted.

31. Mr. BEDJAOU (Special Rapporteur) said that he opposed the deletion of paragraphs (48) to (51) but was ready to consider drafting suggestions concerning their wording. He felt that paragraph (48) should be retained as it drew attention to the position of the debtor countries, which had been expressed by a hundred or so Heads of State or Government of the non-aligned countries at Algiers in 1973. He nevertheless proposed that, in the second sentence, the words "have established quite clearly" should be replaced by the words "have indicated".

It was so agreed.

32. Mr. RIPHAGEN observed that paragraphs (48) to (51) merely pointed to the need for solutions to the general problem of developing-country indebtedness; they did not actually propose any solutions. He thought that the Commission would be ignoring the realities of contemporary life if it decided to delete those paragraphs, although they might perhaps be condensed.

33. Mr. SETTE CÂMARA said that, in his opinion, paragraphs (48), (49) and (51) should be retained, for they merely described steps taken in other international forums and there was no reason why the Commission should refrain from referring to those steps. He suggested, however, that the Commission might, as a compromise, delete paragraph (50), which simply referred to a draft resolution submitted to the Second Committee of the General Assembly.

34. Mr. FRANCIS agreed that paragraphs (48), (49) and (51) should be retained. He supported Mr. Sette Câmara's suggestion that paragraph (50) should be deleted.

35. Mr. TSURUOKA said that he did not question the value of a reference to the financial situation of the newly independent countries. However, he proposed that, as a compromise, paragraphs (48) to (51) should take the form of a foot-note.

36. Mr. TABIBI said that he too supported Mr. Sette Câmara's suggestion for the deletion of paragraph (50). Paragraphs (48), (49) and (51) should be retained, however, because the question of the indebtedness of developing countries was of vital interest to all countries, developed and developing alike, and was not a problem which the Commission could afford to ignore.

37. Mr. CASTAÑEDA said that he supported Mr. Sette Câmara's suggestion for the deletion of paragraph (50) and that he favoured the retention of paragraphs (48), (49) and (51).

38. With regard to paragraph (48), he suggested that the last sentence beginning with the words "At the Fourth Conference of Heads of State or Government of Non-Aligned Countries ..." should be placed in a foot-note because it merely illustrated the statements made in the first two sentences.

39. Mr. BEDJAOUI (Special Rapporteur) endorsed Mr. Sette Câmara's suggestion concerning paragraph (50). Paragraphs (48) to (51) did not seek to propose, still less impose, any solution whatsoever; their sole purpose was to indicate to the Sixth Committee the various kinds of solution now being considered in the international community. He nevertheless agreed to the deletion of paragraph (50) as a compromise.

40. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to delete paragraph (50).

It was so agreed.

41. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to adopt Mr. Castañeda's suggestion that the last sentence of paragraph (48) should be placed in a foot-note.

It was so agreed.

42. Mr. RIPHAGEN said he thought it should be made clear that the commentary to article 22 was designed to illustrate a problem of current importance and that reference had been made to General Assembly resolutions for that purpose. The Commission might add a sentence along the following lines at the beginning of paragraph (48): "The consciousness of the debt problem has been reflected in the proceedings of many international meetings, of which those mentioned in this and the following two paragraphs may serve as illustrations."

43. Mr. YANKOV proposed that, in the sentence suggested by Mr. Riphagen, the words "the consciousness of" should be replaced by the words "a concern about".

44. Mr. BEDJAOUI (Special Rapporteur) supported the suggestion made by Mr. Riphagen, as amended by Mr. Yankov.

Paragraph (48), as amended, was approved.

45. Mr. SCHWEBEL, referring to paragraph (49), said that, since the Commission considered it important to state facts correctly, he hoped it would do so consistently. He therefore suggested the addition, at the end of paragraph (49), of a new sentence reading: "It may be noted that a number of States reserved their position on these provisions."

46. The CHAIRMAN said that it would be more appropriate if the sentence suggested by Mr. Schwebel was placed in a foot-note.

47. Mr. BEDJAOUI (Special Rapporteur) said that it was not the Commission's practice to indicate the manner of adoption of a United Nations resolution. A resolution either existed or it did not. It was what it was and it should not be weakened by a statement that it had formed the subject of reservations by some States. He therefore opposed Mr. Schwebel's proposal, which would create an extremely dangerous precedent.

48. Mr. TABIBI said that he supported the Special Rapporteur's view concerning the force of resolutions adopted by the General Assembly. He therefore found Mr. Schwebel's suggestion concerning paragraph (49) unacceptable.

49. Mr. USHAKOV said that he too considered it quite unacceptable to indicate in the commentary that a particular General Assembly resolution had been the subject of reservations by some Governments.

50. Mr. ŠAHOVIĆ proposed that the commentary should state that the resolution in question had been adopted by consensus.

51. Mr. SCHWEBEL stressed that it was very important that the manner in which the General Assembly resolutions in question had been adopted should be reflected in paragraphs (49) and (51), otherwise readers of the report might gain the impression that those paragraphs reflected the generally accepted view, which was not in fact the case. His purpose was to ensure that the Commission could not be accused of having distorted the facts. In that connexion, contrary to what Mr. Šahović had said, General Assembly resolutions 3201 (S-VI) and 3202 (S-VI), relating to the establishment of a new international economic order, had been adopted without

objection, although they had been accompanied by a number of reservations.

52. The CHAIRMAN said that it was not customary to indicate the manner in which General Assembly resolutions had been adopted.

53. Mr. QUENTIN-BAXTER said that he was not sure whether Mr. Schwebel had given sufficient consideration to the change in the general tenor of the report introduced by the incorporation in paragraph (48) of the sentence suggested by Mr. Riphagen. He also drew Mr. Schwebel's attention to the very specific and accurate statement made in what had now become the second sentence of paragraph (48), namely, that "Solutions agreeable to both developing countries and industrialized creditor states ... have not been easy to achieve". Indeed, he thought that paragraph (51), which a foot-note supplemented to the effect desired by Mr. Schwebel, was the only paragraph in which any emphasis at all had been placed on the question of solutions to the debt problems of developing countries. In his opinion, no one reading the commentary to article 22 would think that the Commission had dwelt heavily on the importance of such solutions.

54. The CHAIRMAN said that, if there was no objection, he would take it that the Commission approved paragraph (49) as it stood.

Paragraph (49) was approved.

55. Mr. CASTAÑEDA suggested that, in the English version of the foot-note to paragraph (51), the words "has not reached" should be replaced by the words "did not reach" since the Conference on International Economic Co-operation had ended.

It was so agreed.

56. The CHAIRMAN said that, if there was no objection, he would take it that the Commission approved paragraph (51) and the foot-note, thereto, as amended in accordance with Mr. Castañeda's suggestion.

Paragraph (51) and the foot-note thereto, as amended, were approved.

57. The CHAIRMAN pointed out that Mr. Schwebel had still to propose the addition of a foot-note reserving his position with regard to paragraphs (40) to (51).

The meeting rose at 1.10 p.m.

1472nd MEETING

Thursday, 28 July 1977, at 3.10 p.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Draft report of the Commission on the work of its twenty-ninth session (*continued*)

CHAPTER III. Succession of States in respect of matters other than treaties (*concluded*) (A/CN.4/L.260 and Add.1-3)

B. Draft articles on succession of States in respect of matters other than treaties (*concluded*) (A/CN.4/L.260 and Add.1-3)

2. TEXT OF ARTICLES 17-22, WITH COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS TWENTY-NINTH SESSION (*concluded*) (A/CN.4/L.260/Add.1-3)

Commentary to article 22 (Newly independent States) (concluded) (A/CN.4/L.260/Add.3)

Paragraphs (48)-(51) (*concluded*)

1. Mr. SCHWEBEL proposed the insertion of a foot-note to paragraph (51); it might be placed after the existing foot-note and should read:

"One member objected to the inclusion of paragraphs (40) to (51) of the present commentary, particularly on the grounds that they contain, in his view, economic exposition and analysis which are not within the sphere of the Commission's competence and that such exposition and analysis in some respects are debatable."

2. The CHAIRMAN said that such foot-notes had been inserted in the Commission's report on previous occasions. He suggested that, as the proposed foot-note reflected the view of only one member and was short, the Commission should not object to its insertion.

It was so agreed.

Paragraphs (52)-(62)

Paragraphs (52)-(62) were approved.

Paragraph (63)

3. Mr. SCHWEBEL said that paragraph (63) could give the impression that the Declaration on the Establishment of a New International Economic Order¹ and the Charter of Economic Rights and Duties of States² had been adopted unanimously. In fact, a large number of States had entered reservations in respect of the Declaration, a number of States had voted against the Charter as a whole, and virtually every industrialized democracy in the world had voted against, or abstained in the vote on, articles 2 and 16 of the Charter. He therefore proposed the insertion of the following foot-note relating to paragraph (63):

"One member believed it important to note that a number of States had voted against the Charter of Economic Rights and Duties of States as a whole, that a larger number of States had voted against articles 2 and 16 of that Charter, and that reservations to the passages quoted from General Assembly resolutions 3201 (S-VI) and 3202 (S-VI) had been entered by a number of States."

4. Mr. DADZIE pointed out that it had been agreed at the previous meeting that it was not for the Commission to indicate how States had voted on resolutions adopted by other bodies. Anyone wishing to obtain such information had only to refer to the records of those bodies. Once a resolution had been adopted, it was a resolution.

¹ General Assembly resolution 3201 (S-VI).

² General Assembly resolution 3281 (XXIX).

5. Mr. SETTE CÂMARA agreed with Mr. Dadzie that the Commission should not go into details concerning voting on resolutions adopted by other bodies. However, if a member of the Commission wished to emphasize those details in a foot-note, he should be allowed to do so.

6. The CHAIRMAN said that, in his view, provided it was clear that the foot-note reflected the position of one member and not that of the Commission as a whole, the foot-note might be inserted.

7. Mr. DÍAZ GONZÁLEZ endorsed the comments made by Mr. Dadzie. He said he opposed the insertion of the proposed foot-note.

8. Mr. SETTE CÂMARA said that it had always been the practice of the Commission to allow any member who felt strongly about a point to express his opinion in a foot-note. Such an opinion did not commit the Commission. While he did not share Mr. Schwebel's opinion, he felt that Mr. Schwebel had a right to reserve his position in a foot-note.

9. The CHAIRMAN agreed with the observations of Mr. Sette Câmara and said that the Commission would be departing from its practice if it refused to insert the foot-note proposed by Mr. Schwebel.

10. Mr. FRANCIS endorsed the comments made by Mr. Sette Câmara.

11. Mr. DADZIE said he noted that both the Chairman and the Vice-Chairman had claimed that Mr. Schwebel was entitled to express his opinion in a foot-note. He himself considered that the contents of the foot-note in question amounted to an analysis of a vote taken in the United Nations, and that the Commission's report should not contain analyses of votes taken in other bodies.

12. Mr. BEDJAoui (Special Rapporteur) said that he regretted the re-opening of a debate which he thought had ended at the previous meeting, when the Commission had done everything possible to give satisfaction to Mr. Schwebel. The Commission could not continue to make one-way concessions, for one concession led to another. The commentary under consideration concerned an article whose time had passed—for the process of decolonization was over—and the article might at least bear the mark of generosity. Moreover, a commentary could not be so riddled with reservations as to become unreadable. Like Mr. Dadzie and Mr. Díaz-González, he could not agree to the foot-note proposed by Mr. Schwebel.

13. If, at the very outside, the Commission allowed one of its members to express his view in opposition to all the others, the ideas so expressed ought to be combined in a single note. In the case in point, such a note could be merged with the foot-note which related to paragraph (69) and contained the text of the alternative text for article 22 proposed by Mr. Schwebel. Such an approach would avoid mutilating the text of the commentary. He called for a decision by the Chairman.

14. The CHAIRMAN said that, if he were to take a decision in the matter, it would be completely to the opposite effect because the Special Rapporteur's report had now become the commentary of the Commission. The Commission was considering a request by a single member to have his view recorded in a foot-note relating to the

corresponding passage in the report. Such a request was in accordance with practice. However, it would be far better to settle the matter without the exercise of his authority.

15. Mr. SCHWEBEL said that obviously foot-notes should appear where the text to which they related appeared. If it would help the Special Rapporteur, however, he would be prepared to combine his two foot-notes into a single note.

16. Mr. AGO said that the report should as far as possible avoid recording personal opinions but he recognized Mr. Schwebel's perfect right to have his point of view correctly stated. In the present instance, the note might simply point out that the adoption of the resolution in question had been far from unanimous, particularly with regard to certain passages quoted in the report. On the other hand, an unfortunate precedent would be created if details were given of the voting on a resolution in the General Assembly. The Commission should hesitate to embark on such a course.

17. The CHAIRMAN, summing up Mr. Ago's suggestion, proposed that the foot-note should read:

"One member considered it important to note that the resolution was adopted with a considerable measure of dissent."

18. Mr. SCHWEBEL said that he could accept Mr. Ago's suggestion provided the foot-note stated that the observation referred to both the Charter of Economic Rights and Duties of States and the General Assembly resolution entitled "Declaration on the Establishment of a New International Economic Order".

19. Mr. DADZIE said that the foot-note read out by the Chairman was even stronger than what Mr. Schwebel had originally proposed.

20. Mr. USHAKOV reiterated that every member of the Commission was free to express his view provided that he kept to topics under discussion by the Commission and that his divergent opinion related to rules proposed by the Commission or, at the very most, to rules adopted on the proposal of the Commission. The opinion in question was not of that kind but was a personal judgment on certain things that had happened in an international organization.

21. Mr. SCHWEBEL said that he thought Mr. Dadzie might find it easier to accept the following formula:

"One member considered it important to note in connexion with paragraph 63 of the commentary that a number of States had dissented from the quoted elements of the Charter of Economic Rights and Duties of States and the Declaration on the Establishment of a New International Economic Order."

22. Mr. DADZIE said that he preferred that formulation. In actual fact, he did not like the foot-note at all, but he would not deny Mr. Schwebel the right to express his minority opinion on the subject.

23. Mr. DÍAZ GONZÁLEZ said that he agreed that a member of the Commission could express his opinion in a foot-note. He suggested, however, that it should be stated that the Charter of Economic Rights and Duties

of States had been adopted by the General Assembly despite the reservations entered by some developed States.

24. Mr. SCHWEBEL said it was not a question of reservations but of opposition. There had been negative votes. The Charter had been voted on paragraph by paragraph and as a whole. A number of States had voted against it as a whole and a larger number had voted against certain paragraphs. He was willing to omit that detail but did not consider there was any need to go further than the bland text he had proposed in reply to Mr. Dadzie's misgivings. If the quoted elements were removed from the commentary, he would not call for the insertion of a foot-note.

25. Mr. BEDJAOUI (Special Rapporteur) pointed out that there had never been any question of denying a member of the Commission the right to express his views. As could be seen from the summary records, the Commission had taken very full account of the opinions expressed by Mr. Schwebel in the course of the general discussion on article 22. Not only were Mr. Schwebel's views to be found in the summary records but he now had the opportunity of grouping all his reservations in a foot-note relating to paragraph (69). If that course was not acceptable to him, the matter would have to be put to the vote.

26. The CHAIRMAN said that, if the foot-note under discussion was added to the foot-note that had already been accepted, it would be out of context. As to the proliferation of foot-notes, the one under discussion was only the second of two short foot-notes proposed by Mr. Schwebel.

27. He proposed to put to the vote the question whether Mr. Schwebel's proposed foot-note should be added to paragraph (63).

28. Mr. QUENTIN-BAXTER said that the Commission should consider what the consequences of a vote might be. The Commission had not yet adopted the paragraph to which the foot-note referred. If there was a vote on the foot-note, anyone disagreeing with the outcome of the vote could request that the paragraph itself be put to the vote and in that way express his dissent. That would create a lamentable precedent. It was not doubted that every member of the Commission had the right to say that he did not agree with statements made in the report. Recognition of that right would obviate the need for a vote. The choice seemed to be between a foot-note which merely stated that a member did not agree and one that indicated the measure of his disagreement. In his opinion, the second type of foot-note was preferable, and was no reflection upon the paragraph as a whole. He hoped that the Commission would accept Mr. Schwebel's foot-note, which simply expressed the view of one member.

29. Mr. AGO urged the Chairman not to yield in despair to the temptation to decide the matter by a vote. Such an outcome to the discussion would create a precedent even worse than a plethora of foot-notes. Moreover, Mr. Schwebel had not yet replied to the offer to combine his views in a single note, which could carry even greater weight.

30. The CHAIRMAN said that he was not prepared to allow a long procedural discussion. If the Special Rapporteur agreed, the Commission could add the proposed foot-note. A vote seemed the only way to settle the question. He appealed to the Special Rapporteur to realize that the foot-note did not distort his text.

31. Mr. SCHWEBEL said that he would not object to his statement being inserted in paragraph (69).

32. He suggested that, in the first sentence of that paragraph, the word "thereon" should be followed by a comma and the words: "and one member expressed reservations on certain paragraphs of the commentary to this article as well", followed by a foot-note indicator. There would then be a foot-note, the first sentence of which would consist of the foot-note to paragraph (51), which had already been accepted, the second sentence being the text he had read out in reply to Mr. Dadzie's objections.³

33. The CHAIRMAN suggested that the Commission should accept those changes to paragraph (69).

It was so agreed.

Paragraph (63) was approved.

Paragraphs (64)-(68)

Paragraphs (64)-(68) were approved.

Paragraph (69)

Paragraph (69), as amended, was approved.⁴

Paragraph (70)

34. Mr. BEDJAOUI (Special Rapporteur) proposed the insertion, at the end of paragraph (70), of the words "unless both States otherwise agree". In addition, it should be made clear that the member of the Commission referred to in the paragraph had considered that the rule expressed in article 22 was self-evident.

Paragraph (70), as amended, was approved.

The commentary to article 22, as amended, was approved.

Chapter III as a whole, as amended, was approved.

CHAPTER II. State responsibility (A/CN.4/L.259 and Add. 1-4)

A. Introduction (A/CN.4/L.259)

35. Mr. QUENTIN-BAXTER suggested that, in the interests of accuracy, the first line of paragraph 18 should be amended to read: "At the end of the present session, the Commission received a Secretariat document ...".

It was so agreed.

The introduction, as amended, was approved.

B. Draft articles on State responsibility (A/CN.4/L.259 and Add.1-4)

1. TEXT OF ALL THE DRAFT ARTICLES ADOPTED SO FAR BY THE COMMISSION (A/CN.4/L.259)

Subsection 1 was approved.

2. TEXT OF ARTICLES 20-22, WITH COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS TWENTY-NINTH SESSION (A/CN.4/L.259/Add.1-4)

³ See para. 21 above.

⁴ See para. 32 above.

Commentary to article 20 (Breach of an international obligation requiring the adoption of a particular course of conduct) (A/CN.4/L.259/Add.1)

The commentary to article 20 was approved.

Commentary to article 21 (Breach of an international obligation requiring the achievement of a specified result) (A/CN.4/L.259/Add.2)

The commentary to article 21 was approved.

CHAPTER V. Other decisions and conclusions of the Commission (continued)* (A/CN.4/L.262 and Add.1-2)

E. Programme and methods of work of the Commission (A/CN.4/L.262/Add.2)

36. The CHAIRMAN pointed out, with regard to paragraph 3 and subsequent paragraphs of section E of chapter V, that some decisions and observations of the Planning Group and the Enlarged Bureau had been attributed to the Commission in order to save time, but the Commission as a whole had not considered many substantive points in the text now before it.

Paragraph 1

Paragraph 1 was approved.

Paragraph 2

37. Mr. ŠAHOVIĆ stressed the value, for the future work of the Commission, of the recommendations which had been made by the Planning Group and approved by the Enlarged Bureau. The Commission should in turn approve those recommendations and its approval should be recorded in paragraph 2.

38. Likewise, in paragraph 12, which acted as an introduction to the interim conclusions reached by the Enlarged Bureau and its Planning Group on possible topics for study following the implementation of the current programme of work, it should be made clear that the Commission would, where necessary, consider those conclusions in the light of the discussions of the General Assembly at its thirty-second session.

39. Mr. SETTE CÂMARA said that, in drafting the text, the Planning Group had been mindful, for the reason mentioned by the Chairman, of the fact that the contents had to be approved by the Commission and then by the General Assembly, especially with regard to paragraphs 13 and 15, which proposed the inclusion of two new topics in the Commission's programme of work.

40. Mr. TABIBI said that he had observed in the Enlarged Bureau that the Commission had not in fact had time to discuss all the questions that arose. He felt sure, however, that the Sixth Committee would appreciate the situation and would debate those questions fully at the General Assembly's thirty-second session so that the Commission would receive the requisite directives for its future programme of work in good time for its thirtieth session.

41. The CHAIRMAN said that it had been proposed, subject to the Commission's approval, to complete the last sentence of paragraph 2 by the words "on the basis of those recommendations, adopted the following

paragraphs of this section for inclusion in the present report".

Paragraph 2, amended as proposed, was approved.

42. The CHAIRMAN suggested that, from paragraph 3 onwards, the references to the Planning Group and the Enlarged Bureau should be replaced by references to the Commission.

It was so agreed.

Paragraph 3

43. Mr. QUENTIN-BAXTER, referring to the implications of the paragraph for the Commission's schedule of work, said that the Commission must bear in mind the need to give high priority to the preparation of a first set of draft articles on State responsibility for internationally wrongful acts, as mentioned in paragraph 11.

44. He also wondered whether the Commission was giving sufficient attention to the increase in its workload, which, as things now stood, seemed too much for the 12-week session to be held in 1978.

45. The CHAIRMAN said that the Enlarged Bureau had been conscious of the problem. The difficulty lay not only in the question of priorities but in deciding how much time would have to be given to the various topics. For example, the time required for the second reading of the draft articles on the most-favoured-nation clause would depend on outside factors such as the extent and promptness of replies from Governments. It had been thought that, for the time being, the topics should all be selected for consideration, subject to the priorities which the General Assembly would set when it had seen the Commission's report and heard the explanations which the Chairman of the Commission would furnish to the Sixth Committee.

46. Mr. AGO said that he was of the same opinion as the Chairman but shared the concern expressed by Mr. Quentin-Baxter. The Commission must be flexible in its forecasting because some difficulties were unforeseeable. As Special Rapporteur for a topic to which the General Assembly attached great importance, he intended to submit a number of articles to the Commission at its thirtieth session, and their consideration would probably take more than three weeks. The Planning Group had taken a wise decision in recommending a heavy programme of work for it was better for the Commission to have too much work than not enough.

47. Mr. QUENTIN-BAXTER expressed the fear that, at its thirtieth session, shortage of time might lead the Commission to give priority to certain topics at the expense of a second reading of the draft articles on the most-favoured-nation clause. For instance, the General Assembly could not have foreseen the progress the Commission would make at the present session on the first reading of the draft articles on succession of States in respect of matters other than treaties. It might therefore decide that the Commission should give priority to that or other topics instead of to the most-favoured-nation clause, particularly if the question of replies from Governments complicated work on the latter topic, the consideration of which might then be deferred to a subsequent session.

Paragraph 3 was approved.

* Resumed from the 1470th meeting.

Paragraphs 4-10

Paragraphs 4-10 were approved.

Paragraph 11

48. Mr. AGO said that it was not appropriate to speak of "the preparation of a first set of draft articles on State responsibility for internationally wrongful acts" when a good number of articles on that topic had already been adopted. It would be better to use the words "the preparation of the draft articles on State responsibility for internationally wrongful acts".

It was so agreed.

49. Mr. YANKOV said that the words "the active subjects" in the last sentence seemed peculiar.

50. The CHAIRMAN suggested that they should be replaced by the words "the topics".

It was so agreed.

Paragraph 11, as amended, was approved.

Paragraph 12

Paragraph 12 was approved.

Paragraph 13

51. Mr. AGO said that he welcomed the Enlarged Bureau's recommendation that the topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law" should be placed on the active programme of the Commission at the earliest possible time. He had frequently emphasized that it was a topic which, although entirely different from that of State responsibility for internationally wrongful acts, should be studied concurrently with it. However, he wondered whether the Enlarged Bureau had envisaged specific steps in that respect, more particularly the question of entrusting one or more persons with preparing the study of the topic.

52. The French version of the title of the new topic would be more in keeping with the English version if the words *de l'accomplissement* were deleted. Moreover, the words *pour faits internationalement illicites* should be added at the end of paragraph 13 since the French language, unlike English, made no distinction between liability and responsibility.

53. The CHAIRMAN said that it would perhaps be as well, with regard to the preparation of the topic in question, for the Commission not to take any decision which might prejudice the General Assembly's views.

54. With regard to the French version of the title of the topic, it had been established by General Assembly resolution 3071 (XXVIII).

55. He suggested that the words "for internationally wrongful acts" be added at the end of the paragraph.

It was so agreed.

Paragraph 13, as amended, was approved.

Paragraph 14

Paragraph 14 was approved.

Paragraph 15

56. Mr. SUCHARITKUL said that he was pleased to see the topic of jurisdictional immunities of States and

their property included in the Commission's programme of work, since its codification was long overdue. He thought that the topic should be considered side by side with that of the capacity and immunities of international organizations.

Paragraph 15 was approved.

Paragraph 16

Paragraph 16 was approved.

Paragraph 17

57. Mr. AGO suggested that the third sentence should not speak of the distinction "embodied" but of the distinction "drawn perhaps too rigidly" in the Statute of the Commission between the codification and the progressive development of international law, a distinction which had not been maintained, as a methodological standard, in the practice of the Commission. In actual fact, the Commission decided in each instance how it would take account of that distinction.

58. Following an exchange of views in which Mr. TSURUOKA, Mr. BEDJAOU, Mr. ŠAHOVIĆ and Mr. AGO took part, Mr. VEROSTA proposed that the third and fourth sentences of the paragraph should be replaced by the following sentence: "However, out of the need to incorporate elements of both *lex lata* and *lex ferenda* in the rules to be formulated, the Commission follows, generally speaking, a single consolidated method, which incorporates the various procedures set forth in articles 16 to 23 of its Statute".

It was so agreed.

59. Mr. AGO said that, in the French version, the use of the nominative form required that the definite article *la* should be placed before each of the expressions "*lex lata*" and "*lex ferenda*".

60. Mr. SETTE CÂMARA said that, while he had no objection to the more flexible wording, he did not feel that the Commission had ever been too rigid in its interpretation or approach.

Paragraph 17, as amended, was approved.

Paragraphs 18-34

Paragraphs 18-34 were approved.

Paragraph 35

61. Mr. YANKOV said that, because of the need for a certain amount of flexibility, the third sentence of paragraph 35 should be amended to read: "The Commission will provide headings and subheadings within each individual chapter or section and reflect them in the table of contents so as to make consultation of the report by Governments and delegations easier, and it may also consider, whenever practicable, the provision of summaries". A distinction would thus be made between the helpful and relatively easy provision of headings and subheadings and the preparation of summaries, which required more thought.

Paragraph 35, amended as proposed, was approved.

Section E, as amended, was approved.

The meeting rose at 6.05 p.m.

1473rd MEETING

Closure of the session

Friday, 29 July 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Draft report of the Commission on the work of its twenty-ninth session (concluded)

CHAPTER II. State responsibility (concluded) (A/CN.4/L.259 and Add.1-4)

B. Draft articles on State responsibility (concluded) (A/CN.4/L.259 and Add.1-4)

2. TEXT OF ARTICLES 20-22 AND COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS TWENTY-NINTH SESSION (concluded) (A/CN.4/L.259/Add.1-4)

Commentary to article 22 (Exhaustion of local remedies) (A/CN.4/L.259/Add.3 and 4)

Paragraphs (1)-(48)

Paragraphs (1)-(48) were approved.

Paragraph (49)

1. The CHAIRMAN suggested that the draft report should include more detailed information on the *Ambatielos* case, in which the rule on the exhaustion of local remedies had been carried further than in the *Finnish Vessels* case.

2. Mr. AGO (Special Rapporteur) said that he would provide the Secretariat with more detailed information on the *Ambatielos* case for inclusion in the foot-note relating to paragraph (49).

Paragraph (49) was approved, subject to the inclusion in the foot-note of the additional information to be provided by the Special Rapporteur.

Paragraphs (50)-(63)

Paragraphs (50)-(63) were approved.

The commentary to article 22, as amended, was approved.

Subsection 2, as amended, was approved.

Chapter II, as amended, was approved.

CHAPTER V. Other decisions and conclusions of the Commission (concluded) (A/CN.4/L.262 and Add.1-3)

F. Co-operation with other bodies (A/CN.4/L.262/Add.3)

Section F was approved.

Chapter V, as amended, was approved.

3. The CHAIRMAN put the draft report of the Commission on the work of its twenty-ninth session as a whole, as amended, to the vote.

The draft report as a whole, as amended, was adopted.

4. Mr. AGO thanked the Chairman for the skill, the firmness and the courtesy with which he had directed the work of the Commission. Under his Chairmanship, the Commission had done extremely fruitful work on such difficult topics as succession of States in respect of matters other than treaties and the question of treaties concluded between States and international organizations or between two or more international organizations. The latter, on consideration, had proved much less easy than had been thought at the beginning. On the topic of State responsibility, the Commission had adopted only three articles, but it could be satisfied with its work. The commentary accompanying the three articles contained what was in effect a monograph on the question of the exhaustion of internal remedies, one of the most important issues posed by State responsibility, not only technically and juridically but even from the political aspect. Thanks to the patience and firm guidance of its Chairman, the Commission had succeeded in overcoming very great difficulties. It had substantial achievements to submit to the Sixth Committee of the General Assembly, which would doubtless have some criticisms to make of the Commission's methods of work, the length of its reports and its slow progress. The Commission could nevertheless have a clear conscience for it had not been sparing in its efforts.

5. Congratulations must also go to the other officers of the Commission, and particularly to the Chairman of the Drafting Committee, Mr. Tsuruoka, who had had a very heavy task that year.

6. The work of the Chairman of the Commission during the session represented only part of his duties. The other and perhaps the more important part consisted in explaining to the General Assembly what the Commission had done and under what conditions. It was most important not to forget that the Commission had been able to do useful work precisely because its members were not representatives of States; they were men who were guided by their conscience rather than by national interests. That should be borne in mind whenever it was proposed to revise the working methods followed by the Commission and in connexion with the codification of international law and with treaty-making procedure in general. The successes achieved at plenipotentiary conferences were due in no small measure to the fact that the work of codification was prepared by the International Law Commission.

7. Mr. EL-ERIAN, Mr. USHAKOV, Mr. TABIBI, Mr. SETTE CÂMARA, Mr. FRANCIS, Mr. VEROSTA, Mr. SCHWEBEL and Mr. DADZIE associated themselves with the statement made by Mr. Ago.

8. The CHAIRMAN expressed his thanks to the officers and to the members of the Secretariat and declared the twenty-ninth session of the International Law Commission closed.

The meeting rose at 12.30 p.m.

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