

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION

1980

Volume I

*Summary records
of the meetings
of the thirty-second session*

5 May-25 July 1980

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 ellipsis points, a year and a volume number, e.g. *Yearbook . . . 1975*, vol. II.

Volume II (Part One) of this *Yearbook* contains the Special Rapporteurs' reports discussed at the session and certain other documents; volume II (Part Two) contains the Commission's report to the General Assembly.

All references in the present volume to those reports and documents, as well as quotations from them, are to the edited version of those texts as they appear in volume II of the *Yearbook*.

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| <i>Rapporteur:</i> | Mr. Alexander YANKOV |

Mr. Valentin A. Romanov, 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 1584th meeting, held on 5 May 1980:

1. Succession of States in respect of matters other than treaties
 2. State responsibility
 3. Question of treaties concluded between States and international organizations or between two or more international organizations
 4. The law of the non-navigational uses of international watercourses
 5. Jurisdictional immunities of States and their property
 6. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier
 7. International liability for injurious consequences arising out of acts not prohibited by international law
 8. Relations between States and international organizations (second part of the topic)
 9. Programme and methods of work
 10. Co-operation with other bodies
 11. Date and place of the thirty-third session
 12. Other business
-

ABBREVIATIONS

| | |
|-----------------------|---|
| ECE | Economic Commission for Europe |
| EEC | European Economic Community |
| FAO | Food and Agriculture Organization |
| GATT | General Agreement on Tariffs and Trade |
| <i>I.C.J. Reports</i> | International Court of Justice, <i>Reports of Judgments, Advisory Opinions and Orders</i> |
| ILO | International Labour Office |
| IMF | International Monetary Fund |
| OAS | Organization of American States |
| OAU | Organization of African Unity |
| OECD | Organisation for Economic Co-operation and Development |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCTAD | United Nations Conference on Trade and Development |
| UNDP | United Nations Development Programme |
| UNEP | United Nations Environment Programme |
| UNESCO | United Nations Educational, Scientific and Cultural Organization |
| WHO | World Health Organization |

CHECK LIST OF DOCUMENTS OF THE THIRTY-SECOND SESSION

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| A/CN.4/318/Add.5-7 | Eighth report on State responsibility, by Mr. Roberto Ago: The internationally wrongful act of the State, source of international responsibility (<i>concluded</i>) | Text reproduced in vol. II (Part One). |
| A/CN.4/326 | Provisional agenda | Mimeographed. For the agenda as adopted, see p. xi above. |
| A/CN.4/327 and Corr.1 | Ninth report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Mr. Paul Reuter, Special Rapporteur (<i>concluded</i>) | Text reproduced in vol. II (Part One). |
| A/CN.4/328 and Add.1-4 | State responsibility: Comments and observations of Governments on chapters I, II and III of Part 1 of the draft articles on State responsibility for internationally wrongful acts | <i>Idem.</i> |
| A/CN.4/329 and Add.1 | The law of the non-navigational uses of international watercourses: Replies of Governments to the Commission's questionnaire | <i>Idem.</i> |
| A/CN.4/330 and Corr.1 and 3 | Preliminary report on the content, forms and degrees of international responsibility, by Mr. Willem Riphagen, Special Rapporteur: Part 2 of the draft articles on State responsibility | <i>Idem.</i> |
| A/CN.4/331 and Add.1 | Second report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur | <i>Idem.</i> |
| A/CN.4/332 and Corr.1 and Add.1 | Second report on the law of the non-navigational uses of international watercourses, by Mr. Stephen M. Schwebel, Special Rapporteur | <i>Idem.</i> |
| A/CN.4/333 | Twelfth report on succession of States in respect of matters other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur: Draft articles with commentaries on succession to State archives (<i>continued</i>) | <i>Idem.</i> |
| A/CN.4/334 and Add.1, Add.1/Corr.1 and Add.2 | Preliminary report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur | <i>Idem.</i> |
| A/CN.4/335 | Preliminary report on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, by Mr. Alexander Yankov, Special Rapporteur | <i>Idem.</i> |
| A/CN.4/L.311 | Topical summary, prepared by the Secretariat, of the discussion on the report of the International Law Commission, held in the Sixth Committee during the thirty-fourth session of the General Assembly | Mimeographed |
| A/CN.4/L.312 | Draft articles on treaties concluded between States and international organizations or between international organizations: Texts adopted by the Drafting Committee of articles 61-80 and Annex | Texts reproduced in the summary record of the 1624th meeting, para. 30 |
| A/CN.4/L.313 | Draft articles on succession of States in respect of matters other than treaties—draft articles on succession to State archives: Texts adopted by the Drafting Committee of articles C, D, E and F | <i>Idem.</i> , 1627th meeting, para. 27 |
| A/CN.4/L.314 and Add.1 and Add.1/Corr.1 | Draft report of the International Law Commission on the work of its thirty-second session: Chapter IV (Question of treaties concluded between States and international organizations or between two or more international organizations) | Mimeographed. For the final text, see A/35/10, vol. II (Part Two) |
| A/CN.4/L.315 | <i>Idem.</i> : Chapter II (Succession of States in respect of matters other than treaties) | <i>Idem.</i> |

| <i>Documents</i> | <i>Title</i> | <i>Observations and references</i> |
|--------------------------|--|---|
| A/CN.4/L.316 | Draft articles on the law of the non-navigational uses of international watercourses: Texts of articles 1–5, X, and explanatory note adopted by the Drafting Committee | Text reproduced in the summary record of the 1636th meeting, para. 24 |
| A/CN.4/L.317 | Draft articles on jurisdictional immunities of States and their property: Texts of articles 1–6 adopted by the Drafting Committee | <i>Idem.</i> , 1634th meeting, para. 43 |
| A/CN.4/L.318 | Draft articles on State responsibility: Texts of articles 33–35 adopted by the Drafting Committee | <i>Idem.</i> , 1635th meeting, paras. 42, 53 and 62 |
| A/CN.4/L.319 | Draft report of the International Law Commission on the work of its thirty-second session: Chapter I (Organization of the session) | Mimeographed. For the final text, see A/35/10, vol. II (Part Two) |
| A/CN.4/L.320 and Add.1–4 | <i>Idem.</i> : Chapter III (State responsibility) | <i>Idem.</i> |
| A/CN.4/L.321 and Add.1 | <i>Idem.</i> : Chapter V (The law of the non-navigational uses of international watercourses) | <i>Idem.</i> |
| A/CN.4/L.322 | <i>Idem.</i> : Chapter VI (Jurisdictional immunities of States and their property) | <i>Idem.</i> |
| A/CN.4/L.323 | <i>Idem.</i> : Chapter VII (International liability for injurious consequences arising out of acts not prohibited by international law) | <i>Idem.</i> |
| A/CN.4/L.324 | <i>Idem.</i> : Chapter VIII (Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier) | <i>Idem.</i> |
| A/CN.4/L.325 and Add.1 | <i>Idem.</i> : Chapter IX (Other decisions and conclusions) | <i>Idem.</i> |
| A/CN.4/SE.1584–SR.1642 | Provisional summary records of the 1584th to 1642nd meetings of the International Law Commission | Mimeographed. The final text appears in the present volume. |

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE THIRTY-SECOND SESSION

Held at Geneva from 5 May to 25 July 1980

1584th MEETING

Monday, 5 May 1980, at 3.25 p.m.

Acting Chairman: Mr. Milan ŠAHOVIĆ
Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Opening of the session

1. The ACTING CHAIRMAN declared open the thirty-second session of the International Law Commission.

Tribute to the memory of Marshal Josip Broz Tito, President of the Socialist Federal Republic of Yugoslavia

2. The ACTING CHAIRMAN invited the members of the Commission to pay tribute to the memory of President Tito, the founder of the Socialist Federal Republic of Yugoslavia and a man who had fought throughout his long life as a revolutionist and a patriot for the independence of his country and for the liberty, fraternity and unity of its nations. He had devoted all his strength to the struggle for social justice and socialism, for the liberation of peoples oppressed by colonialism, for peace and non-alignment, for equality and co-operation and for peaceful co-existence. He had firmly believed in the purposes and principles of the Charter of the United Nations and in the historic mission of the organization and had always stressed the need to strengthen the role of international law and ensure strict observance of its rules. In 1963, President Tito had actively supported the initiative that had led to the adoption 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.¹ With President Tito's death, the world had lost an indefatigable fighter and an ardent supporter of the search for new solutions to meet the needs of the modern world.

¹ *Official Records of the General Assembly, eighteenth session, Plenary meetings, 1251st meeting, paras. 1-29.*

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

3. The ACTING CHAIRMAN said that, as a Yugoslav, he wished to thank the members of the International Law Commission for the tribute paid to the memory of President Tito.

Statement by the Acting Chairman

4. The ACTING CHAIRMAN said that, in resolution 34/141, concerning the report of the Commission on the work of its thirty-first session, the General Assembly had expressly recognized:

the importance of referring legal and drafting questions to the Sixth Committee, including topics which might be submitted to the International Law Commission, thus enabling the Commission further to enhance its contribution to the progressive development of international law and its codification,

something which seemed to indicate that, in its concern to participate more effectively in the work of the Commission, the Sixth Committee was showing increased interest in the question of methods of considering the Commission's reports.

Election of officers

Mr. Pinto was elected Chairman by acclamation.

Mr. Pinto took the Chair.

5. The CHAIRMAN thanked the members of the Commission for the honour they had done him in electing him as Chairman for the thirty-second session.

6. Since he found it daunting to speak to the members of the Commission about matters of international law, he had decided to quote Wilfred Jenks, who had written in an article entitled "Ideal and idealism in international law" that:

Practical men . . . know from life that men live by their visions and that, while an imperfect vision may lead astray, where there is no vision the people perish.²

Referring to ideals, Mr. Jenks had gone on to say that:

If international law is concerned with these things it matters greatly; it becomes a vital factor in the shaping of the human future. If international law regards these things as beyond its purview, it matters much less. It may regulate the life of states but

² In *The Japanese Annual of International Law, 1972* (Tokyo), No. 16, p. 3.

remains of small account in the lives of men. This is the scale of things by which we must judge whether idealism in international law should be rejected as an illusion unworthy of the trained intellect or cherished as the vital energy without which the law cannot fulfil its mission in the service of mankind. So stated the choice becomes a simple one for those who have not lost faith in human destiny.³

7. Those thoughts were offered for contemplation in the hope that, although the Commission was meeting in unusually troubled times, its work would be crowned with success.

Mr. Calle y Calle was elected first Vice-Chairman by acclamation.

Mr. Thiam was elected second Vice-Chairman by acclamation.

Mr. Verosta was elected Chairman of the Drafting Committee by acclamation.

Mr. Yankov was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/326)

The provisional agenda (A/CN.4/326) was adopted unanimously.

Organization of work

The Commission decided to begin its work by considering item 3 of its agenda (Question of treaties concluded between States and international organizations or between two or more international organizations).

The meeting rose at 4.15 p.m.

³ *Ibid.*, p. 6.

1585th MEETING

Tuesday, 6 May 1980, at 11.50 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/327)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his ninth report on the question of treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/327).

2. Mr. REUTER (Special Rapporteur) said that his ninth report completed the submission in first reading of the draft articles adapting the articles of the Vienna Convention on the Law of Treaties¹ to the special case of treaties concluded between States and international organizations or between two or more international organizations.

3. He had not considered it necessary to propose articles concerning final provisions, since it was customary to leave the task of preparing those articles to the conference responsible for adopting the draft convention. Nevertheless, he had proposed a draft article corresponding to article 66 of the Vienna Convention, one which, although it was contained in the body of the Convention, could, by virtue of its subject-matter, be considered as a final clause. The Commission would therefore have to decide whether article 66 of the Vienna Convention should be transposed to the draft articles. The other articles proposed to the Commission did not appear to present any major problems. Some of them (articles 61, 64, 68, 71, 72, 75 and 80) did not differ from the corresponding articles of the Vienna Convention: most of the others (articles 65, 69, 70, 74, 76, 77, 78 and 79) entailed only minor drafting changes; and only a few articles (62, 63, 67 and 73) involved questions of principle, some of which had already arisen in connexion with other articles.

ARTICLE 61 (Supervening impossibility of performance)

4. Mr. REUTER (Special Rapporteur) introduced draft article 61 (A/CN.4/327) which read:

Article 61. Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

¹ For the text of the Convention (hereinafter referred to as the "Vienna 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.

5. Draft article 61 reproduced unchanged the text of the corresponding article of the Vienna Convention, an article whose title suggested that it covered all cases of *force majeure*. However, as he had noted in his commentary, article 61 of the Vienna Convention actually covered only cases resulting from “the permanent disappearance or destruction of an object indispensable for the execution of the treaty”, whereas in its draft articles on State responsibility² the Commission had provided a much more comprehensive and detailed definition of *force majeure*. Nevertheless, he had deemed it preferable to remain as faithful as possible to the Vienna Convention, in accordance with the approach adopted thus far by the Commission.

6. Mr. USHAKOV asked what was meant by “the permanent disappearance or destruction of an object indispensable for the execution of the treaty”, since the interpretation and application of draft article 61, particularly paragraph 1 thereof, would depend to a large extent on the meaning ascribed to that phrase.

7. He also asked whether, in the context of article 61, the position of a State party to a treaty was the same as that of an international organization party to the treaty. In the case of an international organization, the permanent disappearance or destruction of an object indispensable for the execution of the treaty might result from a decision taken by that international organization within the limits of its competence. For example, if an international organization concluded a technical or financial assistance treaty with a State and the States members of the organization refused to allocate the funds necessary for the granting of such assistance, could that be considered as the permanent disappearance or destruction of an object indispensable for the execution of the treaty? In short, could a decision taken by an international organization in accordance with its rules be considered as a breach of a treaty obligation? In that respect, he thought that there was a difference between the position of an international organization and the position of a State, and it should be clarified.

8. Mr. REUTER (Special Rapporteur) said that Mr. Ushakov’s first question related to the interpretation of article 61 of the Vienna Convention. That article could be interpreted narrowly by limiting it to a very specific case of *force majeure*, namely the physical disappearance of an object indispensable for the execution of the treaty. In the case of a treaty relating to the legal régime of an island, for example, it was quite obvious that, if the island disappeared in a cataclysm, the object of the treaty disappeared at the same time. That interpretation was based on two very valid arguments. Firstly, the use of the indefinite article before the word “object” gave that word a physical sense. Secondly, article 73 of the Vienna Convention contained a

reservation concerning all questions relating to responsibility. Yet the spirit of the Vienna Convention was such that the question of *force majeure* formed an integral part of the question of responsibility. The *sedes materiae* of *force majeure* might therefore be said to be the question of responsibility, rather than the law of treaties. Article 60 of the Vienna Convention did, it was true, deal with certain consequences of a wrongful act, but only in so far as the operation of a treaty was concerned; it did not take up the question of responsibility as a whole. The words “the permanent disappearance or destruction of an object indispensable for the execution of the treaty” could therefore be taken in a restrictive sense. Nevertheless, there were still some points at which the law of treaties and the question of responsibility converged, and article 61 was one of them.

9. It would be easier to answer Mr. Ushakov’s second question on the basis by a restrictive interpretation of article 61, since what must be determined was whether, in the case of an assistance treaty concluded between an international organization and a State, financial difficulties resulting from a deliberate attitude on the part of the members of the organization would lead to the application of paragraph 1 or of paragraph 2 of the article. The Commission had not considered the question of the general responsibility of international organizations, and it might well be asked whether, in the event of failure to perform an obligation, responsibility lay solely with the international organization itself, or with the organization and its members, or simply with the members of the organization.

10. Mr. Ushakov’s third question, which was a variation on his second question, reopened the discussion of draft article 27.³ In that connexion, it should be remembered that an international organization could conclude two sorts of agreement. It could conclude an autonomous agreement, which was not subject to the implementation of a decision of the organization. In such a case, it could not invoke its internal functions as a ground for not performing an obligation under the agreement. But it could also take a decision which called for the conclusion of an agreement in order for the decision to be implemented. For example, the United Nations Security Council could, by virtue of the powers conferred on it by the Charter, take a decision relating to peace keeping and implementation of that decision would entail the conclusion of an agreement between the Organization and one or more States. Such an agreement was not autonomous, since it was contingent on the decision taken. If the decision was valid only for a given period, the agreement terminated when that period expired. The Organization could also legitimately cancel, modify or suspend its decision.

² See *Yearbook . . . 1979*, vol. II (Part Two), p. 93, document A/34/10, chap. III, sect. B, 1, art. 31.

³ For the text of all the draft articles adopted so far by the Commission, *ibid.*, pp. 138 *et seq.*, document A/34/10, chap. IV, sect. B, 1.

11. Sir Francis VALLAT said that, in his view, article 61 of the Vienna Convention, the text of which had been adopted for the draft article under consideration, was entirely satisfactory. It was sound in concept and, on the whole, well drafted; any difficulties of interpretation to which it might admittedly give rise were not enough to hinder the adoption of its wording. In practice, it would be comparatively easy to say whether or not an object indispensable for the execution of a given treaty had been destroyed and, clearly, the disappearance of one of the parties would always amount to the destruction or disappearance of such an object. For instance, to take the somewhat hypothetical case of a treaty between Scotland and an island in the Pacific for the shipment, by a named ship, of whisky made in a certain distillery in Scotland, if the ship or the distillery was destroyed or the island disappeared, any one of those occurrences would amount to the disappearance of an object indispensable for the execution of the treaty. On the other hand, if performance of a treaty for the general supply of whisky was rendered more difficult because a given distillery was destroyed, that would not amount to the destruction of such an object.

12. There was, however, another, virtually overriding, consideration which had been borne in mind throughout the Commission's work on the draft articles, namely, that the Commission's mandate was to adapt the Vienna Convention for the purpose of treaties to which one or more international organizations were parties and not to draft new substantive provisions.

13. In that connexion, it would perhaps be a fitting moment for the Commission to record with satisfaction the entry into force on 27 January 1980 of the Vienna Convention, which represented a landmark in the history of the law of treaties and of international law in general.

14. Mr. USHAKOV said that in the context of draft article 61 the position of international organizations was slightly different from that of States, since, under draft article 27,

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.

whereas an international organization party to a treaty could invoke its rules as justification for its failure to perform the treaty if the performance of the treaty was "subject to the exercise of the functions and powers of the organization".

15. In the case of an assistance treaty between an international organization and a State, a lack of the funds necessary for the performance of the treaty could be considered as the consequence of a decision taken by the organization in accordance with its constituent instrument. Hence it could be asked whether such a decision by the international organ-

ization could be invoked under the terms of paragraph 1 of draft article 61 or whether, by virtue of paragraph 2, it constituted a breach of an obligation under the treaty. Consequently, could an international organization invoke its constituent instrument in order not to perform a treaty, or did the obligations deriving from the treaty take precedence over its constituent instrument?

16. He proposed that the text of article 61 of the Vienna Convention should be retained, but that the commentary should indicate that the text could be interpreted in two different ways in the case of international organizations.

17. Mr. VEROSTA said that some of the difficulties presented by draft article 61 had to do with the word "permanent", since in the case of an assistance treaty concluded between an international organization and a State, a lack of funds invoked by the organization as ground for not performing the treaty might be only temporary. The possibility of the temporary disappearance of an object indispensable for the execution of the treaty should therefore be covered in the commentary.

18. Mr. DÍAZ GONZÁLEZ said that he saw no particular difficulty in adopting the draft article. In the first place, it was simply a matter of transcribing the corresponding provisions of the Vienna Convention as faithfully as possible; secondly, in regard to the physical disappearance of *an*, as opposed to *the*, object indispensable for the execution of the treaty, there was no significant difference between international organizations and States. In the event of the permanent physical disappearance or destruction of such an object, the parties to the treaty, whether States or international organizations, would find it impossible to comply with the terms of the treaty. Moreover, paragraph 1 of the draft article provided for temporary impossibility, in which event the treaty in question would merely be suspended: that provision would cover the case of an international organization which did not have sufficient funds in its budget to fulfil its obligations under the treaty, for the organization might well have enough funds to do so in the future and the physical disappearance of the object would not be absolute. If, however, the treaty was in breach of the organization's constituent instrument, the question of impossibility resulting from the temporary or permanent disappearance of an object indispensable for the execution of the treaty would not arise: there would be a defect in the treaty, since the treaty would have been concluded in breach of the constituent instrument and would be rendered void *ab initio*.

19. For those reasons, he considered that the article should be referred to the Drafting Committee as it stood and that no addition to the commentary was required.

The meeting rose at 1 p.m.

1586th MEETING

Wednesday, 7 May 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Tribute to the memory of Mr. Alfred Verdross

1. The CHAIRMAN said it was his sad duty to report with deep regret the death on 27 April 1980 of Professor Alfred Verdross, a former member of the International Law Commission.

2. Among his many other achievements, Mr. Verdross had been a trusted adviser of the Austrian Government; an accomplished diplomat; professor emeritus and doctor *honoris causa* of the Universities of Frankfurt, Paris, Salamanca, Vienna, Salzburg, Salonika and many others; a member of the European Court of Human Rights and of the Permanent Court of Arbitration; and the recipient of honours from many Governments. He had influenced the development of international law and legal philosophy not only through a long and distinguished career of public service, but also and, perhaps more lastingly, as a teacher of students from Austria and many other countries throughout the world.

3. Mr. Verdross had been a member of the Commission from 1957 to 1966 and had made a substantial contribution to the elaboration of the Commission's draft on diplomatic relations and immunities. He had been elected President of the United Nations Conference on Diplomatic Intercourse and Immunities, which was held in Vienna in 1961, a high responsibility which he had fulfilled with authority and fairness.

4. The passing of Professor Verdross removed a friend from the Commission's midst and was a great loss to legal philosophy and to the legal profession.

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

5. Mr. VEROSTA thanked the members of the Commission for the condolences they had expressed on the death of Professor Verdross, with whom he had worked for many years. Professor Verdross had made valuable contributions to the development of international law and was the author of many learned publications. His interest in the philosophy of law had led him to conduct research on the law of classical antiquity and to follow the course of human thought throughout the centuries. His work on the occidental

philosophy of law, its fundamentals and main problems¹ had brought him wide acclaim.

6. The CHAIRMAN invited Mr. Nettel, Permanent Representative of Austria to the United Nations Office and specialized agencies at Geneva, to address the Commission.

7. Mr. NETTEL (Austria) thanked the members of the Commission for their tribute to the memory of Professor Verdross. He would convey the Commission's condolences to Professor Verdross's family and to the Austrian Government.

Entry into force of the Vienna Convention on the Law of Treaties

8. The CHAIRMAN said that the Vienna Convention on the Law of Treaties, of 23 May 1969,² had entered into force on 27 January 1980. The Convention was a major instrument which would be one of the most enduring and the matrix of other developments in the field of treaty law, including the law concerning treaties concluded between States and international organizations or between two or more international organizations.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/327)

[Item 3 of the agenda]

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

ARTICLE 61 (Supervening impossibility of performance)³ (*concluded*)

9. Mr. FRANCIS said that he had no objection to the wording of draft article 61, which could be referred to the Drafting Committee. He did, however, have a few comments to make as a result of some of the points raised at the preceding meeting.

10. He considered that if the Commission found any obvious ambiguities in the text of the Vienna Convention⁴ it was duty bound to adapt the wording of that text to the subject-matter under consideration. In that connexion, he agreed that the commentary to the

¹ *Abendländische Rechtsphilosophie* (Vienna, Springer, 1958).

² 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.

³ For text, see 1585th meeting, para. 4.

⁴ See 1585th meeting, foot-note 1.

articles was the place in which such adaptations should be explained. He was not sure, however, whether the case mentioned by Mr. Ushakov of financial difficulties of an international organization could be dealt with in that way. In his own opinion, article 61 adequately covered the question of the impossibility of performance. Since all the eventualities could not be foreseen in advance, it would be presumptuous of him to suggest that the financial issue was not covered by the provisions of draft article 61, but he would suggest that that situation could also be covered by article 62,⁵ paragraph 4. Indeed, he would venture to say that the situation that had arisen in 1978 when a member State had withdrawn from the International Labour Organisation, or the hypothetical situation in which the States Members of the United Nations withheld their financial contributions for a certain time, thus throwing the finances of the Organization into disarray, could be covered either by draft article 61 or by draft article 62, because neither of those two situations could be said to have been created by the organizations in question.

11. Mr. ŠAHOVIĆ said that the Special Rapporteur had been right to reproduce, unchanged, the text of article 61 of the Vienna Convention. In the first place, that article codified a general rule and, secondly, while the Vienna Convention need not be regarded as a sacrosanct instrument, it was beyond question an important element in international law as a whole.

12. There was no reason to preclude the possibility of the rule laid down in article 61 being applied to international organizations, since the Commission had recognized the treaty-making capacity of such organizations. The mode of operation of the rule could simply be discussed in the commentary, due consideration being given to the special position of international organizations as subjects of international law. However, the Commission should not over-emphasize the possible limitations of the application of the rule to international organizations. The Commission might cite examples of the application of that provision, though without differentiating between treaties in such a way as to rob the rule of its generality.

13. In explaining the concept of the permanent disappearance or destruction of an object indispensable for the execution of the treaty, the Special Rapporteur had said that the object must be a physical one. Yet, he (Mr. Šahović) thought that the rule in article 61 might conceivably also be invoked in the case of the disappearance of a legal situation, regardless of whether the relevant treaty was between States, between States and organizations, or between two or more organizations. For example, treaties relating to Trust Territories had been concluded between the United Nations and certain States. When those Territories ceased to be subject to the regime of

trusteeship, the Organization ceased to be bound to perform the obligations arising under such treaties.

14. It was probably not desirable to stress the concept of *force majeure*, although it might be the reason for the impossibility of performance. In drafting the Vienna Convention, both the Commission and the United Nations Conference on the Law of Treaties had taken traditional institutions as their basis but had refrained from referring to them by name, preferring to leave their identity to be established by practice and doctrine. While *force majeure* was admittedly the underlying concept of article 61, that concept was nevertheless more closely akin to the area of State responsibility.

15. Mr. BARBOZA said he agreed with other members of the Commission that draft article 61 as proposed by the Special Rapporteur should be adopted. His reason was that, as Sir Francis Vallat had pointed out (1585th meeting), it was the Commission's task to follow the text of the Vienna Convention as closely as possible and to depart from it, when necessary, only when required to by differences between States and international organizations.

16. Although he fully agreed with Mr. Šahović that it was better not to reopen the discussion of the substance of questions already discussed at the Conference on the Law of Treaties, he wondered why draft article 61 referred exclusively to the case of "the permanent disappearance or destruction of an object indispensable for the execution of the treaty". It appeared from the discussion held at the preceding meeting that that case was really one of *force majeure*. He suggested, therefore, that the Commission might refer directly to article 31 of its draft on State responsibility.⁶

17. He further agreed with Mr. Šahović that the disappearance or destruction of an object might not be due exclusively to *force majeure*. For example, what would happen if a State that was to use a certain object to execute a treaty destroyed the object as a result of a state of necessity? In his opinion, article 61, paragraph 2, would not apply in such a case. Another case might be imagined in which a State deliberately destroyed an object indispensable for the execution of a treaty and offered another similar object for that purpose. That case could also not be considered one of *force majeure*, but rather as a typical case of destruction or disappearance of the object coming under the law of treaties, and not under that of State responsibility in general.

18. At the previous meeting, Mr. Ushakov had raised the question whether, under draft article 61, States and international organizations were equal for the purposes of the treaty. In his (Mr. Barboza's) opinion, there was no doubt that they were, since the draft

⁵ See para. 33 below.

⁶ See 1585th meeting, foot-note 2.

article under consideration referred to the “object” indispensable for the execution of the treaty and not to the “subject” of the treaty, whether referring to States or to international organizations. Neither States nor international organizations could comply with the treaty if an object indispensable to that compliance had been destroyed. The text referred explicitly to the physical destruction of the object. Mr. Ushakov had also referred to the case in which an international organization was unable to fulfil its treaty obligations because of financial difficulties or because of the amendment of its constituent instrument. He (Mr. Barboza) was of the opinion that, in a case where an international organization changed fundamentally or even disappeared, it would not be article 61 that applied, but, rather, draft article 73, on cases of State succession and succession of international organizations (A/CN.4/327).

19. Mr. SCHWEBEL said that, although he regretted that draft article 61 was not more broadly worded, he understood why it could not be, and therefore agreed that it should be referred to the Drafting Committee.

20. He had been struck by a passage in the introduction to the Special Rapporteur’s ninth report (A/CN.4/327), which read: “[. . .] the content of any eventual final clauses will depend entirely on the final form to be given to the draft and on the way in which international organizations will be associated with its entry into force, questions which will be settled at a later stage”. Would those questions be submitted to the Commission for its consideration, or would they be considered only by a conference held with a view to the adoption of a future convention on the topic under consideration? In particular, he wished to know whether the Special Rapporteur had in mind the possibility that international organizations as such could become parties to a future convention.

21. Mr. THIAM said that, in practice, it had not yet been decided whether the Commission could stray from the language of the Vienna Convention. In his commentary to article 61, the Special Rapporteur had been anxious “to remain faithful to a line of conduct which involves abstaining from any effort to improve the text of a convention definitively adopted for treaties between States”. Besides, in the past the existence of the Vienna Convention had always been invoked in order to resist proposed modifications, whether of substance or of form. Nevertheless, he asked for clarification on the point.

22. Mr. VEROSTA said that, while it was a principle of the Commission to follow the language of the Vienna Convention, it should nevertheless consider carefully the impact which treaties concluded between States and organizations or between two or more organizations, could have on that Convention, failing which it would not be discharging its task to the full.

23. In his view, the title of article 61 was too broad, given the terms of paragraph 1. While it was open to the Commission, of course, simply to enlarge the scope of the article in the commentary, it would encounter the same problem when dealing with paragraph 1 of article 62, for it would then have to specify whether there was a fundamental change of circumstances if, for example, as a result of the withdrawal of a number of member States from an international organization which had previously concluded a financial assistance treaty with a State, the organization’s budget no longer enabled it to defray current expenditures. In short, it might be worthwhile reviewing article 61 and its commentary after article 62 had been considered.

24. Mr. REUTER (Special Rapporteur) said that he would reply to two specific questions before reviewing the comments made in the course of the debate.

25. In reply to Mr. Thiam, he said that it had been decided that the Commission was free to depart from the Vienna Convention, and that it even had a duty to do so, whenever the special nature of international organizations so required; conversely, it should refrain from doing so if such departures would result in changes, in respect of the treaties to which the draft articles related, concerning relations between States. Such relations were, in principle, subject to the same rules as those contained in the Vienna Convention. Admittedly, the title of article 61 of the Vienna Convention could give rise to confusion, but there was no question of modifying the text of a convention in force and thereby possibly creating even greater confusion.

26. In reply to Mr. Schwebel’s question concerning the future disposition of the draft articles, he said that there were a number of options, but both the Special Rapporteur and the Commission itself were at the disposal of States and international organizations, which would inform them of their preferences. It was possible that no further action would be taken on the draft articles, as had happened in the case of the draft on arbitration procedure; alternatively, it might become a convention open only to States, or an instrument with which international organizations could be associated.

27. The members of the Commission seemed to be generally agreed that draft article 61 should be referred to the Drafting Committee and—subject to a proposal by Mr. Ushakov (1585th meeting, para. 16)—that neither the title nor the text of the article should be changed. The members of the Commission as a whole had found the commentary to article 61 to be too brief. Not only should it be more substantial, but the passage relating to *force majeure* should be redrafted. It would probably be more prudent, after all, to retain the wording of article 61 of the Vienna Convention, whose drafters had been at pains to affirm that certain situations which could give rise to questions of responsibility outside the scope of the Vienna Convention had effects on the operation of treaties. The

drafters of the Vienna Convention had refrained from adopting a very clear-cut position on a number of legal concepts, such as *force majeure*, fortuitous event and state of necessity. Consequently, the Commission could not now impose a specific interpretation of that instrument. In view of draft article 73, which dealt *inter alia* with State responsibility, the Commission should state explicitly in the commentary to article 61 that the latter did not govern any question of responsibility. The commentary should refer, in addition, to all draft articles on which the application of article 61 could have an impact, particularly articles 62 and 73.

28. It had been generally agreed that it was not the Commission's task to enumerate the cases in which the draft articles being prepared could apply. Its task was one of pre-codification and should be limited to offering guidelines, so as not to hamper the work of codification. No one disputed that the application of draft article 61 might present more difficulties for international organizations than for States, as Mr. Ushakov had pointed out at the previous meeting. Yet it would be wrong to infer that it was always simple for a State to define the concept of an object indispensable for the execution of a treaty. If the purpose of the treaty was the delivery of a unique object, such as a work of art, the destruction of the object obviously came within the terms of article 61, paragraph 1. If, however, the treaty involved the delivery of a generic object, such as a certain quantity of wheat, the destruction of the object might involve the application of paragraph 1 of article 61 or bring into operation paragraph 2. The question of the finances of an international organization fell generally within the area of cases of succession of an international organization to a State or of an international organization to an international organization, which were dealt with in draft article 73. Cases of financial difficulties were, of course, conceivable that would come within the scope of article 61. If a sum of money to be transferred by an international organization to a State became unavailable or lost its value, it was possible that the international organization would be released from its obligation. Situations could be envisaged that were less clear-cut: the Commission should mention them in the commentary, though without giving too many examples.

29. The Drafting Committee might feel inclined to add some further provisions to article 61, even though the members of the Commission apparently did not favour the idea of enlarging the article.

30. Mr. SCHWEBEL said he had gathered from the Special Rapporteur's explanation that the Commission had not yet considered whether international organizations would be parties to a future convention on the topic under consideration. The Special Rapporteur had also said that he was waiting until the comments of States and international organizations

had been received before formulating an opinion on that question.

31. He (Mr. Schwebel) thought that, at some stage, the Commission should discuss that question, because it would be prejudged if the decision was left to a conference attended by States only. Merely asking international organizations to submit their comments and views on the question was not the same as saying that they could become parties to a future convention. In his view, the draft articles under consideration would affect the conduct of international organizations, and it was therefore no frivolous matter to consider whether they should or should not be parties to a future convention and have the full weight of their views brought to bear on the matter.

32. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer draft article 61 to the Drafting Committee, on the understanding that the commentary to the draft article might be expanded.

*It was so decided.*⁷

ARTICLE 62 (Fundamental change of circumstances)

33. The CHAIRMAN invited the Special Rapporteur to introduce draft article 62 (A/CN.4/327), which read:

Article 62. Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty concluded between several States and one or more international organizations and establishing a boundary.

3. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

4. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

34. Mr. REUTER (Special Rapporteur) said that article 62 of the Vienna Convention tried to balance two conflicting requirements: on the one hand, to ensure respect for treaties which had been concluded,

⁷ For consideration of the text proposed by the Drafting Committee, see 1624th meeting, paras. 30 *et seq.*

and on the other, to admit that in certain exceptional circumstances those treaties might lose their binding force. The article, which had been adopted unanimously by the Commission, had been approved at the United Nations Conference on the Law of Treaties by a very large majority of States. Hence he saw no reason for not reproducing it in the draft articles or for changing its substance.

35. By reason of the generality of article 62 of the Vienna Convention, on the other hand, its application to specific situations where States were concerned was a delicate matter, and *a fortiori* it was delicate where international organizations were concerned. In the case of States, the word “circumstances” referred to conditions external to the State, whereas in the case of international organizations it could also refer to an internal situation. For example, the withdrawal of some of the members of an international organization might be regarded as a fundamental change of circumstances, and where that happened it was debatable whether the organization was still the same or whether it had become a different entity. A fundamental change of circumstances might therefore raise the problem of the continuing identity of an international organization.

36. He said that he could, of course, have reproduced verbatim the language of paragraph 2 (a) of article 62 of the Vienna Convention, under which the article did not apply to treaties establishing a boundary—by which were meant not only delimitation treaties but also treaties of cession. But that would have implied that a treaty between two or more organizations was capable of establishing a boundary, in other words, that an international organization had capacity to participate in the establishment of a boundary by treaty. Yet surely it was inconceivable that an international organization should have capacity to dispose of a State’s territory by treaty if that power had not been delegated to it by a treaty between States. For example, the General Assembly had disposed of the former Italian colonies by virtue of an express provision—article 23—of the Treaty of Peace with Italy of 10 February 1947.⁸ Manifestly, an international organization could not really own territory in the traditional sense of the word, for if it did it would cease to be an international organization—that is, an intergovernmental organization, according to the meaning of the definition in paragraph 1 (i) of draft article 2⁹—but would be a State. It was in the light of those considerations that he had slightly amended the text of article 62 of the Vienna Convention, so that the proviso in subparagraph 2 (a) of that article would apply only to a treaty to which at least two States were parties, for it was conceivable that two States might entrust the task of determining the status of a territory to a body like the International Court of Justice.

⁸ United Nations, *Treaty Series*, vol. 49, p. 3.

⁹ See 1585th meeting, foot-note 3.

37. Mr. SCHWEBEL said he agreed that international organizations did not have authority to enter into boundary treaties, although, very exceptionally, they might be entrusted with specific territorial responsibility, as had happened in the example of the former Italian colonies. It could happen also that international courts might establish boundaries, although such courts, not being intergovernmental bodies, did not typically come within the meaning of the definition of international organizations as laid down in the draft articles; the members of the International Court of Justice, for example, did not represent Governments. On that basis, he considered that the Special Rapporteur had been right in holding that, as a general principle, international organizations did not have authority to establish or disestablish boundaries, whether such boundaries were the subject of a treaty of peace or of some other agreement.

38. At the same time, he was not altogether persuaded that paragraph 2 of article 62 as drafted would serve its purpose, and therefore he suggested that it be amended to read:

“A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty concluded between States establishing a boundary, which treaty accords relevant functions to one or more international organizations”.

39. Mr. QUENTIN BAXTER said that it would be well, in paragraph 2 of article 62, to follow the wording of article 19 *bis*, so that the paragraph would read:

“A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty between States and one or more international organizations establishing a boundary”.

40. So far as Mr. Schwebel’s proposed amendment was concerned, he saw a difficulty in it, since a treaty which assigned functions to organizations was not necessarily a treaty between States and organizations.

41. The CHAIRMAN, speaking as a member of the Commission, said it seemed to him that, as drafted, paragraph 2 of article 62 might not cover an organization which was about to be formed. He had in mind the new International Sea-Bed Authority, which would have certain features commonly attributed to a State in that it was to be vested with extensive jurisdiction over the wide area of the sea-bed that lay beyond national jurisdiction. Under the draft convention conferring special powers on the Authority, a Commission on the Limits of the Continental Shelf¹⁰

¹⁰ “Informal Composite Negotiating Text/Revision 2”, drawn up in April 1980 by the President of the Third United Nations Conference on the Law of the Sea and by the Chairmen of the main committees of the Conference (A/CONF.62/WP.10/Rev.2 and Corr.2-5). See, in particular, arts. 156, 157, 1 and 76 of the draft convention.

was to be established, which inevitably meant that the boundaries set by coastal States might be contested. As draft article 62 would probably not be adopted in final form before that convention had been concluded, some thought should perhaps be given to the matter with a view to ascertaining whether the Authority would be covered by the terms of the article.

42. The Authority would also have the right to set other types of boundaries, such as those delimiting the area of the sea-bed in which a given entity, which might well be a State, would have the right to carry on mining operations. Although that might not be a boundary in the traditional sense of a boundary between sovereignties, it would nonetheless be a physical boundary in property, agreed between an international organization and a State. He would be grateful for the Special Rapporteur's comments on that point.

43. Sir Francis VALLAT said he was not sure that a boundary, within the meaning of paragraph 2 of article 62, was invariably a territorial boundary in the traditional sense. In a recent case between Greece and Turkey,¹¹ the International Court of Justice had treated the delimitation of the boundary of the continental shelf appertaining to each of those States as a question that concerned territorial status. If one took the traditionalist view, one might argue that such a boundary was not, strictly speaking, a territorial boundary. Yet it seemed to him that, if one followed the view of the Court, the delimitation would create a boundary that should be treated for legal purposes as if it were a territorial boundary, and he therefore inclined to the view that it would be a boundary within the meaning of paragraph 2 of article 62. By the same token, a boundary established for customs purposes might perhaps be similarly regarded. Or did a boundary have to be one that simply divided the sovereignty between two States?

44. Furthermore, it was possible to visualize a case where a treaty between, say, the United Nations and a former mandatory power and relating to a mandated territory that was due to attain independence, made provision for certain international guarantees to be effected through the Organization. Should such a treaty, concluded between a State and an international organization, be excluded from the scope of the draft articles?

45. He would be grateful for the Special Rapporteur's comments on those points.

46. Mr. REUTER (Special Rapporteur) said he had based his reasoning on the traditional notion of territory, but that notion could obviously be extended. In reply to Mr. Pinto's question concerning the law of the sea, he said that where the limits of the territorial

sea were at issue, the area was obviously a territory in the traditional sense of the word, but the problem was much more complicated where the limits of jurisdiction over the continental shelf were involved. An analogous problem arose in connexion with lines of demarcation or armistice lines, which were comparable to boundaries from the point of view of aggression only, but which it would be very dangerous to treat in general as on a par with territorial boundaries.

The meeting rose at 12.55 p.m.

1587th MEETING

Thursday, 8 May 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/327)

[Item 3 of the agenda]

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

ARTICLE 62 (Fundamental change of circumstances)¹ (*concluded*)

1. Mr. REUTER (Special Rapporteur) said that the question whether the term "boundary" could be used to describe boundaries other than the traditional boundaries between States—as in the examples from the law of the sea cited by Mr. Pinto at the previous meeting—arose only in cases where boundaries that could not be established except by treaties to which one or more international organizations were parties. In cases of boundaries which could also be the subject of ordinary treaties between States the question did not arise, since treaties establishing boundaries fell within the scope of the Vienna Convention² (which had entered into force), and the introduction of new provisions on that topic would be tantamount to amending that convention.

2. Mr. USHAKOV said that, while he approved of draft article 62 submitted by the Special Rapporteur,

¹¹ *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978, p. 3.*

¹ For text, see 1586th meeting, para. 33.

² See 1585th meeting, foot-note 1.

he considered that the text presented exactly the same problem as did that of draft article 61.

3. Both draft articles had the same structure: paragraph 1 stated that a party to a treaty could terminate or withdraw from the treaty by invoking, in the case of article 61, the permanent disappearance or destruction of an object indispensable for the execution of the treaty, or, in the case of article 62, a fundamental change of circumstances. Under article 61, paragraph 2, and article 62, paragraph 3, a party to a treaty could not claim that right if it had itself provoked, in the case of article 61, the permanent disappearance or destruction of an object indispensable for the execution of the treaty, or, in the case of article 62, the fundamental change of circumstances.

4. That exception to the rule laid down in paragraph 1 presented no problem in the case of States, since, under article 27,³ a State party to a treaty could not plead the provisions of its internal law in defence of non-performance of the treaty. However, the exception did present a problem in the case of international organizations, for it was arguable that such an organization was not able to plead its internal law—i.e. its constituent instrument—in defence of the action which had caused the fundamental change of circumstances or the permanent disappearance or destruction of an object indispensable for the execution of the treaty. Whereas a State could—in fact, should—amend its internal law to conform to the provisions of the treaties that it had concluded, an international organization, by contrast, was not entitled to amend its constituent instrument, which was, after all, an international treaty concluded by the States members of the organization and had the same binding force as the treaty referred to in the draft articles. Only the States members of the organization could amend its constituent instrument. The organization had to comply with the provisions of that instrument, in accordance with the principle *pacta sunt servanda*. An international organization that was party to a treaty could therefore cite its constituent instrument—i.e. an international treaty predating the treaty in question—in justification of the legitimacy of a decision taken in pursuance of that instrument and resulting in a fundamental change of circumstances that made the execution of the treaty impossible. However, paragraph 3 of draft article 62 could be interpreted as meaning that it was not open to an international organization party to a treaty to plead its constituent instrument in justification of an action resulting in a fundamental change of circumstances, if such action constituted a breach of an obligation of the treaty.

5. In the event of a breach of a treaty obligation as a result of an action taken in conformity with the constituent instrument of an international organ-

ization, the issue would be, therefore, whether it was the treaty or the constituent instrument which should prevail. That was a very difficult issue, for, since the constituent instrument of an international organization was itself a treaty, the observance of that instrument was also an international obligation by virtue of the principle *pacta sunt servanda*. The problem arose only in the case of international organizations, in that, unlike States, they were not free to amend their internal law. That difference between the situation of States and that of international organizations should be mentioned in the commentary or form the subject of a new paragraph which the Drafting Committee might add to draft article 62.

6. Referring to paragraph 2 of draft article 62, he said that he approved entirely the text proposed by the Special Rapporteur. The Special Rapporteur had been right to exclude treaties concluded between international organizations from the exception provided in that paragraph and to mention only treaties concluded between several States and one or more international organizations. In his view, the concept of a boundary should remain the same as in the Vienna Convention.

7. Mr. TABIBI said that he had occasion earlier, both within the Commission and at the United Nations Conference on the Law of Treaties, to express concern regarding the content of the text that became article 62 of the Vienna Convention, and he had not been alone in raising objections to the exception embodied in that paragraph to the doctrine of *rebus sic stantibus*, which was fundamental to international law. He had therefore voted against the inclusion of the exception in the Vienna Convention and, when he had signed the Convention on behalf of his Government, had entered a reservation on that point. Treaties, after all, were like human beings—they came into being, lived and passed away. They were inevitably subject to any fundamental change of circumstances and could never be permanent. Indeed, it was for that very reason that he had accepted the principle laid down in draft article 61.

8. Paragraph 2 of draft article 62 raised a very complex issue, involving as it did the question of the establishment of boundaries in so far as that question affected international organizations. If the Commission wished to settle the issue, it would have to define the meaning of the term “boundary” or else to spell out its meaning in the commentary. International organizations were not to be compared to sovereign States, for organizations possessed no territory and hence no boundaries; nor did all international organizations have treaty-making capacity.

9. The matter was further complicated by the question of mining areas, as raised in the most recent version of the draft convention on the law of the sea, and also by that of the territorial areas and boundaries of the continental shelf.⁴ Were the latter, for instance,

³ *Ibid.*, foot-note 3.

⁴ See 1586th meeting, foot-note 10. See, in particular, articles 133 and 76 of the draft convention.

to be regarded as boundaries in the traditional sense? For all those reasons, he remained convinced that the important doctrine of *rebus sic stantibus* should not be qualified by paragraph 2 of draft article 62, even in the amended form proposed by Mr. Schwebel (1586th meeting, para. 38).

10. Mr. SCHWEBEL, referring to Mr. Ushakov's remarks, said that the amendment he had proposed to article 62, paragraph 2, had been based on the assumption that, when a treaty accorded relevant functions to one or more international organizations, the organization or organizations in question accepted those functions, with the result that an international treaty relationship would arise. Possibly, however, his suggested wording would be improved if the last part of the amendment were modified to read: "... which treaty accords relevant functions to, and which are accepted by, one or more international organizations".

11. His reason for submitting the amendment was that paragraph 2 as drafted was ambiguous. At first glance, the expression "a treaty concluded between several States and one or more international organizations and establishing a boundary" seemed to refer to a treaty concluded between several States, on the one hand, and one or more international organizations, on the other, which treaty established a boundary. But that was not the meaning intended by the Special Rapporteur, who took the view that international organizations did not conclude treaties establishing boundaries, and that was why the language of paragraph 2 should be modified.

12. Sir Francis VALLAT said that, in general, he could support draft article 62. When referring at the previous meeting to the lack of any definition of the term "boundary", he had merely meant to point out that it would be necessary to indicate what class of treaties would be covered by the exception embodied in paragraph 2 of the draft article. Clearly, the possibility of treaties which touched on maritime boundaries would have to be visualized, because it was probable that an international organization would have functions and powers under such treaties.

13. As to paragraph 2 itself, the problem was partly one of drafting and partly one of substance. So far as the expression "between several States" was concerned, he said the word "several" normally meant three or more but, if the intent was to refer to two or more, then it was necessary to say so expressly. The point of substance was whether the draft articles should make provision for the case of an agreement entered into by only one State with an international organization in regard to a boundary. Since such a case was well within the realm of possibility, it should not be excluded from the draft articles. For that reason, he would prefer the expression "between several States and one or more international organizations" to be replaced by "between one or more States and one or more international organizations", which would be perfectly clear.

14. Another question was whether treaties between two or more international organizations should be covered in the draft articles. In his view, no harm would be done if the Commission followed the text of the Vienna Convention and provided for all treaties which fell within the definition laid down in the draft articles. In that way, it would not run the risk of omitting any cases that might arise in future, and, if no such treaties were in fact concluded, it would not matter. At the same time, since the possibility of a treaty between two organizations which determined a boundary within the meaning of article 62 of the Vienna Convention was not actually envisaged, he could accept that treaties of that type should be omitted, provided that it was made quite clear in the commentary why the Commission had adopted that course and that the application of the principle embodied in paragraph 2 of draft article 62 would not be excluded, should the need arise.

15. Lastly, with regard to paragraph 3, he said that while the Commission might wish to draw attention to the type of problem raised by Mr. Ushakov, he did not think that any modification of the paragraph was required.

16. Mr. FRANCIS said that draft article 62 raised certain questions of substance which gave him cause for concern. There had been several fundamental changes of circumstances since the Vienna Convention was adopted, and the Commission, which was also engaged in the progressive development of international law, should not fail to take account of such changes. They included, first, the emergence of a new right of property covering a large area of the globe, forming part of the common heritage of mankind, which had been vested in an international authority. The fact that the property in question was subterranean in no way detracted from its territorial nature. Inevitably, therefore, questions relating to boundaries, in the territorial sense, would arise, and consequently the matter should be dealt with either in the draft article or in the commentary.

17. Another question related to treaties between two or more international organizations. He fully agreed that, even if such treaties were not sure to be concluded in the future, the question merited further consideration. There was also the concept of the new economic zone which, though formerly opposed by many countries, had been incorporated into several national systems of law. The Commission, while remaining faithful to its established practice, should not lay itself open to the charge that it had failed to take account of impending developments. If it was not possible to reflect the issues he had raised in the draft articles, then some way should be found of considering them at a later stage. He would welcome the Chairman's reaction to those views.

18. He added that Mr. Schwebel's proposed amendment to paragraph 2 of draft article 62 did not really settle the issues he had mentioned.

19. Mr. VEROSTA said that it would be preferable to retain paragraph 2 of the draft article proposed by the Special Rapporteur, in view of the very broad meaning which the Conference on the Law of Treaties had attributed to the term “treaty establishing a boundary”. He approved of the wording suggested by Sir Francis Vallat, which had the merit of not excluding any form of treaty. He was afraid that Mr. Schwebel’s proposal, on the other hand, would complicate the text. In his view, it would be better not to introduce too many details into the body of the article and to provide the necessary explanations in the commentary.

20. The CHAIRMAN, speaking as a member of the Commission, said that, with the increasing importance which maritime boundaries had assumed in recent years, it was more than ever necessary to give serious thought to the meaning of the term “boundary”. A boundary, in the sense in which that term was used by the Special Rapporteur, was one between two States, and even where it was drawn between, say, adjacent or opposite States in the territorial sea or on the continental shelf, it remained a boundary between territorial sovereignties. There was therefore no problem in that respect. It had been decided, however, in the latest version of the draft convention on the law of the sea, to establish an International Sea-Bed Authority,⁵ which would have a certain jurisdiction over the wide area of the sea-bed which lay beyond any national territorial jurisdiction. In addition to that new jurisdiction, the Authority would also have the capacity to enter into agreements with States and to conclude treaties, which could give rise to difficulties of interpretation so far as paragraph 2 of draft article 62 was concerned.

21. The term “boundary” occurred in several passages in the draft convention on the law of the sea. Reference was made, for example, to the “seaward boundary of [a State’s] continental shelf where that shelf extends beyond 200 nautical miles . . .”,⁶ 200 miles being the limit of the “exclusive economic zone”.⁷ Beyond that limit, territorial jurisdiction, and hence sovereignty, for the purpose of the exploitation of resources, could be claimed. There was a very complex formula for determining the boundary, which would vary from case to case, and the geographical coordinates of the boundary would have to be notified to a “Commission on the Limits of the Continental Shelf”.⁸ The boundary would be drawn not between two sovereignties, but between one sovereignty and an international organization which shared some of the elements of the jurisdiction of a sovereign State. The question, therefore, was whether the idea underlying paragraph 2 of draft article 62 was adequate to cover

such a case, a point on which the Vienna Convention offered little guidance.

22. The matter was further complicated by the inclusion in the draft convention on the law of the sea of an article governing cases where a resource straddled the boundary between a sovereign State and the Authority.⁹ Such a resource could, however, only be exploited with the consent of the territorial State concerned, which clearly implied that, in such cases, there would have to be an agreement between the Authority and the territorial State concerning a boundary.

23. Of perhaps somewhat lesser importance were the agreements which the Authority could enter into with States for the award of mining contracts, which might cover areas as extensive as 400,000 square kilometres. There, again, a boundary would be involved, although possibly the area concerned would be one where no State and no international organization enjoyed sovereignty.

24. As regards the principle in paragraph 2 of draft article 62, he said it was not his intention to argue for a change, since his main concern was that provision should be made for the case where a treaty between an international organization and a State established a boundary. There were two possible ways of making such provision: either by adopting the relevant provision of the Vienna Convention and adding in the commentary an explanation of the meaning of the various terms used, together with a reference to the special kind of maritime boundary between an international organization—one that had jurisdiction over a territorial area and a sovereign State—or, alternatively, by adopting the Special Rapporteur’s proposed text. Of the two possibilities, he would prefer the former, but he could accept the latter, provided that the ambiguity in paragraph 2 was retained.

25. Mr. DÍAZ GONZÁLEZ said that he supported the wording of draft article 62 proposed by the Special Rapporteur, but wished to make it clear that his support was based on the fact that the wording of that draft article was a faithful transposition of the corresponding provision of the Vienna Convention. Mr. Tabibi had referred to the discussions that had been held on that provision at the Conference on the Law of Treaties with a view to striking a balance between the principle *pacta sunt servanda* and the principle *rebus sic stantibus*, the latter being one to which he (Mr. Díaz González) attached the highest importance and which he would continue to defend.

26. Accordingly, he was of the opinion that the Commission should adopt draft article 62 as it stood, without going into any further discussion of the question of boundaries. Although he agreed with the

⁵ *Ibid.*, art. 156.

⁶ *Ibid.*, art. 76, para. 7.

⁷ *Ibid.*, art. 55.

⁸ *Ibid.*, art. 76, para. 8.

⁹ *Ibid.*, art. 142.

comments made by the Chairman in his personal capacity and by Mr. Francis concerning the new concept of maritime boundaries, he thought it would be dangerous to hold a lengthy discussion of the meaning and definition of that concept.

27. Mr. SCHWEBEL said he thought that the remarks made by the Chairman in his personal capacity required careful consideration, but so, in his view, did the text of draft article 62 proposed by the Special Rapporteur, primarily because some members of the Commission seemed to interpret draft article 62 to embrace international organizations as potential parties to boundary treaties, and some did not.

28. Now, if the advocates of those two opposing viewpoints supported the text proposed by the Special Rapporteur, it followed necessarily that the text was ambiguous. He submitted that indeed it was. The Chairman seemed to see that ambiguity as the main virtue of the draft article because it would permit international organizations to conclude boundary treaties. That possibility was not, however, altogether clear from the text and certainly seemed to be contrary to the Special Rapporteur's intent. Accordingly, the solution might well be the one proposed by the Chairman, namely, to revert to the original wording of article 62 of the Vienna Convention and prepare a commentary that would make the meaning of the text of draft article 62 clear. The key to agreement on the proposal by the Chairman might lie in the fact that international organizations had only the powers in respect of "boundaries" that were expressly allotted to them by treaty.

29. Mr. REUTER (Special Rapporteur), speaking as a member of the Commission, said that the drafting of paragraph 2 of the article in question was not entirely satisfactory. To his mind, the provision should cover treaties by which at least two States established a boundary between them and to which one or more international organizations could be parties.

30. With regard to the law of the sea, he thought the problem should be approached from the political point of view. Article 62 of the Vienna Convention was a stabilizing article which established a certain political balance. The present issue was not whether the lines under discussion in the United Nations Conference on the Law of the Sea constituted genuine frontiers or not; it was whether those lines should be explicitly or implicitly excluded from the scope of the article—which would be very serious, for it would tend to destabilize the law of the sea.

31. In the recent arbitration case between the United Kingdom and France concerning the delimitation of the continental shelf in the area of the Channel Islands (some of which were so close to the French mainland that the dividing line merged with the limits of the territorial sea), the arbitrators had asked the Governments concerned whether they were competent to delimit the territorial sea and had received a negative

reply from both of them.¹⁰ The two kinds of lines had been considered distinctly different.

32. From one point of view, the limits of the territorial sea could be said to constitute true boundaries, but were they really so within the meaning of the stabilizing article 62? If two States separated by a vast stretch of open sea fixed their frontier line by treaty at three nautical miles, could it be argued that, whatever the circumstances, they would be unable to terminate or to withdraw from the treaty?

33. The Conference on the Law of the Sea would probably work out an over-all compromise which would have a stabilizing effect on that area of international law. However, it could not be expected that all States would be quick to acknowledge that the resulting convention constituted a treaty establishing boundaries.

34. As it was out of the question to deal with those matters in the text of the article under consideration, the Commission might do so in the commentary and state that it was leaving the way open to possible solutions. It was not impossible that an international organization might some day conclude a treaty which could properly be regarded as a treaty establishing a boundary. But would it have to be regarded as a stabilized treaty? Personally, he doubted it, for an international organization was very fluid by its very nature. For example, a treaty concerning Namibia should be capable of being adjusted to circumstances. For that reason, he doubted whether it was advisable to stress stabilization, however much he, like other members of the Commission, might want to look forward to the development of international organizations. It was debatable, for example, whether the United Nations Council for Namibia acted on behalf of the United Nations or on behalf of an entity which had already been recognized as possessing a certain existence by many African States. The question might be of importance in the event of an illicit act. Since a nascent State did exist, would it not be fair to consider that the United Nations had given it an organ and that the responsibility for that illicit act devolved on that future State? Although those problems could not be ignored in the commentary, the Commission should nevertheless refrain from making any statement which might have practical consequences, especially for the representatives of certain countries at the Conference on the Law of the Sea who might fear the stabilizing effect of the article under consideration.

35. Summing up the debate on article 62, as Special Rapporteur, he noted that all members of the Commission were in favour of dealing with the problem of the law of the sea in the commentary.

¹⁰ Decision of 30 June 1977, Delimitation of the continental shelf case: *International Law Reports* (Cambridge), vol. 54 (1979), p. 33.

36. With regard to paragraph 2 of the article in question, opinions were divided. Some members of the Commission thought it would be advisable to keep the Special Rapporteur's proposal, which referred to treaties by which States established boundaries and to which one or more international organizations were parties. Others thought that the provision could refer to treaties between one or more States and one or more international organizations which established a boundary, so as to cover the case of a treaty concluded between a State and an international organization. It would then have to be made clear in the commentary that no treaty of that kind had yet been concluded, but that that possibility was not excluded, in so far as the term "boundary" was interpreted in a special sense; it should be added that such an interpretation was not that of the Commission. Lastly, the text of article 62 of the Vienna Convention could be adopted unchanged, but the commentary should then be even more explicit. The Commission should state that it was not expressing any judgement as to the meaning which States might attach to the word "boundary".

37. It seemed that the article in question could be referred to the Drafting Committee, which could prepare two alternative texts in the light of the debate.

38. One question which the Commission had considered earlier in connexion with other articles had been raised by Mr. Ushakov: could a State conclude a treaty by which it debarred itself from changing certain provisions of its constitution? He answered that question in the affirmative. For example, Austria, whose Constitution affirmed the principle of neutrality, had entered into a solemn international commitment to the same effect. What, then, was the position of an international organization? It could not conclude treaties inconsistent with its constituent document. In the case of some entities, such as the European Communities, it was even expressly provided that the conclusion of certain treaties would first require the amendment of their constituent charter. But Mr. Ushakov went further: he envisaged a treaty in conformity with the constitution of an international organization at the time when the treaty was concluded, and wondered whether the existence of that treaty would prevent the organization from amending its constitution or from availing itself of certain powers which were provided for in the constitution but the exercise of which was incompatible with that treaty. In principle, that organization could not subsequently amend its constitution. However, there were certain powers of which it was not clearly known whether they were affected by a treaty. If a State concluded a treaty with an international organization, the number of the organization's member States was not thereby stabilized. It would seem, therefore, that a big change in the number of member States would constitute a fundamental change of circumstances. It was inconceivable that a treaty should freeze a power recognized to the sovereign States which were members of an international organization. Problems of that kind

raised practical difficulties which ought to be mentioned. When it had the comments of Governments before it, the Commission would be able to judge whether article 27, as amended on first reading, was sufficient to cover that point. Perhaps the Drafting Committee might try to revise article 62 in the light of that problem.

39. The CHAIRMAN said that, in the absence of objections, he would take it that the Commission decided to refer draft article 62 to the Drafting Committee for consideration in the light of the debate.

*It was so decided.*¹¹

ARTICLE 63 (Severance of diplomatic or consular relations)

40. The CHAIRMAN invited the Special Rapporteur to introduce draft article 63 (A/CN.4/327), which read:

Article 63. Severance of diplomatic or consular relations

The severance of diplomatic or consular relations between States parties to a treaty does not affect the legal relations established between those States by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

41. Mr. REUTER (Special Rapporteur), introducing draft article 63, said that diplomatic or consular relations existed only between States. No relationship between an international organization and member States or non-members could be equated with diplomatic or consular relations. The existence of permanent representatives or observers did not imply any relationship of a diplomatic or consular character. Consequently, the text he was proposing for draft article 63 referred only to States parties to a treaty.

42. Sir Francis VALLAT said that he would not dispute what was so clearly stated in the commentary concerning the non-existence of diplomatic and consular relations between international organizations, although, even on that point, he had a slight doubt. In London, there had been for many years a representative of the European Communities who had had the title of ambassador and whose functions might have been considered as coming more within the category of diplomatic representation than within that of the representation of a State to an international organization. Nevertheless, that was perhaps an exceptional case, and the title may have been misused.

43. He was of the opinion that the members of the Commission should reflect on the question of relations between States and international organizations and on the implications of draft article 63. Under the draft

¹¹ For consideration of the text proposed by the Drafting Committee, see 1624th meeting, paras. 30 *et seq.*

article as it stood, a severance of diplomatic and consular relations between States would not affect the existence of a treaty between States and international organizations. Relations between States and international organizations were not mentioned. What would happen if draft article 63 was included in the draft articles under consideration? If, in the hypothetical case in which a treaty was concluded by a State and an international organization, a crisis occurred between the two and the permanent representative of the State was withdrawn, it might be argued on the basis of draft article 63, which dealt only with diplomatic and consular relations, but not with the status of permanent representatives, that the recall of the permanent representative implied an intention to repudiate the treaty between the State and the international organization and that the change in the relations between them would have an effect on the standing of the treaty.

44. He also referred to article 6 of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character¹² and to article 3 of the 1961 Vienna Convention on Diplomatic Relations,¹³ drawing attention to the fact that there was a remarkable parallel between the functions of the permanent mission and those of the diplomatic mission. Perhaps the most pertinent function of the permanent mission was the one referred to in article 6 (c) of the 1975 Vienna Convention, that of "negotiating with and within the Organization". Article 3, paragraph 1 (c), of the 1961 Vienna Convention provided that diplomatic missions had a similar function, namely that of "Negotiating with the Government of the receiving State". Moreover, article 12, paragraph 1, of the 1975 Vienna Convention provided that:

The head of mission, by virtue of his functions . . . , is considered as representing his State for the purpose of adopting the text of a treaty between that State and the Organization.

45. Since a comparison of the functions of diplomatic and permanent missions showed how similar they were, it seemed to him that, if draft article 63 failed to mention the representation of States in their relations with international organizations, there would be a powerful argument for saying that the termination of representation in the case of States and international organizations would have an effect on the existence of a treaty, whereas, in the case of the Vienna Convention on the Law of Treaties, the termination of diplomatic relations would not have such an effect.

46. He was not pressing for an amendment of the wording of draft article 63. He merely thought that the

problem raised in that article merited more careful consideration than had been given to it in the commentary by the Special Rapporteur.

47. Mr. USHAKOV inquired why the first phrase in the article in question referred to States parties "to a treaty", whereas, according to the commentary on that provision, only those treaties were taken into consideration to which "at least two States and one or more organizations" were parties.

48. If it was the intention to refer to that class of treaties, it was unnecessary to provide that the severance of diplomatic or consular relations did not affect the legal relations established "between those States" only: it also did not affect the legal relations established between those States and the other parties to the treaty.

49. Mr. REUTER (Special Rapporteur) replied, first, that the words "to a treaty" referred to a treaty in the general meaning of the word and did not include treaties concluded between two international organizations, since it appeared from the preceding words that they referred to the severance of diplomatic or consular relations between States parties. However, there would hardly be any objection to redrafting the beginning of article 63 to read:

"The severance of diplomatic or consular relations between States parties to a treaty between two or more States and one or more international organizations does not affect . . .".

50. In reply to Mr. Ushakov's second question, he said that the Vienna Convention itself was not very specific on the point. Even as regards the case of a treaty concluded between three States, the Convention provided simply that the severance of diplomatic or consular relations between two States did not affect the legal relations established by those two States, and did not mention the third. If the Commission wished to draft the article under consideration in clearer language than that of the corresponding provision of the Vienna Convention, it could add the words "and between those States and the other parties" after the words "between those States".

51. Referring to Sir Francis Vallat's comments, he explained that representatives of the European Communities abroad were not considered diplomats by the Commission of the European Communities, even assuming that the Communities were really international organizations. However, the United Kingdom often granted diplomatic status to persons who did not hold the title of ambassador, such as the Commissioners of the Dominions who recognized the Head of State as their sovereign, and the United Kingdom had no doubt accorded analogous treatment to the representatives of the Communities as a matter of courtesy.

52. Concerning the problem raised by Sir Francis, he would wait to hear the opinion of the other members of the Commission.

¹² *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 hereinafter called "1975 Vienna Convention".

¹³ United Nations, *Treaty Series*, vol. 500, p. 95.

53. Sir Francis VALLAT said that he wished to give further examples to illustrate the problem to which he had referred earlier in the discussion. The European Economic Community could, for instance, make commercial treaties and it might be possible to argue that the termination of any representation there might be between a State non-member of the United Nations and the European Communities could have an effect on such commercial treaties. Another more relevant example was that of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations.¹⁴ If draft article 63 did not mention relations between States and organizations, it might be possible to argue that, in the event of the severance of those relations, that kind of treaty would be terminated. It would be unfortunate if the Commission, by omitting a specific provision on the point from article 63, might be thought to imply that, by withdrawing its permanent representation, a host State could cast doubt on the validity, standing or operation of a headquarters agreement.

54. The CHAIRMAN said it was clear from the comments made by members of the Commission that draft article 63 would require further consideration.

Drafting Committee

55. The CHAIRMAN said that, in the absence of objections, he would take it that the Commission decided to appoint a Drafting Committee composed of 12 members: Mr. Verosta (Chairman), Mr. Barboza, Mr. Díaz González, Mr. Evensen, Mr. Jagota, Mr. Njenga, Mr. Reuter, Mr. Schwebel, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat and (*ex officio*) Mr. Yankov, Rapporteur of the Commission.

It was so decided.

Absence of a member of the Commission

56. The CHAIRMAN said that he had received a letter from Mrs. Dadzie informing him that her husband, Mr. Emmanuel Dadzie, would be unable to attend the current session of the Commission because he was seriously ill.

57. If the members of the Commission agreed, he would write to Mrs. Dadzie expressing the Commission's wishes for Mr. Dadzie's speedy recovery.

It was so decided.

The meeting rose at 1.05 p.m.

1588th MEETING

Friday, 9 May 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/327)

[Item 3 of the agenda]

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

ARTICLE 63 (Severance of diplomatic or consular relations)¹ (*concluded*)

1. Mr. FRANCIS said that, for the purpose of establishing the connexion—which was missing in the text as drafted—between draft article 63 and the draft articles as a whole, a provision should be added in the article on the lines of the passage in the Special Rapporteur's commentary which stated that in the case of the treaties under discussion the rule laid down could apply only to a special group of treaties: those to which at least two States and one or more organizations were parties.

2. Referring to the questions of substance that had been raised at the previous meeting by Mr. Ushakov and Sir Francis Vallat and that should be taken into account in improving the commentary, he said it was generally agreed, as was quite obvious from the text of draft article 63, that heads of mission accredited by States to international organizations were not ambassadors, and that diplomatic and consular relations existed only between States. Hence he suggested, for the purposes of draft article 63, that the words "relations of representation" be used to describe the reciprocal relations between States and international organizations.

3. In the case of the issue of relations between South Africa and the United Nations, it could be said that there had been a severance of representational relations which could, by analogy, be compared to a severance of diplomatic relations between States. In such a case, he did not think that it could justifiably be claimed that a treaty between the State and the

¹⁴ United Nations, *Treaty Series*, vol. 11, p. 11.

¹ For the text, see 1587th meeting, para. 40.

international organization in question ceased to be operative. That example substantiated the more general comment made by Sir Francis Vallat.

4. Mr. THIAM queried whether it was possible to affirm purely and simply, as the Special Rapporteur had done in his commentary to the article in question, that diplomatic and consular relations existed only between States, while disregarding similar forms of representation. The function of a diplomat was to act in a representative capacity, to negotiate and sometimes to sign agreements. He pointed out that organizations like UNDP and UNESCO had agents in certain States who were responsible for representing them as well as for negotiating and signing agreements on their behalf. Those agents were quasi-diplomats, and their status was generally akin to that of diplomats. Likewise, the agents of regional organizations, such as the Organization of African Unity, had authority to negotiate and sign agreements.

5. Mr. SCHWEBEL inquired if the Special Rapporteur would consider expanding the commentary or even draft article 63 itself to take account of what would, in practical terms, be a likelier situation than that visualized in the draft article as it stood. There might, for example, be some merit in including wording along the following lines:

“Subject to Articles 5 and 6 of the Charter of the United Nations, the withdrawal or expulsion of a representative or mission accredited to an international organization does not affect the legal relations between the sending State and the international organization, between the sending State and the host State, and between the other parties to the treaty.”

6. He asked whether in the Special Rapporteur's opinion such wording fell within the scope of the draft articles as a whole. After all, the Commission's discussion of draft article 63 had shown that there were practical matters of that kind that had to be taken into account. For example, it might happen that a State, in withdrawing its representation to an international organization, attached legal consequences to that fact. In 1978, there had been a case in which a head of mission had been expelled from a delegation accredited to the United Nations on a charge of having engaged in espionage activities. Although no one had suggested that the expulsion had any effect on the legal relations of the States concerned, he referred to it in order to stress that cases of that kind should be dealt with in the commentary to draft article 63. As the article now stood, however, its practical relationship to the draft as a whole appeared quite marginal.

7. Mr. ŠAHOVIĆ said it would be desirable to specify in article 63 that the treaties covered by it were those concluded between at least two States and one or more international organizations. In addition, like Mr. Thiam, he thought the article should attach a broader meaning to diplomatic and consular relations and the

reciprocal character of those relations should not be over-emphasized. In particular, the new kinds of relations which might be established between States and international organizations should be studied in greater depth. It would be for the Drafting Committee to enlarge the scope of article 63, while not straying beyond the limits of the actual legal situation in the modern world.

8. Mr. USHAKOV said he was entirely satisfied by the Special Rapporteur's answers to the two questions he had asked at the previous meeting.

9. So far as substance was concerned, he found draft article 63 perfectly acceptable, for in his view diplomatic or consular relations did not exist between States and international organizations. The relations between the member States of an organization and that organization flowed exclusively from the fact of their membership in the organization. Whether a State maintained or did not maintain a permanent representation with an organization, the relations between that State and that organization remained unaffected. If a State member of an organization abolished its permanent mission to the organization, their relations were not changed by that fact and the State retained its status as a member. Consequently, relations of that kind could not be regarded as comparable to diplomatic and consular relations between States, and still less could the relations resulting from the presence of an observer for a non-member State in an international organization, or the relations involved in sending an observer for one international organization to another international organization.

10. The subject matter of article 63 was the severance of diplomatic or consular relations between States. Even between States it was possible for diplomatic or consular relations to exist without embassies having been opened. Such relations could also exist if an embassy had been closed and authority to represent the State which had taken that step was entrusted to another State. Nor was there any severance of relations if a member State of an organization withdrew from it; the only result was a break in its membership in the organization. The eventuality of a severance of relations between two international organizations was even less conceivable.

11. Mr. QUENTIN-BAXTER said that article 63 of the Vienna Convention² stated such a self-evident proposition that it would be totally unreasonable for the Commission to advance the contrary proposition in the case of relations between States and international organizations. He did not think that, even if the Commission remained silent on the question of relations between States and international organizations, the article allowed any kind of argument

² See 1585th meeting, foot-note 1.

a contrario. Nevertheless it had been demonstrated by Sir Francis Vallat and other members of the Commission that the commentary should indicate that the Commission's decision not to extend the scope of draft article 63 in no way implied a belief on its part that a conclusion to the contrary could be drawn from a failure to state the self-evident fact that a break in a State's relations with an international organization could not in any way affect a treaty relationship.

12. Mr. BARBOZA said that it was not the Commission's task to determine whether relations between the member and non-member States of an international organization and that international organization were diplomatic relations. Such relations should, however, no matter what they are called, be duly recognized in international law, because they had taken on increasing importance.

13. In his opinion, the severance of such relations, for example, where a State withdrew its permanent representative to an international organization, could not affect the treaties concluded by that State and that international organization, just as the severance of diplomatic relations between States could not affect the treaties they had concluded. Nor was it the Commission's task to determine whether the two types of relations to which he had just referred were equal: for all practical purposes, it would be enough to say in the commentary to draft article 63 that relations between States and international organizations—which did not have to be further defined—would not affect the treaties concluded by those States and international organizations.

14. Some members of the Commission apparently thought that a State's membership in an international organization would be affected by a severance of relations. In his view, that was not possible, for the treaty laying down the conditions for membership in an international organization was a multilateral treaty concluded with other States, not with the international organization.

15. He considered that the wording of draft article 63 should not be changed, except possibly by the drafting improvements suggested by Mr. Ushakov (1587th meeting, paras. 47 and 48) and Mr. Šahović, and that the commentary should take account of the examples referred to in the discussion.

16. Mr. VEROSTA said that in his opinion it was very dangerous to compare the departure of a State's representative to an international organization to a severance of diplomatic relations. In law, the only material cases to be taken into consideration were those of a State's withdrawal from an organization and a State's expulsion; all other cases, however significant politically, had no legal implications. Inasmuch as the rule in article 63 covered only treaties concluded between at least two States and one or more organizations, the article should say so expressly.

17. Mr. REUTER (Special Rapporteur), summing up the debate, said that the proposed drafting changes seemed to him to be acceptable. The article should specify, first, that the diplomatic or consular relations which were severed were relations between States parties to a treaty "between two or more States and one or more international organizations", and should state, secondly, that all the legal relations established by the treaty in question remained unaffected, and not only those between the two States which had severed relations. For that purpose, it would be sufficient to delete the words "between those States" in the phrase "the legal relations established between those States by the treaty".

18. Several members of the Commission had suggested that the scope of article 63 should be enlarged by expanding the text of the article or the commentary thereto so as to make it clear that the severance of relations between an international organization and a State did not affect any treaties concluded between them. In that connexion, Mr. Barboza had properly observed that, in order for article 63 to operate, there must exist between the international organization and the State in question a treaty within the meaning of the draft articles, i.e. a treaty to which an international organization was a party. However, the constituent charters of organizations did not come within the terms of that definition. It followed that, if a member State of an organization practised the empty chair policy or recalled its representative to that organization, the article which would apply was not the one under consideration but article 63 of the Vienna Convention.

19. As Sir Francis had pointed out at the previous meeting, other cases were conceivable. There might be a treaty between an organization and one of its member States to which that State was a party by virtue of some circumstance other than its membership of the organization; *a fortiori* it was possible to conceive of a treaty between an organization and a non-member State, a case illustrated by the Headquarters Agreement concluded between Switzerland and the United Nations.³ The relations between the two parties to that treaty were managed by certain administrative services, and it was possible to imagine that some dispute might arise between them which could not be settled by way of discussion. Would the headquarters agreement be affected by it? Another case that could be visualized was that where an international organization by a treaty concluded with one of its member States vested in that State a special trusteeship function to be performed on behalf of the organization. If their reciprocal relations were institutionalized in the shape of some machinery which suddenly broke up, was the State in question still bound by the treaty? In its Advisory Opinion of 1971

³ United Nations, *Treaty Series*, vol. 1, p. 163.

concerning Namibia (South West Africa), the International Court of Justice had in effect given an answer in stating that certain essential obligations still remained in spite of the expiry of the mandate.⁴

20. In order to make provision for such possibilities, the Commission could either add a second paragraph to article 63 or else discuss the possible situations in the commentary. As regards the first solution, he drew attention to the proviso at the end of article 63. In the situations which had been mentioned, that proviso should be taken into account. For that matter, those situations were indirectly envisaged in article 60,⁵ since the severance of relations would lead to the non-performance of the treaty. If the Commission should decide to add a paragraph to article 63, the additional paragraph would have to provide that where permanent relations of a special character were established for the execution of a treaty between an international organization and a State, the severance of those relations would not *per se* invalidate the treaty, except in so far as the existence of those relations was indispensable for the application of the treaty.

21. Mr. SCHWEBEL said that, in his view, the problems raised during the discussion of draft article 63 should be dealt with in the commentary, because the subject-matter of the draft article was not altogether of a speculative nature, even in the specific context in which the Special Rapporteur had placed it.

22. If, for example, a State and an international organization, such as the World Bank, the IMF or UNDP, concluded a treaty which provided for assistance to that State and surveillance of the use of that assistance by a team sent to that State by the international organization, but the State found, perhaps as a result of a change of Government, that the conditions attaching to such assistance were unduly onerous and expelled, or requested the withdrawal of, the team sent by the international organization, would the surveillance of the assistance be a condition for the maintenance of relations between the State and the international organization? Such a case was not a purely hypothetical one, and it should, in his opinion, be dealt with in the commentary to draft article 63.

23. Sir Francis VALLAT said that, since he had raised the question of the effect on a treaty of the termination of a State's representation to an international organization without really attempting to answer it himself, he was grateful to the Special Rapporteur and to the members of the Commission for their comments, which had convinced him that the question should be dealt with in the commentary, not in the draft article itself.

24. The CHAIRMAN said that, if he heard no

objection, he would take it that the Commission agreed to refer draft article 63 to the Drafting Committee for consideration in the light of the discussion.

*It was so decided.*⁶

ARTICLE 64 (Emergence of a new peremptory norm of general international law (*jus cogens*))

25. The CHAIRMAN invited the Special Rapporteur to introduce his draft article 64 (A/CN.4/327), which read:

Article 64. Emergence of a new peremptory norm of general international law (*jus cogens*)

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

26. Mr. REUTER (Special Rapporteur) said that the commentary to article 64 had been kept very brief, because article 53,⁷ in which the question of *jus cogens* had arisen before, had been adopted by the Commission virtually without discussion. Draft article 64 simply dealt with a specific point.

27. Mr. USHAKOV said that article 53 contained a definition of the concept of a peremptory norm of general international law. The article should be interpreted as meaning that a peremptory norm of general international law, recognized by the international community, was binding also on international organizations.

28. Mr. ŠAHOVIĆ expressed the hope that the commentary to the article under consideration would be expanded.

29. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article 64 to the Drafting Committee.

*It was so decided.*⁸

ARTICLE 65 (Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty)

30. The CHAIRMAN invited the Special Rapporteur to introduce his draft article 65 (A/CN.4/327), which was the opening clause of section 4 (Procedure) of the draft articles and which read:

Article 65. Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which, under the provisions of the present articles, invokes either a defect in its consent to be bound by a treaty or a

⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Reports 1971, p. 16.

⁵ See 1585th meeting, foot-note 3.

⁶ For consideration of the text submitted by the Drafting Committee, see 1624th meeting, paras. 30 *et seq.*

⁷ See 1585th meeting, foot-note 3.

⁸ For consideration of the text submitted by the Drafting Committee, see 1624th meeting, paras. 30 *et seq.*

ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to article 45, the fact that a State or an international organization has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

31. Mr. REUTER (Special Rapporteur) said that, of the four articles in section 4, only articles 67 and 68 actually dealt with questions of procedure. Articles 65 and 66 were essential articles which, while they admittedly related to procedure, were concerned mainly with the settlement of disputes. Normally, such articles formed part of the final clauses of conventions and were not drafted by the Commission. However, article 65 of the Vienna Convention had initially been drafted by the Commission itself. The Commission had taken that initiative because it had felt it essential to include safeguards in section 4. Never before had an international instrument set out in such a systematic way all the circumstances which could cause the substance of a treaty to disappear or destroy its efficacy. The object was to ensure that the rule *pacta sunt servanda* retained its significance, to prevent a State from voiding a treaty of its substance or rendering it ineffective. The United Nations Conference on the Law of Treaties had considered the problem and, with great difficulty, had drafted an article 66. Some States had wanted to supplement the safeguards of article 65 with procedures involving third parties. In the form in which it had been adopted, article 66 provided for a conciliation procedure and, as far as *jus cogens* was concerned, for an application to the International Court of Justice. In his draft, he had placed article 66 in square brackets in order to indicate that it raised a question of principle and method. The Commission might decide not to submit any article 66 at all, to submit an article in square brackets, or to make proposals which went still further. In submitting such a draft article, his intention was not to exert pressure on the Commission, but simply to provide it with a basis for its deliberations.

32. Returning to draft article 65, he said that at the Conference on the Law of Treaties the corresponding article had been adopted by 106 votes to none, with

two abstentions.⁹ The article should not present any special difficulties as far as the international organizations were concerned. It provided three safeguards. First, notification was necessary. Secondly, the notification had to be supported by a statement of reasons. In that connexion, it was interesting to note the development that had taken place in the drafting of the treaties relating respectively to nuclear tests,¹⁰ non-proliferation¹¹ and disarmament.¹² States wishing to denounce the first of those treaties could do so if they felt that higher interests were at stake. In the case of the other two treaties, by contrast, a denunciation had to be substantiated by reasons. Under the procedure described in article 65 the State was both judge and party, but that was inevitable in view of the sovereignty of States. Thirdly, provision was made for a moratorium in order to allow time for reflection and for possible negotiation.

33. The safeguards provided for States were even more justified in the case of international organizations. Consequently, subject to a few minor drafting changes, the text of the article was similar to that of article 65 of the Vienna Convention.

34. Mr. USHAKOV said that in principle he supported draft article 65 as proposed by the Special Rapporteur. However, he thought that a clause should be added stipulating, on the basis of article 45, paragraph 3,¹³ that as far as international organizations were concerned, the notification and objection referred to in paragraphs 1 and 3 of draft article 65 were governed by the relevant rules of the organization. His second point was that he was not sure that the three-month period mentioned in paragraph 2 was sufficient for international organizations, whose procedure was slower than that of States and whose competent organs were not permanently in session.

35. His third comment concerned paragraph 3: were the means contemplated in Article 33 of the Charter of the United Nations for the pacific settlement of disputes between States applicable also to the settlement of disputes between international organizations or between States and international organizations? He did not think, for example, that an international organization could apply to the International Court of Justice for a judicial settlement, for the Statute of the Court provided only for the settlement of disputes

⁹ See A/CN.4/327, foot-note 15.

¹⁰ Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water (United Nations, *Treaty Series*, vol. 480, p. 43).

¹¹ Treaty on the Non-Proliferation of Nuclear Weapons (*ibid.*, vol. 729, p. 161).

¹² Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms (text reproduced in document CD/28 of 27 June 1979).

¹³ See 1585th meeting, foot-note 3.

between States. Nor did he think that an international organization could apply to regional bodies. Accordingly, the reference to Article 33 of the Charter was a potential source of difficulties in respect of the settlement of disputes between international organizations or between States and international organizations, for not all the modes of settlement mentioned in that Article were valid for international organizations. Perhaps provision should therefore be made for special means of settlement where international organizations were concerned.

36. Mr. ŠAHOVIĆ said that the Special Rapporteur had been right to devote section 4 of his draft articles to questions of procedure and to rely on the terms of article 66 of the Vienna Convention, in spite of the difficulties encountered in the drafting of that article.

37. With regard to draft article 65, he considered, like Mr. Ushakov, that the Drafting Committee should endeavour to devise language more in keeping with the special situation of international organizations that were parties to treaties. On the other hand, he could not see the need for a reference to the relevant rules of international organizations, for that was a question of principle which had been resolved earlier in the draft by a more general wording.

38. Mr. SCHWEBEL, expressing support for draft article 65, said that it was of necessity a modest provision since the Commission, having decided to align the draft articles on the text of the Vienna Convention, could hardly depart very far from the terms of that Convention. He doubted whether any modification of article 65 was required, particularly since, as Mr. Šahović had stated, it was understood that, in the case of an international organization, notification must be authorized in accordance with the rules of that organization.

39. In connexion with paragraph 2 of the draft article, Mr. Ushakov had asked a question which perhaps required further consideration. He had rightly stated that organs of international organizations were not generally in continuous session, although that remark did not perhaps apply to such bodies as the World Bank and the IMF, which, in effect, were directed by their Executive Directors, who were in continuous session. One question which did, however, merit further reflection was which organ would have authority in a particular case to give notification. While such an organ could normally be convened in emergency session, it might not always be convenient to do so.

40. He saw no problem regarding the reference in paragraph 3 of the draft article to the means indicated in Article 33 of the Charter of the United Nations. Reviewing those means *seriatim*, one could see that, although some might not seem entirely feasible so far as international organizations were concerned, all were conceivable. That remark was applicable also to judicial settlement, since while the Statute of the

International Court of Justice provided at the moment that only States could be parties in contentious cases, it could in the future be amended to broaden its scope. Moreover, as the Special Rapporteur had pointed out, certain treaties in force provided that an advisory opinion delivered by the court in a case to which an international organization was a party was binding upon all the parties. In effect, therefore, judicial settlement would apply to international organizations even within the context of the International Court. Furthermore, the reference in question seemed to him to be aptly worded for, as he read it, it was not made subject to the condition laid down in Article 33 of the Charter of the United Nations. In other words, under the terms of draft article 65, a dispute did not have to be one "the continuance of which is likely to endanger the maintenance of international peace and security"—it could be any kind of dispute.

41. For those reasons, he would recommend that draft article 65 should be referred to the Drafting Committee.

42. Sir Francis VALLAT said that he too supported draft article 65, subject possibly to certain minor drafting changes.

43. Paragraph 2 of the draft article dealt, in his view, with only one question, not with two questions. In other words, the reference to the period of three months was to be read in conjunction with the expression "except in cases of special urgency". The three-month period was a minimal period and—subject to the proviso of "special urgency"—there was no reason why it could not be longer. The nub of the problem, therefore, was which cases should be regarded as cases of "special urgency" for the purpose of determining the length of the period. If the Commission thought it advisable, he was prepared to consider a longer period in the case of international organizations, but he did not think it was really necessary.

44. Article 33 of the Charter of the United Nations mentioned a variety of means for the specific settlement of disputes from among which the parties could choose. The parties were not required to select any particular means; indeed, as was well known, they could refuse to negotiate and could opt for settlement by arbitration. Consequently, even if it were correct that judicial settlement was not open to international organizations—and that, as Mr. Schwebel had observed, was not strictly accurate in the modern world—it would still not be inappropriate to refer to Article 33 of the Charter of the United Nations in the case of international organizations.

45. In a somewhat broader context, he said that mentally he placed not only draft article 66 between square brackets but also draft article 65. The reason was that, in his capacity as a member of the Commission, he continued to hold the view which he had propounded as leader of the United Kingdom

delegation to the United Nations Conference on the Law of Treaties, namely, that the provision embodied in draft article 65, standing on its own, was inadequate and unsatisfactory. If draft article 65 was to be included in the draft articles, it should be based on the provision embodied in draft article 66.

46. Mr. REUTER (Special Rapporteur) said that for a number of reasons he was hesitant to accept the idea of allowing a longer period where international organizations were concerned. If the dispute arose between two States, the extension of the period was unnecessary. If it arose between two international organizations, or between a State and an international organization, the extension of the period could be justified if the international organization was the object of the notification, but not if the international organization was the author of the notification. Hence, in the last-mentioned case it was debatable whether there was really any need to draw a distinction between the situation of States and that of international organizations.

47. With regard to the reference to the means of peaceful settlement of disputes indicated in Article 33 of the Charter, he said that Article 33 should be considered simply as a catalogue; it was open to each State and to each international organization to choose the preferred mode of settlement. Personally, he believed that the best settlement procedure for international organizations was perhaps conciliation, which was the most flexible procedure and included inquiry. In that connexion, he pointed out that article 66, paragraph (b) of the Vienna Convention provided for recourse to the conciliation procedure only in the case of disputes concerning the application or interpretation of the provisions of Part V of that Convention, and he suggested that recourse to that procedure should perhaps be envisaged in the case of all disputes.

48. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer draft article 65 to the Drafting Committee.

*It was so decided.*¹⁴

The meeting rose at 12.50 p.m.

¹⁴ For consideration of the text submitted by the Drafting Committee, see 1624th meeting, paras. 30 *et seq.*

1589th MEETING

Monday, 12 May 1980, at 3.10 p.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr.

Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/327)

[Item 3 of the agenda]

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

ARTICLE 66 (Procedures for judicial settlement, arbitration and conciliation)

1. The CHAIRMAN invited the Special Rapporteur to introduce draft article 66 (A/CN.4/327), which read:

[Article 66. Procedures for judicial settlement, arbitration and conciliation

1. When, in the case of a treaty between several States and one or more international organizations, the objection provided for in paragraphs 2 and 3 of article 65 is raised by one or more States with respect to another State and under paragraph 3 of article 65 no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

(a) Any State party to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration.

(b) Any State party to a dispute concerning the application or the interpretation of any of the other articles in part V of the present articles may set in motion the procedure specified in the annex (section I) to the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

2. When the objection provided for in paragraphs 2 and 3 of article 65 is raised by one or more international organizations parties to the treaty or involves one or more international organizations parties to the treaty and under paragraph 3 of article 65 no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

(a) Any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may ask one of the bodies competent under the terms of Article 96 of the Charter to request an advisory opinion from the International Court of Justice, unless the parties by common consent agree to submit the dispute to arbitration; the parties shall regard the advisory opinion of the Court as binding;

(b) Any one of the parties to a dispute concerning the application or the interpretation of any of the other articles of part V of the present articles may set in motion the procedure specified in the annex (section II) to the present articles by submitting a request to that effect, as appropriate, to the Secretary-General of the United Nations or to the President of the International Court of Justice.]

2. Mr. REUTER (Special Rapporteur), referring to his introduction of article 65 at the previous meeting, said that the reason why he had placed draft article 66 in square brackets was that the corresponding provision of the Vienna Convention¹ had been drafted not by the Commission but by the United Nations Conference on the Law of Treaties. The Conference had had great difficulty in working out the text of the provision; its intention had been to allay the fears of Governments that all the grounds mentioned in part V of the Vienna Convention for challenging the validity or application of treaties might jeopardize the stability of the treaties. The article, which offered a compromise solution, had not entirely satisfied all States. Nor did it cover all disputes concerning the application or interpretation of the Convention; it applied only to those connected with part V of the Convention. In the circumstances, he might have refrained from submitting a draft article 66, and might have suggested that the Commission should refer the question to the Sixth Committee and to the General Assembly, as well as to the plenipotentiary conference that would perhaps one day draft the final clauses of which the article would form part. It was evident, however, that many Governments considered article 66 of the Vienna Convention to be a necessary pendant to article 65.

3. It was therefore in order to provide the Commission with a working basis that he had prepared a draft article 66. It would be open to the Commission in its discretion to dispense with a draft article 66, to submit such an article with or without square brackets, or else to suggest an alternative draft article. Whereas the article related only to disputes concerning the application or interpretation of the articles in part V, the Commission might propose that paragraph 1 of article 66 should be replaced by a clause providing for a conciliation procedure in the case of disputes concerning any provision of the future convention. Such a solution would, of course, be a considerable departure from the solution adopted in the Vienna Convention, but it was the one applied by the 1978 Vienna Convention on Succession of States in Respect of Treaties² and by the 1975 Vienna Convention.³

4. As in the case of most of the other draft articles, the Commission should consider whether it was possible to cover all foreseeable cases by one single provision. As far as the articles in part V were concerned, disputes might arise between one State and another State, between one international organization and another organization, between an organization and a State, or even between several organizations and several States. Article 66 of the Vienna Convention

provided for two modes of settlement of disputes. In the case of disputes concerning articles 53 and 64, which raised questions of *jus cogens*, it provided for a written application to the International Court of Justice; in the case of all other disputes, it provided for a conciliation procedure in which the Secretary-General of the United Nations played an essential role. The innovations in the draft article under consideration were easily explained. If a dispute arose between States alone, there was no reason to depart from the provisions of the Vienna Convention. Paragraph 1 of the article under consideration was therefore, with some slight drafting changes, identical to the corresponding article of the Vienna Convention. However, in the case of a dispute between one international organization and another or between a State and an organization, the two courses provided for in article 66 of the Vienna Convention had to be adjusted somewhat to take account of the fact that international organizations could not be parties to litigation before the Court.

5. Any solution that might be proposed for dealing with disputes relating to articles 53 and 64 would necessarily be imperfect, inasmuch as the Conference on the Law of Treaties had regarded such disputes as serious enough to be submitted to the Court. The reason why he had not suggested the arbitration solution was that application for adjudication could be made only to an authority whose competence was recognized by the entire international community. Conflicting arbitral awards would strike a blow not only at every rule of *jus cogens* in question, but at the very principle of *jus cogens*. The solution he proposed, which was imperfect in more than one respect, was that of providing for the possibility of asking a competent body of the United Nations to request an advisory opinion from the International Court of Justice. The international organization in question might not have the capacity to request an advisory opinion. Some of the international organizations in the United Nations system had that capacity, but organizations outside the system, whether regional or universal, did not. An international organization which was not qualified to ask for an advisory opinion could bring the matter to the United Nations, and through it, might eventually succeed in having a request for an advisory opinion made to the International Court. That solution was also imperfect, because the body competent to request an advisory opinion enjoyed discretionary powers. Moreover, advisory opinions were not binding. There was, however, a practice provided for in a number of international instruments, such as the 1946 Convention on Privileges and Immunities of the United Nations⁴ and the United Nations Headquarters Agreement of 26 June 1947 between the United Nations and the United States of America,⁵ by which it was recognized in advance that

¹ See 1585th meeting, foot-note 1.

² *Official Records of the United Nations Conference on the Succession of States in Respect of Treaties*, vol. III, *Documents of the Conference* (United Nations publication, Sales No. E.79.V.10), p. 185. Hereinafter called "1978 Vienna Convention".

³ See 1587th meeting, foot-note 12.

⁴ United Nations, *Treaty Series*, vol. 1 p. 15

⁵ See 1587th meeting, foot-note 14.

the advisory opinion would be binding. The same solution had been adopted in respect of advisory opinions related to decisions of the Administrative Tribunals of the United Nations and the International Labour Organisation. In the draft articles under consideration, he had accordingly suggested that the advisory opinion would be considered by the parties as binding.

6. The question with regard to conciliation was much simpler. In the Vienna Convention the conciliation procedure attributed an important role to the Secretary-General of the United Nations, particularly if one of the States concerned did not appoint a conciliator as it should, or if the third member of the conciliation commission was not appointed. A dispute involving the United Nations would cause a problem, for how could the Secretary-General act in an independent capacity in a dispute to which the Organization was a party? That was why paragraph 2 (b) of draft article 66 provided that a request could be submitted to the Secretary-General of the United Nations or to the President of the I.C.J., as appropriate. The mode of operation of the conciliation procedure would be considered by the Commission in connexion with the draft annex relating to procedures established in application of article 66.

7. Mr. USHAKOV said that the comments he had made during the previous meeting concerning article 65, paragraph 3, applied equally to article 66.

8. Paragraph 1 of draft article 66 seemed to be acceptable, but paragraph 2 presented great difficulties. That provision covered the situation when “the objection provided for in paragraphs 2 and 3 of article 65 is raised by one or more international organizations”, but apparently it also covered the case where a State raised an objection to a notification by an international organization. Again, the passage “involves one or more international organizations” struck him as an implied reference to an objection raised by one or more States with respect to another State, a case covered in paragraph 1. Both passages would accordingly need redrafting.

9. Commenting on the reference to articles 53 and 64 in subparagraph 2 (a) of draft article 66, he noted that, according to that provision, any party to a dispute “may ask one of the bodies competent under the terms of Article 96 of the Charter to request an advisory opinion from the International Court of Justice”. Under Article 96, only the General Assembly and the Security Council were competent to request the Court to give an advisory opinion, but the General Assembly could authorize other organs of the United Nations and specialized agencies to make such a request. If, therefore, a regional economic organization was a party to a dispute it would have to apply to the United Nations and ask that one of its competent organs request an advisory opinion. Actually, it was doubtful whether such an application would be acted upon, particularly if it concerned a matter wholly extraneous

to the United Nations. In practice, therefore, it might be very difficult to channel the request for an opinion as envisaged in subparagraph 2(a). Besides, the paragraph contained a proviso concerning the case where the parties agreed by common consent to submit the dispute to arbitration. He pointed out that whereas article 66 of the Vienna Convention offered the choice between a request to the International Court and arbitration, the choice offered in the article under consideration was that between an application for a request for an advisory opinion and arbitration, which did not really seem to correspond to the Special Rapporteur’s intention. The paragraph further provided that “the parties shall regard the advisory opinion of the Court as binding”, a clause which might be a source of difficulties if the organization concerned was not a party to the future convention, for how could it be bound by the advisory opinion?

10. In view of the problems to which draft article 66 gave rise, he said that preferably the matter should be referred to the plenipotentiary conference which might one day be convened or, better still, provision should be made for conciliation procedure to be applied in all disputes.

11. Mr. ŠAHOVIĆ said that, during the discussion on article 65 (1588th meeting), he had already expressed support for article 66. The square brackets around the article might even be removed, as there was a corresponding provision in the Vienna Convention and as its drafting stages, paralleling those of article 65, were reported in the records.

12. As draft article 66 was closely bound up with the annex relating to procedures established in application of the article, the annex should be studied, if not at the same time as the article, at least immediately thereafter. He saw no reason why the future Convention should not have such an annex.

13. It was perfectly logical, in keeping with the Commission’s own guidelines, to divide draft article 66 into two paragraphs each covering very different cases.

14. The faculty referred to in paragraph 2 (a) to “ask” one of the competent bodies to request an advisory opinion was acceptable, since it corresponded with the specific position of the United Nations. It might be advisable not to deal in the same provision with the question whether or not advisory opinions were binding. The examples cited by the Special Rapporteur concerned situations appreciably different to those to which article 66 referred. The question was more complex than it seemed, and should not form the subject of too much research.

15. He supported the provision in subparagraph 2(b) whereby the request which would set the conciliation procedure in motion could be submitted to the Secretary-General of the United Nations or to the President of the International Court of Justice as appropriate.

16. Mr. RIPHAGEN, voicing his general support for the views expressed by the Special Rapporteur and Mr. Šahović, said that a number of delegations to the United Nations Conference on the Law of Treaties had felt that, as there were so many articles on invalidity in the Convention, it was imperative to provide for some method of settling disputes that arose in regard to the application of those articles. As a consequence, the necessary procedures had been incorporated as part and parcel of the Convention. For the same reason, and also for the sake of logic, he considered that a corresponding provision should be included in the draft articles and he therefore agreed that the Commission should adopt draft article 66 without the square brackets.

17. The only reason why the Vienna Convention provided for a special procedure in the case of articles 53 and 64 was that those two articles dealt with *jus cogens*, and it had been felt necessary that the highest Court in the world should have a say in such matters. While the same consideration applied to the draft articles, there was a point of difficulty, since disputes arising out of draft articles 53 and 64 were not bilateral in character; the International Court of Justice, under its Statute, was called upon to deal mainly with bilateral disputes, and an international organization could not be a party to a dispute either as claimant or defendant. The Special Rapporteur had therefore been right to provide in subparagraph 2 (a) of draft article 66 that in such cases an advisory opinion could be requested from the Court. Although there was no certainty that such a request would in fact be made, Article 96 of the Charter of the United Nations provided that the General Assembly could request the International Court of Justice to give an advisory opinion on any legal question, and not necessarily on one dealing only with the work of the General Assembly. That meant that the opinion of the Court could be sought on any matter of world-wide interest: in his submission, if *jus cogens* was involved, the matter would be of interest to the whole world and hence also to the General Assembly and the other organs of the United Nations.

18. Sir Francis VALLAT said that he had already indicated the importance which he attached to draft article 66, and it followed from the remarks he had made at the previous meeting that he was in favour of deleting the square brackets around the draft article, although he understood why the Special Rapporteur had inserted them.

19. Referring to the text of the draft article, he first pointed out that, as he had explained in connexion with draft article 62, the expression "several States", which occurred in the first line of paragraph 1 of article 66, implied, in English, three or more States. Since a dispute between two States was perfectly possible, he considered that the expression should be amended to read "two or more States". Secondly, he did not see why the objection raised by one or more States should

be limited to the case of an objection against another State, since it was quite conceivable that such an objection could be multilateral on both sides. For instance, one State might well find itself obliged to defend its position against a group of States which had joined together to commit a breach of a treaty, and it was in precisely such a case that the one State would need the protection the procedure was designed to provide. Thirdly, he noted that whereas in paragraph 1 the clause "in the case of a treaty between several States and one or more international organizations" made it clear to which treaties that paragraph applied, there was no corresponding clause in paragraph 2. If the latter paragraph was meant to apply to all treaties to which the draft articles applied, then, purely as a matter of drafting, it would be desirable to state so expressly. Fourthly, he would like to know what exactly was meant by the expression "involves one or more international organizations parties to the treaty", which occurred in paragraph 2. Did it mean that an objection was directed to one or more organizations? And in what way would an international organization be involved? Lastly, with regard to subparagraph 2 (a), he considered that, while the word "may" ("Any one of the parties ... may ask") should perhaps be retained, it should be made quite clear in the commentary, as a matter of courtesy, that the provision was not intended to override the procedures of any international organization concerned.

20. Turning to questions of substance, he expressed his full agreement on the need to provide that the International Court of Justice should be the ultimate judicial body to pronounce on questions of *jus cogens*. That had been a vital issue at the Conference on the Law of Treaties and it was equally vital in the case of draft articles 53 and 64. It would be most unsatisfactory if, because a treaty happened to be between a State and two or more international organizations, a reference to the Court could be bypassed in some way. He therefore regarded subparagraph 2 (a) of draft article 66 as essential to the whole structure of the draft so far as validity, invalidity and *jus cogens* were concerned. If that proposition were accepted, as he believed it would be by the majority of States, the next question which arose was how to bring the issue of *jus cogens* before the International Court. The answer, clearly, was by way of a request for an advisory opinion; and, equally clearly, given the precedents to which the Special Rapporteur had referred, the international organizations concerned could agree in advance that an advisory opinion would be binding upon them. That was now part of the jurisprudence of the Court, and hence of the States Members of the United Nations, despite serious doubts about the soundness of the proposition in the past.

21. There was, however, one point on which he would hesitate to go so far as subparagraph 2 (a). It arose from Article 96 of the Charter of the United Nations. That Article drew a distinction between, on the one hand, the General Assembly and the Security

Council, which could request an advisory opinion of the International Court of Justice on any legal question, and, on the other, specialized agencies or other organs of the United Nations, which could also request such opinions on legal questions arising within the scope of their activities. Normally the distinction was of little significance, but in cases where a point of *jus cogens* was referred to the Court it could assume importance. In other words, questions of *jus cogens* as such would not generally be questions for the specialized agencies, although they might be questions for other organs of the United Nations. For example, a human rights issue, involving a point of *jus cogens*, could well be referred to the Economic and Social Council, but in such a case the Council would be wise, to say the least, to refer the matter to the General Assembly or possibly the Security Council.

22. One possibility, of course, would be to provide that any organ of the United Nations could request the International Court of Justice for an advisory opinion, although the difficulty that might then be encountered was whether the issue was within the scope of the activities of the organ in question. The difficulty could perhaps be surmounted by following the precedent set forth in regard to conciliation in the Annex to the Vienna Convention and treating the Secretary-General of the United Nations as the person to whom the request should be referred for adoption by the competent organ of the United Nations. As he saw the matter for the time being, however, he considered it would be better to limit the faculty of asking the Court for an advisory opinion to the United Nations, and not to extend it to the specialized agencies. That would be in conformity with the fundamental concept of *jus cogens* and would avoid the risk that a request for an advisory opinion might be referred to another organization that was not entirely appropriate. To his mind, the universal character of the United Nations and its broad influence made it the body *par excellence* to be consulted. If there were any arguments to the contrary, he would be pleased to hear them since he was entirely open to conviction.

23. Mr. SCHWEBEL said that he too agreed that the square brackets around draft article 66 should be removed. He considered, however, that the compromise reached at the Conference on the Law of Treaties regarding third-party settlement was not the ideal result, but only the best that could be achieved, and in his view it was particularly deficient in that it did not subject claims of *rebus sic stantibus* to the compulsory jurisdiction of the International Court of Justice. If the Commission were to depart to any marked degree from the formula of the Vienna Convention, he trusted that it would be in the direction of extending, rather than narrowing, the provisions for third-party settlement. The Commission was, after all, concerned with the progressive, not regressive, development of international law. Bearing in mind that the Commission's mandate was to abide by the provisions of the Vienna Convention, he was however

prepared to accept the draft article as a minimal provision.

24. He would prefer it if an advisory opinion, when sought in such circumstances, were binding, particularly since the relevant provision in the draft article was cast in the form of an alternative or complement to arbitration, which was by definition binding.

25. The point raised by Sir Francis Vallat regarding a possible limitation of the advisory procedure was very pertinent. Specialized agencies were showing a tendency to stray into areas of a political nature and it might well be that, in their own interests, they should not be encouraged to do so.

26. The CHAIRMAN, speaking as a member of the Commission, also agreed that the square brackets around draft article 66 should be removed.

27. He had noted an apparent ambiguity in paragraphs 1 and 2 of the draft article and would be grateful for the Special Rapporteur's clarification. Whereas the introductory part of paragraph 1 provided for an objection raised by one or more States with respect to another State, the introductory part of paragraph 2 provided for an objection raised by one or more international organizations with respect to one or more organizations parties to the treaty. That phraseology, coupled with the use of the word "involves" in paragraph 2, suggested to him that the objection provided for in paragraph 2 might be raised not by an international organization but, perhaps, by a State. He therefore wondered whether the intent was to establish a broader principle under paragraph 2 than under paragraph 1.

28. The Special Rapporteur had made an excellent attempt in paragraph 2 to reflect the solution offered by article 66 of the Vienna Convention by providing for an advisory opinion to be requested of the International Court of Justice, which the parties would agree to regard as binding, in place of the normal decision of that Court. The only difficulty was that the competent bodies which would be asked by the parties to a dispute to make such a request were not clearly specified.

29. Further, he had noted that Mr. Ushakov had suggested arbitration as a possible alternative method of settlement, in addition to a request for an advisory opinion or the conciliation procedure, as provided for under subparagraphs 2 (a) and (b) respectively. He wondered, however, whether arbitration was in fact the only alternative and whether the intent was that any other method of compulsory settlement agreed by the parties should be excluded. Possibly a clause reading "unless the parties by common consent agree to submit the dispute to another method of compulsory settlement" could be inserted, or some wording along similar lines, to provide for cases where, under a treaty to which an international organization was a party, a method of compulsory settlement other than arbitration was contemplated and agreed.

30. Lastly, he drew attention to the second revision of the "Informal composite negotiating text" of the United Nations Conference on the Law of the Sea,⁶ which contained many interesting ideas of direct relevance to the subject-matter under consideration. He suggested that the members of the Commission might pay particular attention to articles 186 to 189 of the text itself and to annex VI, section 4.

31. Mr. CALLE Y CALLE said that, just as it had been logical for the United Nations Conference on the Law of Treaties to formulate procedural articles such as articles 65 and 66, so it would be logical to incorporate in the set of draft articles provisions like those in draft articles 65 and 66 proposed by the Special Rapporteur.

32. If in the case envisaged in draft article 66, paragraph 1, the dispute related to the existence of a peremptory norm of general international law or to the emergence of a new peremptory norm of general international law, the dispute could be submitted to the International Court of Justice, or else, with the common consent of the parties, it could be referred to arbitration. In his opinion, it might be desirable for the Commission to consider whether the Conference on the Law of Treaties had been right in providing that such an important decision could be taken during an arbitration procedure organized by the parties to the dispute.

33. According to draft article 66, paragraph 2, the objection provided for in draft article 65, paragraphs 2 and 3, could be raised by one or more international organizations parties to the treaty or could involve one or more international organizations parties to the treaty. If no solution was reached under draft article 65, paragraph 3, which referred to "the means indicated" in Article 33 of the Charter (which include "judicial settlement"), a problem could arise, because international organizations did not have the same possibility as States of seeking solutions by judicial settlement. Provision must nevertheless be made for some kind of settlement since, under draft article 66, paragraph 2 (a), any one of the parties to a dispute relating to the existence or emergence of a peremptory norm of general international law could ask one of the bodies competent under the terms of Article 96 of the Charter to request an advisory opinion from the International Court, the binding nature of whose advisory opinions would be analogous to that of a judgement. If the dispute did not relate to a peremptory norm of general international law, draft article 66, subparagraph 2 (b), stated that any one of the parties could set in motion the procedure specified in the Annex (sect. II) to the draft articles by submitting a request to that effect.

34. He noted that the draft articles as a whole would apply to all international organizations, not only to

those related to the United Nations, which were, however, the only ones that could ask the Court for an advisory opinion under the terms of Article 96 of the Charter. Accordingly, international organizations not related to the United Nations would be excluded from the procedure provided for in article 66, paragraph 2 (a), and would be able to submit their disputes to arbitration only.

35. Lastly, he said that he fully agreed with section II, paragraph 2 *bis*, of the Annex to the draft articles, which provided that, if a request was made by or directed against the United Nations (in accordance with paragraph 2 (b) of draft article 66) it should be submitted to the President of the International Court of Justice.

36. Mr. TSURUOKA said that draft article 66 should not be placed in square brackets, although it called for some improvements. Paragraph 1 referred only to States. However, a dispute between States could have repercussions on the position of international organizations. It would be desirable, therefore, that the international organizations concerned should have the possibility of participating in the settlement of a dispute. Such a solution had in fact been provided for in Article 34 of the Statute of the International Court of Justice. The possibility of the international organizations concerned participating in the settlement of a dispute should be mentioned in the commentary to the draft article.

37. Like other members of the Commission, he had a number of difficulties with paragraph 2 (a), with regard to the competent bodies that could be approached with a request for an advisory opinion and the procedure to be followed in obtaining the consent of the bodies competent within the meaning of Article 96 of the Charter of the United Nations. He would submit to the Drafting Committee the text of an amendment designed to improve the wording of the subparagraph in question. Personally, as far as the application and interpretation of articles 53 and 64 were concerned, he was of the view that the only competent authority was the International Court of Justice.

38. Mr. QUENTIN-BAXTER said that while he fully agreed with other members of the Commission that draft article 66 should be included in the text of the draft articles under consideration, he thought that it might give rise to some purely practical difficulties.

39. For example, it seemed reasonable to him that when a dispute arose between States parties to a treaty the procedure provided for in article 66 of the Vienna Convention should apply as exactly as possible. The result of the application of that procedure would nevertheless be that an international organization also party to the treaty might find itself in a position of standing by with nothing to say, because if the dispute was submitted to the International Court of Justice, the international organization would have no chance of being heard. In such a case, however, the international

⁶ See 1586th meeting, foot-note 10.

organization party to the treaty could also raise an objection, thus immediately bringing into play paragraph 2 of draft article 66.

40. That paragraph, which must apply whenever an international organization party to a treaty was either the party giving notice under draft article 65 or the party objecting, might also create problems because of the difficulty of adapting the advisory opinion procedure of the International Court to a circumstance for which it had not been designed. As the Special Rapporteur had pointed out, however, there was no reason to suppose that the Court would object to the course suggested in paragraph 2 (a) or to the stipulation that the parties should regard its advisory opinion as binding.

41. In his opinion, the request referred to in subparagraph 2 (b) should be made to the Secretary-General of the United Nations when the United Nations was involved in a dispute. Paragraph 2 (a) should also contain wording indicating which body was competent under the terms of Article 96 of the Charter to request an advisory opinion from the International Court of Justice. He could see no reason in principle why that should not be one of the most important United Nations bodies, particularly since it was clearly the policy of the Vienna Convention that disputes relating to *jus cogens* should always be settled by the highest judicial organ of the United Nations. If the procedure proposed in draft article 66 was applied as strictly as possible, the body competent to request an advisory opinion from the Court and approached for that purpose, would surely take the view that the policy of the Vienna Convention was clear and that the dispute should be settled by the Court. Accordingly, he was of the opinion that the commentary to draft article 66 should favour the presumption that a request for an advisory opinion would need no other substantiation than the fact of an unresolved dispute.

42. Mr. THIAM noted that subparagraphs 1 (a) and (b) of draft article 66 referred only to the case of a dispute between States parties to a treaty. However, such a dispute could have repercussions on the position of one or more international organizations. The draft articles before the Commission concerned essentially international organizations, and he was in favour of enhancing the legal personality of international organizations. For those various reasons, he considered that reference should be made to the position of international organizations in paragraph 1 of the text under consideration.

43. Mr. REUTER (Special Rapporteur) spoke in reply to Mr. Ushakov's question regarding the interpretation of subparagraph 2 (a) of draft article 66, as compared with subparagraph 1 (a).

44. He said that in Mr. Ushakov's view both the corresponding text of the Vienna Convention and that of subparagraph 1 (a) gave the impression that the Vienna Convention offered a choice to States which

were parties to a dispute concerning the application or interpretation of articles 53 or 64, in that any State party to such a dispute could, by an application, submit the dispute to the International Court of Justice, unless the parties by common consent decided to submit the dispute to arbitration. Consequently, the parties had a somewhat surprising option, a fact which would tend to prove that the United Nations Conference on the Law of Treaties had not wished to draw all the necessary inferences from the line of thinking expressed by some members of the Commission, namely that the best body to decide such matters was the Court. He (Mr. Reuter) pointed out, however, that the option open to the parties actually included a third possibility: the State which raised an objection when another State invoked the invalidity of a treaty on the grounds that it was contrary to *jus cogens* could withdraw its objection. The State which considered the treaty invalid could legitimately draw all the inferences from that act.

45. That third possibility aside, it was true that there was never any certainty that, in the case of the draft articles under consideration, an advisory opinion would be requested through one of the competent bodies. A provision might be drafted stipulating that, if an advisory opinion was not requested, the two parties should submit to arbitration, but, there again, there was no certainty that that obligation would be acted on. The insertion of such a provision, moreover, would constitute a significant departure from the Vienna Convention. To remove the possibility of dropping the case would be a departure from the line followed in the Vienna Convention.

Point of order raised by Mr. Ushakov

46. Mr. USHAKOV, speaking on a point of order, drew the attention of the members of the Commission to a letter dated 24 April 1980 from the Minister of Foreign Affairs of the Democratic Republic of Afghanistan, addressed to the Secretary-General of the United Nations, which read as follows:

Excellency,

As your Excellency may be aware Mr. Tabibi, who is a member of the International Law Commission, resigned from Government service and he is not now in Afghanistan. In an international organ such as the International Law Commission, where in accordance with the provisions of Article 8 of the Statute, the main forms of civilization and the principal legal systems of the world should be represented, Mr. Tabibi cannot represent the legal system of the New Afghanistan.

For this reason the Government of the Democratic Republic of Afghanistan declares Mr. Tabibi as not possessing the required qualifications referred to in Article 8 of the Statute.

Taking into account the above, I request your Excellency to declare the post, occupied at present by Mr. Tabibi, who no longer represents the legal system of Afghanistan, vacant.

In accordance with Article 11 of the ILC, I request, your Excellency, that the ILC at its forthcoming Session, which

resumes its work on 5th May, 1980 hold elections to fill this causal vacancy.

At the same time the Government of the D.R.A. proposes as candidate for election to this post Dr. Mohammad Akbar *Kherad* the curriculum vitae of whom is attached.

(Signed) Shah Mohammad DOST
Minister of Foreign Affairs of the
Democratic Republic of Afghanistan

47. Mr. Ushakov stated that, under article 3 of the Statute of the Commission, the members of the Commission were elected by the General Assembly from a list of candidates nominated by the Governments of States Members of the United Nations. Under article 2 of the Statute, each member should be a national of one State and, in the event of dual nationality, a candidate would be deemed to be a national of the State in which he ordinarily exercised civil and political rights. Moreover, article 8 provided that the electors should bear in mind that the persons to be elected to the Commission should individually possess the qualifications required and that, in the Commission as a whole, representation of the main forms of civilization and of the principal legal systems of the world should be assured. In the case of Mr. Tabibi, the conditions prescribed by article 8 of the Commission's Statute were no longer fulfilled, with all that that implied. That was the view he wished to express on the matter.

48. He requested that the text of the letter from the Minister of Foreign Affairs of the Democratic Republic of Afghanistan which he had just read out should be reproduced in the summary record of the meeting and that his opinion should be reflected in the Commission's report.

49. The CHAIRMAN said that the letter read out by Mr. Ushakov raised a question which related to the interpretation of the Commission's Statute and which might give rise to controversy. Since Mr. Ushakov had raised the matter referred to in the letter as a point of order, the members of the Commission now had to decide whether to interrupt their work on the topic under consideration and how to deal with the statement made by Mr. Ushakov.

50. Mr. TSURUOKA proposed that discussion of the question whether the Commission could deal with the matter raised by Mr. Ushakov should be postponed.

51. Sir Francis VALLAT seconded the proposal made by Mr. Tsuruoka.

52. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission decided to postpone consideration of the matter raised by Mr. Ushakov.

It was so decided.

The meeting rose at 6 p.m.

1590th MEETING

Tuesday, 13 May 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Diaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/327)

[Item 3 of the agenda]

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

ARTICLE 66 (Procedures for judicial settlement, arbitration and conciliation)¹ (*concluded*)

1. Mr. FRANCIS said he agreed with the substance of draft article 66, in which the Special Rapporteur had skilfully adapted the text of article 66 of the Vienna Convention² to the case where several States and one or more international organizations were parties to a treaty.

2. Subparagraph 2 (*a*) of the draft article dealt with the case where, in the event of an objection made by or addressed to an international organization, any party to the dispute could ask a body competent under Article 96 of the Charter to apply to the International Court of Justice for an advisory opinion. The question as to which body such a request should be addressed had been brought into sharp focus at the preceding meeting by Sir Francis Vallat, who had pointed out that the General Assembly and the Security Council had broader competence than other bodies because they could request the Court to give an advisory opinion on any legal question. He (Mr. Francis) was of the opinion that subparagraph 2 (*a*) should also enable international organizations outside the United Nations family to apply to the Court for advisory opinions through the competent United Nations body, in order to encourage the development of the jurisprudence of the organizations concerned and to strengthen the peace-making role which the United Nations could play in its relations with other international organizations.

3. He agreed with the view that the advisory opinions of the International Court of Justice should be binding on the parties to the treaty. States might, of course,

¹ For text, see 1589th meeting, para. 1.

² See 1585th meeting, foot-note 1.

find that view somewhat daunting at first, but they should bear in mind the fact that, had a dispute arisen under similar circumstances between States only, a contentious issue would arise under subparagraph 1(a) for a decision by the Court in respect of a rule of *jus cogens*; that decision would, in any case, be binding under Article 59 of the Court's Statute. Although international organizations belonging to the United Nations family would probably not be reluctant to regard the advisory opinions of the Court as binding, the same might not be true of organizations outside the United Nations family, which should, however, be required to accept the binding nature of the Court's opinions as the price they had to pay for being allowed to request such opinions.

4. Lastly, he expressed support for the principle in paragraph 2 (b) of draft article 66.

5. Mr. BARBOZA said that, even though draft article 66 was in square brackets, it offered a number of viable options which the Commission had been able to consider and which States would be able to take into account in expressing their views. The main difficulties to which the draft article gave rise were difficulties of principle, as well as difficulties of a political or procedural nature. It also gave rise to problems of a drafting nature, which could be dealt with by the Drafting Committee.

6. In discussing draft article 66, the Commission must remember that it was restricted by, and could not stray too far from, the system established in article 66 of the Vienna Convention, which was not entirely perfect because it provided that a dispute relating to a peremptory norm of general international law should be submitted to the International Court of Justice unless the parties by common consent agreed to submit the dispute to arbitration. In his opinion, arbitration was not the best procedure for the settlement of a dispute concerning a rule of *jus cogens*, because a dispute of that kind could affect the interests of the entire international community. In view of its composition and its place in the international hierarchy, the International Court of Justice offered better guarantees than arbitration for the settlement of disputes of that kind.

7. The Commission had, however, to conform to the system established by the Vienna Convention, even in trying to solve problems like that raised in draft article 66, subparagraph 2(a), which provided that an international organization party to a treaty could indirectly request an advisory opinion from the Court. In that connexion, several members of the Commission had pointed out that it was not at all certain that the body competent under Article 96 of the Charter to request such an advisory opinion would, in fact, wish to make such a request of the Court. If that body was unwilling to do so, the parties to treaties like those covered by the draft articles would be more likely to submit their disputes to arbitration. Indeed, because of the constraints imposed by article 66 of the Vienna Conven-

tion draft article 66 seemed to give the preference to arbitration, with the imperfections inherent in that procedure for the settlement of disputes relating to norms of *jus cogens*. He realized, however, that legal solutions were often limited by political considerations and that the ones arrived at were often the best possible in the circumstances. Accordingly, he hoped that the Commission and the Drafting Committee would have further opportunities to consider draft article 66.

8. Mr. TABIBI said that the draft article under consideration would certainly contribute to the stability of treaties and of relations between States and international organizations. The article took account of the situation of international organizations, which were not, of course, covered in article 66 of the Vienna Convention. He therefore supported draft article 66, which should be removed from square brackets and referred to the Drafting Committee.

9. Mr. ŠAHOVIĆ, supplementing the statement he had made at the preceding meeting, said he agreed with other members of the Commission that all international organizations should be afforded an equal opportunity to request advisory opinions concerning the application or the interpretation of article 53 or article 64. The question should be considered in the light of the legal rules embodied in the Vienna Convention and in the Charter of the United Nations. Article 96 of the Charter, which regulated the right of international organizations to request advisory opinions, constituted a guarantee against possible abuses of the exercise of that right. That system was generally satisfactory and required no amendment. The Vienna Convention indicated the place to be occupied in international law by *jus cogens*, and required all parties to treaties to respect the peremptory norms of general international law. A distinction could not therefore be made between the parties to treaties, and certain international organizations could not be placed in a position of inferiority in relation to States or the United Nations so far as the right to request advisory opinions was concerned. It was thus, in the final analysis, necessary to follow the solutions proposed by the Special Rapporteur, who had shown that he was aware of the difficulties which would arise if the Commission failed to take account of the provisions of the Vienna Convention and of Article 96 of the Charter.

10. As he had stated at the preceding meeting, he was in favour of deleting the reference in subparagraph 2 (a) to the binding nature of advisory opinions, which was a very complex problem. Treaties in respect of which the Court could be asked for an advisory opinion could either be treaties between States and international organizations or treaties between international organizations. The situation might be more delicate in the first case than in the second because, in the second, only international organizations would be involved, whereas in the first an international organization might

request an advisory opinion on a point of *jus cogens*, and the opinion would then be binding on States. In his own view, at the current stage of the development of the law of treaties, it was not necessary to go that far in the study of the problem. It would be better to rely on practice, in whose evolution both States and international organizations would take part. What mattered was that international organizations should be able to obtain advisory opinions. It should also be noted that the draft was generally oriented towards greater equality between international organizations and States and that nothing should be done to hamper the progress that had already been made in that direction.

11. In conclusion, he said that he was in favour of the solutions proposed by the Special Rapporteur in subparagraph 2 (a). Perhaps the commentary should refer to the various criticisms which had been made of that provision, so that Governments might have a general idea of the situation. Once the Commission had received the comments of Governments, it might lean towards the adoption of other solutions.

12. Mr. DÍAZ GONZÁLEZ said that the square brackets should be removed from draft article 66 and that it should be referred to the Drafting Committee, for, as the Special Rapporteur had pointed out, the Commission should not refrain from presenting a draft article on the ground that the article was bound to give rise to a great many legal and political problems.

13. In that connexion, he noted that, if it had been difficult for the participants in the United Nations Conference on the Law of Treaties to reach a consensus on article 66, which related exclusively to subjects of international law such as States, it would be even more difficult to reach agreement on draft article 66, which related both to States and to international organizations.

14. In his opinion, draft article 66 was one which reflected the parallel between the growing legal capacity of international organizations and the progressive development of international law. It was perhaps because of that parallel that Article 33 of the Charter of the United Nations, on the pacific settlement of disputes, referred only to States, whereas Article 96 of the Charter referred expressly to international organizations and empowered them to ask the International Court of Justice for advisory opinions.

15. Draft article 66 consisted of two parts: one based on article 66 of the Vienna Convention and dealing only with relations between States, and another devoted exclusively to international organizations, which, perhaps because of the innovation it introduced by providing that international organizations could request advisory opinions from the International Court of Justice, had given rise to a lengthy discussion in the Commission. The basis for the second part of the article was thus Article 96 of the Charter, which stated in rather vague terms that organs of international

organizations could request advisory opinions from the Court. The problem in his mind was not only that, under draft article 66, subparagraph 2 (a), any one of the parties to a dispute could ask one of the bodies competent under the terms of Article 96 of the Charter to request an advisory opinion from the International Court of Justice, but also that it would be necessary to determine on what basis that body could be authorized to request such an opinion.

16. Mr. USHAKOV, referring again to the question he had asked the Special Rapporteur at the preceding meeting, said that the proviso "unless the parties by common consent agree to submit the dispute to arbitration", which was contained in subparagraph (a) of paragraphs 1 and 2 and which reproduced the wording of the Vienna Convention, was strange. By common consent, the parties were free, surely, to agree on any means for the settlement of disputes, and not only on arbitration. If they chose conciliation, it was quite normal that they should not be able to initiate any other means for the settlement of the dispute for so long as the consultation procedure had not been completed. Article 66 could not be interpreted to mean that not until on the expiry of 12 months after an objection had been made would the parties be able to resort to arbitration, and to arbitration only. It was thus the Vienna Convention which was not an entirely satisfactory starting point. Although the Commission had to follow the Convention as closely as possible, there was no reason why it should not decide to drop the words "unless the parties by common consent agree to submit the dispute to arbitration" from the article under consideration.

17. Mr. REUTER (Special Rapporteur), summing up the debate, said that the comments of members of the Commission could be divided into three broad categories—those relating to substance, those relating to procedure and those relating to drafting. It would be for the Drafting Committee to follow up the comments on drafting.

18. The members of the Commission had been even more concerned with matters of procedure than with matters of substance. Members seemed to be generally in favour of retaining draft article 66, although one of them had expressed doubts on one part of the solutions proposed. Many members even considered that the square brackets should be deleted. They felt that the corresponding article of the Vienna Convention played an important role. Some members had stressed that *jus cogens*, the existence of which was recognized by the Vienna Convention, was so important that failure to provide for any special procedure in the draft would be tantamount to according it a purely moral significance.

19. Like several members of the Commission, he believed that draft article 66 could be referred to the Drafting Committee. Nevertheless, it might be better that the Drafting Committee should not consider it until after the annex referred to in the draft article had been discussed.

20. With regard to substance, Mr. Šahović had suggested that the reference to the binding nature of advisory opinions should be deleted. The Drafting Committee or the Commission might come round to that view, if only because the ideal of placing international organizations on the same footing as States was quite unattainable. Even if the binding nature of advisory opinions was expressly stipulated, inequalities would still continue to exist in certain procedures. In the final analysis, the Commission was hampered by the formalism of the Statute of the International Court of Justice and the Vienna Convention. However, all members were convinced that, where a State or an international organization relied on *jus cogens*, the situation would be very serious because it would concern the entire international community. Consequently, it was not of paramount importance to state specifically that advisory opinions would have a binding character.

21. Personally, he subscribed to Mr. Ushakov's criticism of the passage "unless the parties by common consent agree to submit the dispute to arbitration", which appeared in the Vienna Convention. As Special Rapporteur, he wondered how that imperfection could be remedied. It would be for the Drafting Committee to find a solution, not only with regard to problems which might arise between States but also with regard to those which might emerge in the course of a procedure to which an international organization was a party. Furthermore, given the nature of *jus cogens*, it would be paradoxical to leave a matter involving a peremptory rule of general international law to be resolved by an arbitration procedure. How, in such a case, could States resort to an arbitration procedure without affording the other parties concerned an opportunity to intervene? In the Statute of the International Court of Justice, provision was made for intervention, whereas in arbitration proceedings, questions of procedure were determined by the parties which were not bound to make provision, in their agreement to arbitrate, for the possible intervention of others. Since, however, any question of *jus cogens* was of concern to the entire international community, it might—if referred to arbitration—be downgraded to a mere private problem, which was far from satisfactory.

22. Another question of substance had been described as one of drafting: whereas paragraph 1 referred to a certain type of treaty, paragraph 2 did not specify what treaties it covered. Nor was it specified in paragraph 2 that it applied also to a State which raised an objection against a claim made by an international organization. Such would be the case if an international organization relied on one of the articles of part V and a State raised an objection. Another comment—which really concerned drafting—had drawn attention to the asymmetrical structure of draft article 66, in that the Special Rapporteur envisaged the hypothesis of a bilateral dispute, while on occasion broadening the scope of that hypothesis.

23. No member of the Commission had speculated on the problems to which the operation of paragraphs 1 and 2 of draft article 66 might give rise. It was possible, for example, to conceive of a multilateral treaty to which at least two States, and at least one international organization, were parties. If, in such a case, one of the States invoked a ground for invalidating the treaty or suspending its operation, another State might set in motion one of the procedures provided for in paragraph 1 of article 66. However, the international organization party to that treaty could itself set in motion one of the procedures provided for in paragraph 2. In his opinion, there was a serious technical defect which ought to be remedied. It should be decided that, at least in the case of *jus cogens*, as soon as a State brought a dispute before the International Court of Justice, the other procedures were suspended. The other States parties to the dispute would then be able to intervene, as provided in the Statute of the Court. Although international organizations were not qualified to intervene in the same way, under Article 34 of the Court's Statute they could submit information. In that special situation, the Court would give a ruling which would have the force of *res judicata* between the two States but would not bind the international organization. In the final analysis, such a consequence was not particularly serious, since any decision by the Court on a question of *jus cogens* implied acceptance by the international community as a whole. A decision accepted by all States would also be accepted by international organizations. The Commission had expressed an opinion on that point earlier, when it had discussed the question of universal customary rules and had taken the view that, in that regard, international organizations were indistinguishable from States.

24. For the purposes of the article under consideration, international organizations could be divided into three categories—the United Nations, the specialized agencies entitled to request an advisory opinion, and the other organizations. Mr. Francis had expressed the view that means should be found of enabling the last-mentioned organizations to request advisory opinions. Another issue that had been raised was whether it was right that the specialized agencies should suffer some kind of *capitis deminutio* by the revocation of their right to request advisory opinions. It was conceivable that the specialized agencies communicated to the Secretary-General their intention to request an advisory opinion, and that consultations were then held to determine whether the question was sufficiently serious to be brought to the attention of the Security Council. In some cases, the issue would be not so much whether the request for an advisory opinion should be submitted by the General Assembly rather than by a specialized agency as whether a matter was so serious that it had to be referred, first, to the Security Council. Under the Charter, the Secretary-General was empowered to seize the Security Council with a question. If the Commission opted for the

solution involving application to the Secretary-General, the Secretary-General could then seize the Security Council with the question, with the recommendation that an advisory opinion should be requested from the International Court of Justice. While there was no provision in the Charter enabling the Secretary-General to place any matter whatever before the General Assembly, rule 13 (g) of the Rules of Procedure of the General Assembly nevertheless empowered him to include in the provisional agenda of an Assembly session any item he deemed it necessary to put before it. In that respect, therefore, there was no technical difficulty.

25. In conclusion, he wished to submit a purely provisional suggestion which would involve a departure, not from the substance, but from the structure of the Vienna Convention. In view of the lack of co-ordination between paragraphs 1 and 2 of the article under consideration, it would surely be reasonable, he thought, to refer to the conciliation procedure in a general clause at the beginning of draft article 66. Such a clause would apply equally to States and international organizations, and perhaps even in the event of an objection being raised by one State against another without an international organization party to the treaty being involved. That solution would mean that the Secretary-General would become involved. It would then be stipulated that, in the event of only two States being concerned, the clause in question would not prevent one of them from submitting a request to the International Court, in which case, all other procedures would cease. It would then be necessary to refer to the possibility of a request being made for an advisory opinion. As the conciliation procedure would be mentioned first, the intervention of the Secretary-General would already be provided for in the event of a request for an opinion. Such a solution would also dispose of the question of arbitration, a procedure which should be retained for States but might be dropped in the case of international organizations. It would also be consistent with a suggestion which a number of members of the Commission had not ruled out, namely that provision should be made for a general conciliation procedure. The inclusion of a reference to conciliation at the beginning of article 66 could be taken as an invitation to the General Assembly to make provision for a general conciliation procedure for the settlement of disputes concerning any provision of the draft.

26. Mr. FRANCIS said it had been possible to reach agreement on article 66 of the Vienna Convention precisely because a reference to arbitration had been included in that article in deference to the views of those delegations that had opposed the compulsory reference to the International Court of Justice of disputes arising out of the Convention. He therefore wondered whether the omission of such a reference from the draft articles might not violate the spirit of the Convention.

27. With regard to the Special Rapporteur's suggestion that draft article 66 should open with a provision for a conciliation procedure, he thought that little harm would be done if all that was involved was transposing the corresponding provisions of the Vienna Convention. He would, however, have certain reservations if the draft article were to be cast in such a way that the conciliation procedure took priority over arbitration or a reference to the International Court of Justice.

28. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to refer draft article 66 to the Drafting Committee, together with a recommendation that the square brackets around the draft article should be removed.

*It was so decided.*³

ARTICLE 67 (Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty)

29. The CHAIRMAN invited the Special Rapporteur to introduce draft article 67 (A/CN.4/327), which read:

Article 67. Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. The notification provided for under article 65, paragraph 1, must be made in writing.

2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If an instrument emanating from a State is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers. An instrument emanating from an international organization shall be accompanied by the production of the powers of the representative of the organization communicating it.

30. Mr. REUTER (Special Rapporteur) said that draft article 67 established procedural guarantees for all acts having as their object to declare invalid, terminate, withdraw from or suspend the operation of a treaty.

31. The guarantees in the corresponding provision of the Vienna Convention related to three points. First, the acts declaring invalid, terminating, withdrawing from or suspending the operation of a treaty had to be in written form. The Vienna Convention even spoke of an instrument, i.e. a written document clothed with a certain solemnity. Secondly, the instruments in question had to be communicated to all the other parties. And thirdly, whereas the Convention allowed considerable latitude in the conclusion of treaties—apart from the case of the Head of State, there was no

³ For consideration of the text proposed by the Drafting Committee, see 1624th meeting, paras. 30 *et seq.*

categorical rule regarding the powers of the representative of the State who concluded a treaty—article 67 was more demanding where the issue was that of invalidating a treaty. The explanation was that the conclusion of a treaty was intrinsically a procedure characterized by common practices from which it was possible to infer the will of the parties, whereas the declaration invalidating or suspending the operation of a treaty was a unilateral act. That was why article 67 of the Convention provided that if the instrument was not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it might be called upon to produce full powers.

32. The guarantees in draft article 67 included the requirement that the notification had to be in writing and that the instrument had to be communicated to the other parties. The only problem which arose concerned the status of the representatives of an international organization communicating the instrument in question. In draft article 7 as adopted by the Commission,⁴ paragraph 4 stated:

A person is considered as representing an international organization for the purpose of communicating the consent of that organization to be bound by treaty if:

(a) he produces appropriate powers; or

(b) it appears from practice or from other circumstances that that person is considered as representing the organization for that purpose without having to produce powers.

If the intention was that, in the case of international organizations, the denunciation, suspension or declaration of invalidity of a treaty should be made more difficult than its conclusion—the solution for treaties between States that was adopted by the Vienna Convention—it should be stipulated that the instrument had to be accompanied by the production of the powers of the representative of the organization who communicated it. That was the solution which he proposed. Paragraph 2 of draft article 67, therefore, drew a distinction between an instrument emanating from a State, whose representative might be called upon to produce full powers, and an instrument emanating from an international organization, which had to be accompanied by the production of the powers of its representative. The other parties to the treaty should have that guarantee, for not all international organizations had an agent with general authority to represent them.

33. Mr. USHAKOV inquired why paragraph 2 of article 67 of the Vienna Convention referred to paragraphs 2 or 3 of article 65, whereas it was paragraphs 1 and 2 of that article which spoke of the suspension or invalidity of treaties.

34. Moreover, the question of the procedure applicable to objections was not settled either in the Vienna Convention or in the draft under consideration. He

thought that objections should be placed on the same footing as the declaration of invalidity or suspension and should conform to the same procedure, namely, that they should be expressed in writing and communicated to the other parties.

35. Mr. QUENTIN-BAXTER said he agreed entirely that there should be no implicit dispensation from the terms of draft article 67 in the case of an international organization.

36. He would point out that in article 7 the expression “full powers” appeared in reference to a State, whereas “appropriate powers” was the expression used in the case of an international organization. It would therefore seem advisable, for the sake of symmetry, to adopt the latter expression in draft article 67 in the context of an international organization.

37. Also, he noted that, in the English text, both the second and third sentences of paragraph 2 of the draft article referred to “an instrument”; in the French text, the definite article was used. Since it should be clear that, in both instances, the instrument had been referred to in the preceding sentence, he suggested that the definite article should be used in the English text as well.

38. He further suggested that the third sentence be reworded in its entirety to read: “If the instrument emanates from an international organization the representative communicating it shall produce appropriate powers”.

39. Mr. REUTER (Special Rapporteur) explained in reply to Mr. Ushakov’s comments that the procedure provided for in the Vienna Convention actually comprised several acts: first, a notification, for which no other formal condition was prescribed than that it should be in writing, then the objection, which was not subject to any formal condition. At that point, nothing was as yet final; as in a lawsuit, claims and counter-claims had been submitted. Not until later did the formal act take place, the declaration that article 67, more specific than article 65, mentioned in its paragraph 2. In a way, that act corresponded to a ruling by a court; it was a juridical title which the State conferred on itself. It was in connexion with that unilateral act of the State that the Convention spoke of an instrument and the production of powers. The reason why it did not require as much solemnity for the notification and objection was that the dialogue was still going on between the parties.

40. Mr. CALLE Y CALLE said that, under paragraph 1 of draft article 67 as he read it, any party to a treaty, whether a State or an international organization, could make a notification pursuant to paragraph 1 of draft article 65,⁵ subject to the sole condition that such notification be in writing.

⁴ See 1585th meeting, foot-note 3.

⁵ For text, see 1588th meeting, para. 30.

41. Paragraph 2 of the draft article, which dealt with cases where objections had been raised in accordance with the relevant procedure, then drew a distinction between States and international organizations, which he understood in the following way. In the case of a State, the instrument of notification, signed by the Head of State, Head of Government or Minister for Foreign Affairs, had to emanate from the State and had to be communicated to the other parties to the treaty. Alternatively, it could be communicated by the representative of the State, who might be required to produce full powers. In the case of international organizations, the production of powers was mandatory. In other words, the instrument had to emanate from the competent body of the international organization, and hence to comply with its internal rules, and full powers had to be produced at the time when the instrument of notification was communicated. That interpretation was borne out by article 7 of the draft, which provided for two alternatives: the second of those alternatives waived, in the cases covered by paragraph 4 (b) of the article, the production of the powers of representatives of international organizations. Thus, in such cases, the representative of an international organization could signify its consent to be bound by a treaty without producing powers. When, however, such a representative acted as intermediary by communicating a decision or an instrument relating to the procedure set in motion after an objection, he had to produce powers.

42. Mr. REUTER (Special Rapporteur) said that the provision was concerned with the act declaring invalid, terminating, withdrawing from or suspending the operation of the treaty—a decision which was the organization's own—and not with a notification or objection.

43. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer draft article 67 to the Drafting Committee.

*It was so decided.*⁶

ARTICLE 68 (Revocation of notifications and instruments provided for in articles 65 and 67)

44. The CHAIRMAN invited the Special Rapporteur to introduce draft article 68 (A/CN.4/327), which read:

Article 68. Revocation of notifications and instruments provided for in articles 65 and 67

A notification or instrument provided for in articles 65 or 67 may be revoked at any time before it takes effect.

45. Mr. REUTER (Special Rapporteur) said that article 68 of the Vienna Convention reflected the desire

to allow the State which had notified the other States of its intention to contest the validity of a treaty, to terminate it, to withdraw from it or to suspend its operation, or which had made a declaration under paragraph 2 of article 67, to change its mind and to revoke the notification or instrument before they had taken effect. There was no reason for not adopting a similar article concerning treaties to which international organizations were parties, and draft article 68 did not differ from the corresponding article in the Vienna Convention.

46. The draft article called for only one comment. Article 68 of the Vienna Convention did not lay down any formal condition, either for revoking the notification or for revoking the declaratory instrument. The question was whether the Commission should observe the same silence as regards treaties to which international organizations were parties. He had thought that, both with respect to States and with respect to international organizations, the same forms should be followed as in the case of notification and declaration. His view was open to the criticism that it should be made easier to drop the claim to terminate or suspend the operation of a treaty. However, if one followed that argument, one would have to differentiate between States and international organizations, and the trend of opinion was towards prescribing more stringent conditions for such organizations.

47. Mr. ŠAHOVIĆ said that, for the guidance of the members of the Commission and of States, it would be helpful to expand the commentary on draft article 68, in order to show what might be the consequences of approving its wording.

48. Mr. CALLE Y CALLE said that, in the case of States, notice of revocation of a notification or instrument might issue from a body subordinate to that from which such notification or instrument might have emanated, namely, the Head of State. In the case of an international organization, however, once a decision to revoke the instrument had been taken, that decision would have to be communicated either through its principal organ or through its representative, accompanied in both cases by appropriate powers. Consequently, it would be advisable to make it quite clear in the commentary that all such notifications and instruments should be revoked in the form in which they had been issued and subject to the same conditions as those laid down in draft article 67.

49. The CHAIRMAN, noting that there were no further comments, invited the Commission to refer draft article 68 to the Drafting Committee.

*It was so decided.*⁷

The meeting rose at 1 p.m.

⁷ *Idem.*

⁶ For consideration of the text proposed by the Drafting Committee, see 1624th meeting, paras. 30 *et seq.*

1591st MEETING

Wednesday, 14 May 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Díaz González, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/327)

[Item 3 of the agenda]

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

ARTICLE 69 (Consequences of the invalidity of a treaty)

1. The CHAIRMAN invited the Special Rapporteur to introduce Section 5 of the draft articles, entitled "Consequences of the invalidity, termination or suspension of the operation of a treaty", and more particularly draft article 69 (A/CN.4/327), which read:

Article 69. Consequences of the invalidity of a treaty

1. A treaty the invalidity of which is established under the present articles is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the action of corruption or the coercion is imputable.

4. In the case of the invalidity of the consent of a State or an organization to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State or that organization and the parties to the treaty.

2. Mr. REUTER (Special Rapporteur) said that Section 5, which dealt with the consequences of the invalidity, termination or suspension of the operation of a treaty, contained provisions which differed only in drafting from the corresponding provisions of the Vienna Convention.¹ Article 69, concerning the consequences of the invalidity of a treaty, closely followed article 69 of the Vienna Convention. Paragraph 1

implied that there was no case of invalidity other than those provided for in the draft articles. Paragraph 2, read in conjunction with article 73 of the draft,² showed the continuing importance of good faith; it reserved the problem of responsibility and stated that invalidity in itself did not render acts unlawful. Paragraph 4 concerned the special case of multilateral treaties.

3. Mr. USHAKOV said that, in his opinion, in adjusting the language of the Vienna Convention to the present context another drafting change should be made in article 69: in paragraph 4, the word "other" should be inserted before the word "parties" in the phrase "in the relations between that State or that organization and the parties to the treaty".

4. From the point of view of substance, a distinction should be made between the relations established before the invalidity of the treaty was invoked—acts performed in good faith before the invalidity was invoked were not rendered unlawful by reason only of the invalidity of the treaty—and the situation after its invalidity had been invoked, at which point legal relations ceased to exist.

5. Mr. RIPHAGEN doubted whether it would be correct to refer to the "other parties" to the treaty since, in the event of the invalidity of the consent of a State or an organization to be bound by the treaty, that State or organization would *ipso facto* not be a party to the treaty. It might be better, therefore, to refer simply to "the parties".

6. Mr. CALLE Y CALLE, agreeing with Mr. Riphagen, pointed out that paragraph 4 dealt not with the case of a void treaty, which was covered by the terms of paragraph 1 of the draft article, but with a defect in the consent of a State or an organization such as to prevent that State or organization from being a party to a treaty that remained in being.

7. Mr. ŠAHOVIĆ pointed out that paragraph 4 of article 69 of the Vienna Convention referred to the consent of a "particular" State, and that consequently it would be logically necessary to mention, in paragraph 4 of draft article 69, the consent of a particular State or of a particular organization.

8. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission decided to refer draft article 69 to the Drafting Committee.

*It was so decided.*³

ARTICLE 70 (Consequences of the termination of a treaty)

9. The CHAIRMAN invited the Special Rapporteur

² See para. 22 below.

³ For consideration of the text proposed by the Drafting Committee, see 1624th meeting, paras. 30 *et seq.*

¹ See 1585th meeting, foot-note 1.

to introduce draft article 70 (A/CN.4/327), which read:

Article 70. Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present articles:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State or an international organization denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State or that international organization and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

10. Mr. REUTER (Special Rapporteur) said that since article 70 of the Vienna Convention had been adopted unanimously, it should not be difficult to transpose its terms to the draft articles. The only drafting change he had made in that provision was to add a reference to the international organization to the reference to the State in paragraph 2.

11. Article 70 was important in that its subparagraph 1 (b) contained language dealing with certain problems of transitional or interim law: the termination of a treaty did not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination. The same language recurred in article 71, which concerned the special case of *jus cogens*. Subject to the Commission's views regarding article 71, he thought that preferably the general rule laid down in article 70 should be left as it stood.

12. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission decided to refer draft article 70 to the Drafting Committee.

*It was so decided.*⁴

ARTICLE 71 (Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law)

13. The CHAIRMAN invited the Special Rapporteur to introduce draft article 71 (A/CN.4/327), which read:

Article 71. Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law

1. In the case of a treaty which is void under article 53 the parties shall:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

(b) bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

14. Mr. REUTER (Special Rapporteur) said that article 71 covered the special problem raised by *jus cogens* in two separate paragraphs. Paragraph 1 dealt with the simple case where a treaty was void *ab initio*; for that case, the Vienna Convention laid down a stricter rule than for that of ordinary invalidity, since it stipulated that the parties should eliminate the consequences of any act performed under a provision in conflict with the peremptory norm of general international law. Paragraph 2 dealt with the case of a treaty which had been validly concluded, but which, during its existence, came into conflict with a new peremptory norm of general international law.

15. The solution envisaged by the Commission and adopted at the United Nations Conference on the Law of Treaties was a compromise which gave rise to some problems of interpretation. For example, the beginning of the French text of paragraph 2 was curious from the point of view of legal vocabulary: "Dans le cas d'un traité qui devient nul et prend fin ...". However difficult it might be to interpret, he had not considered it advisable to change the text of the Vienna Convention.

16. Sir Francis VALLAT said that any criticism of draft article 71 was equally applicable to the corresponding provision of the Vienna Convention. Although the draft article was difficult to interpret, he considered that it would be unwise to tamper with the wording, since any attempt at clarification would only complicate the issue. It would be best to leave the draft article as it stood, subject to any recommendation which the Drafting Committee might wish to make.

17. Mr. USHAKOV said that he, too, did not think it necessary to change the text of draft article 71, in spite of the problems of interpretation that it raised—for example, concerning the obligation to eliminate the consequences of any act performed in reliance on any provision in conflict with a peremptory norm of international law, or the obligation to bring the mutual relations of the parties into conformity with the peremptory norm of general international law.

18. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission decided to refer article 71 to the Drafting Committee.

*It was so agreed.*⁵

⁴ *Idem.*

⁵ *Idem.*

ARTICLE 72 (Consequences of the suspension of the operation of a treaty)

19. The CHAIRMAN invited the Special Rapporteur to introduce draft article 72 (A/CN.4/327), which read:

Article 72. Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present articles:

(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;

(b) does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

20. Mr. REUTER (Special Rapporteur) said that, wishing to save whatever could be saved of a treaty, the Commission had attached much importance to the suspension of the operation of a treaty, a situation which occurred—albeit rarely—in practice. It had thought of suspension as a lesser evil than the invalidity or destruction of the treaty. The object of paragraph 2 of the draft article was to prescribe a mandatory line of conduct for the parties, requiring them to behave in such a way as to refrain from any act or any attitude which would worsen the situation of suspension by making the resumption of the operation of the treaty impossible.

21. The CHAIRMAN said that if he heard no objections he would take it that the Commission decided to refer article 72 to the Drafting Committee.

*It was so decided.*⁶

ARTICLE 73 (Cases of State succession, succession of international organizations, succession of a State to an international organization and succession of an international organization to a State, responsibility of a State or of an international organization and outbreak of hostilities)

22. The CHAIRMAN invited the Special Rapporteur to introduce part VI (Miscellaneous provisions) of the draft articles, and specifically draft article 73 (A/CN.4/327), which read as follows:

Article 73. Cases of State succession, succession of international organizations, succession of a State to an international organization and succession of an international organization to a State, responsibility of a State or of an international organization and outbreak of hostilities

The provisions of the present articles shall not prejudice any question that may arise in regard to a treaty from a succession of States, from a succession of international organizations or from a

succession of a State to an international organization or of an international organization to a State, or from the international responsibility of a State or of an international organization, or from the outbreak of hostilities between States.

23. Mr. REUTER (Special Rapporteur) said that part VI of the draft articles comprised three articles which had little interrelationship except in so far as they were designed to allow for the consideration of certain problems raised at the Conference on the Law of Treaties.

24. Article 73 of the Vienna Convention stipulated that the provisions of the Convention should not prejudice any question that might arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States. It was understandable why the Conference should have made that reservation regarding the succession of States and the international responsibility of a State, since those questions had then been under consideration in the Commission. The case of the outbreak of hostilities, however, had not been dealt with by the Commission, on the grounds, first, that even in traditional international law the effect of a state of war on treaties was a controversial subject and, secondly, that since the adoption of the Charter of the United Nations and the development of international law, it was doubtful whether a state of war in the earlier meaning of the term could really be said to exist. The Conference had taken the view, however, that there was a problem in that respect and, not wishing to express a judgement, had withheld its opinion on the issue and used the broad expression “outbreak of hostilities”.

25. The three subjects not dealt with in article 73 of the Vienna Convention were likewise omitted from the draft article 73 under consideration. The topic of State responsibility should be expanded to cover the responsibility of international organizations (that responsibility existed in certain cases, since international organizations were parties to conventions).

26. Similarly, he had considered it necessary to expand the reference to “succession of States” by mentioning other comparable situations, namely succession of international organizations, succession of a State to an international organization and succession of an organization to a State. He had used the term “succession” for the sake of convenience, though without intending to imply that a situation in which one international organization replaced another raised problems identical to those of a succession of States, where a specific element—territory—was involved. He did not think there were any rules applicable to the transition from one international organization to another, such as the transition from the League of Nations to the United Nations, from the Organisation for European Economic Co-operation to the Organisation for Economic Co-operation and Development, or from the International Institute of

⁶ *Idem.*

Agriculture to the FAO. Nor was it clear that a customs union constituted as an international organization was bound by the tariff agreements concluded by its member States with third States. If the union was dissolved, did the tariff agreements concluded by it with third States lapse, or did its member States succeed to them and did they remain bound by them? In the light of those problems, he had felt constrained to use the formula proposed in the title and in the body of draft article 73.

27. As far as the outbreak of "hostilities between States" was concerned, he said that the reference to States might be regarded as restrictive. Was it possible to think of hostilities to which an organization as such was a party? Should not certain acts attributed to States be attributed to international organizations? The problem had arisen in connexion with the United Nations Emergency Forces and with the hostilities in Korea, which, in the opinion of some, had implicated the United Nations as such. He had considered it wise to keep the text of article 73 of the Vienna Convention; his position in that connexion was not unrelated to article 75,⁷ concerning the case of an aggressor State. It was hardly conceivable that an international organization could be styled an "aggressor". According to the Definition of Aggression adopted by the General Assembly⁸ the expression "aggressor State" could cover the case of an international organization that committed an act of aggression. Whereas the problem was settled as far as article 75 was concerned, the same was not true of article 73 and its reference to the outbreak of hostilities between States.

28. Mr. SCHWEBEL said that he supported the use of an expression such as "outbreak of hostilities" in the draft article, since it was possible to envisage a case, quite apart from a state of war, where such an outbreak might affect treaties in force, including treaties to which international organizations were parties. Also, it would be advisable to follow the precedent set by the Vienna Convention. He agreed, however, that, for the reasons stated by the Special Rapporteur, the expression should not be expanded. It was true that under the Charter of the United Nations there could not, legally speaking, be a state of war, but at present there was no need to enter into the issue. It was also true that, while the probability of hostilities between international organizations was very remote, it was not inconceivable, but neither was there any need to be explicit in that regard. And it was likewise true that it was possible to contemplate hostilities to which international organizations were a party; for example, in the case of Korea, the Security Council had taken action that had led to the involvement of United Nations forces in the defence of an entity which

had been the subject of aggression. There, too, there was no need to enter into detail.

29. He agreed entirely that international organizations could be responsible to other international entities, whether States or international organizations, as also to natural persons, for violations of international law. That was established by precedent and the possibility should therefore be provided for in the draft article.

30. He was in favour of including a provision to cover cases of "succession" of international organizations since, in his view, a case could be made out for the proposition that, in some respects, the United Nations was the successor to the League of Nations and the International Court of Justice the successor to the Permanent Court of International Justice, to cite but two examples. On the other hand, the expression "succession of a State to an international organization and succession of an international organization to a State" struck him as a little strange, although he had been impressed by the examples cited by the Special Rapporteur both in the commentary and in his introductory remarks. He suggested that perhaps the Special Rapporteur might elaborate somewhat in the commentary on the practical issues involved.

31. If he had understood aright, the Special Rapporteur held that, as a body of the United Nations, the Commission was bound by the Definition of Aggression adopted by the General Assembly. That definition, however, was so broad, and subject to so many exceptions, that the extent to which it bound anyone was questionable; and, in any event, it was no more than a recommendation by the Assembly. More generally, he considered that the Commission was not bound by the views of a United Nations organ on a point of law unless that organ was authorized to settle the law. Arguably, it might be bound by a decision of the International Court of Justice, though the Commission had not regarded itself as bound by the Court's opinion on reservations to treaties. The Commission was certainly not bound as to the content of the law by resolutions of the General Assembly. A United Nations organ could always make its views known to the Commission, and those views would be weighed on their merits. In the specific instance, he fully agreed that aggression might be committed not only by a State but also by a group of States, and such a group could embrace an international organization.

32. Sir Francis VALLAT said that saving provisions inevitably tended to create difficulties because of the need to be comprehensive. The Special Rapporteur had already referred to some of the difficulties involved in the wording and presentation of draft article 73.

33. He (Sir Francis) agreed with the general thought underlying the draft article and recognized the need for a provision corresponding to that in article 73 of the Vienna Convention. The reference to the international responsibility of an international organization was

⁷ See 1592nd meeting, para. 31.

⁸ Resolution 3314 (XXIX), annex, explanatory note to article I of the Definition.

perfectly acceptable, since in its earlier deliberations the Commission had admitted that an international organization could incur such responsibility.

34. He did, however, have difficulty with other parts of the draft article. In the first place, while he agreed that the concept of an “outbreak of hostilities”, as used in the Vienna Convention, was appropriate in the context of the draft, that expression did not necessarily mean aggression. If, for instance, the United Nations were to decide through the Security Council on enforcement action, there would undoubtedly be hostilities—on the assumption, of course, that armed force was used—but that would certainly not mean the Security Council had committed aggression. Further, it was obviously possible that, in the event of hostilities, treaty rights and obligations might be affected, including treaty rights and obligations of the United Nations. Consequently, if the draft article was to provide for the outbreak of hostilities between States, some language should be devised that would cover hostilities involving an international organization, which meant, first and foremost, the United Nations. He believed that the Drafting Committee could find some general wording which would preclude the somewhat ludicrous notion of a conflict between, say, the ILO and UNESCO.

35. Secondly, it was generally agreed that the definition of succession of States as laid down in the 1978 Vienna Convention⁹ was of a very special character. It was also agreed that succession, in the sense normally understood in internal law, had little in common with the so-called succession of States, and even less with what might be regarded as a succession between international organizations, or a succession to which such an organization was a party. If, however, the draft article used the term “succession”, it would inevitably create the impression, notwithstanding the definition in the 1978 Vienna Convention, that a succession of international organizations was being treated in much the same way as a succession of States, whereas the one thing that was quite clear was that a succession of international organizations could not fall into the same category as a succession of States as defined in that Convention.

36. He had always regarded succession of international organizations as a case not so much of succession as of a transfer of functions, effected either through the assumption of such functions by the new organization or by way of a treaty between the members. He well remembered, for instance, that, when the Constitution of WHO had been drafted, it had been clearly understood that there was no case of succession in the true sense of the term. Nor did he think that the United Nations had succeeded to the League of Nations in any general sense. Perhaps the Permanent Court of International Justice and the

International Court of Justice came closest to a case of succession, but in that particular case there had been a treaty link which provided that the new Court should have certain functions formerly possessed by the old Court. That example, however, also served to underline the confusion which could arise if the transfer of obligations under pre-existing treaties was regarded as a succession. Accordingly, if the concept of succession was to be extended to cover international organizations, some much more general language should be found. Even then, he would be dubious. In any case, he did not think that one should speak of succession in the case of an international organization.

37. Mr. ŠAHOVIĆ said that the ideas behind draft article 73 were acceptable, but the text raised problems which should be clarified in the commentary. He was not unduly concerned about the issue of responsibility. The questions of succession and outbreak of hostilities, by contrast, deserved the Commission’s full attention.

38. As far as succession was concerned, he inquired whether there was any connexion between draft article 73 and articles 3 and 4 of the 1978 Vienna Convention. Article 3 of that convention indicated the scope of the convention in the case of succession of States in respect of international agreements to which other subjects of international law were also parties. Article 4 dealt with treaties constituting international organizations and treaties adopted within an international organization. He inquired what, in the Special Rapporteur’s opinion, would be the possible implications of those two articles for the draft article under consideration. As far as the outbreak of hostilities was concerned, he was not convinced that it was really necessary to discuss all the aspects in the commentary. In his view, the commentary might restate what the Commission had said more than once in the past, without going any further.

39. He added that more concise language should be devised to describe the various cases of succession mentioned in the title and in the body of article 73.

40. Mr. BARBOZA said that he agreed with previous speakers concerning the application of the reservation made in draft article 73 to the responsibility of a State or an international organization.

41. However, the expression “outbreak of hostilities”, which was adopted by the United Nations Conference on the Law of Treaties, might give rise to a number of problems because it was quite broad and rather vague. The Commission would have to face the question whether hostilities could take place between an international organization and a State. As Sir Francis Vallat had said, it was perfectly conceivable and possible that the United Nations might—for example, by a decision by the Security Council under the provisions of Chapter VII of the Charter—find itself involved in military activities against a State. Under the broad terms of draft article 73, such activities could be characterized as “hostilities”.

⁹ See 1589th meeting, foot-note 2.

According to the present wording of the article, it would be hard to say what the potential effect of such hostilities would be on the treaties concluded by the United Nations and the State concerned, because, whereas the case of the outbreak of hostilities between States was precluded by the saving clause of the article, the outbreak of hostilities between an international organization and a State was not. This could mean that the matter was dealt with elsewhere, or that it would be in a future draft, but that was not the case. It therefore should be included in the saving clause of article 73.

42. With regard to the question of the three types of succession affecting international organizations referred to in draft article 73, he said he agreed with the Special Rapporteur that probably a purely drafting problem was involved. He explained, however, that the law of his country and that of many others knew two types of succession: "universal succession", which meant the transfer to the heir of all of the deceased's rights and obligations, and "specific succession", which meant simply the transfer of certain rights and obligations, as in the case where the buyer of a house acquired all the rights and obligations attaching to the house, but not any other of the seller's rights and obligations. No doubt the types of succession contemplated in the Special Rapporteur's draft article 73 were akin to specific succession, which entailed no legal consequences other than those arising out of the succession itself. Accordingly, he agreed with Sir Francis Vallat that the draft article under consideration might give rise to confusion and that it should therefore be discussed in greater detail by the Drafting Committee.

43. Mr. USHAKOV said that, in considering draft article 73, the Commission should steer clear of political questions, and in particular should not consider the issue whether in some particular case the United Nations was engaged in activities having the semblance of hostilities.

44. As in the case of many others of the draft provisions, the Commission, in considering draft article 73, should distinguish the position of States from that of international organizations. It should take account of article 3 of the Vienna Convention, which contained a saving clause regarding the applicability of the Convention to relations between States that were governed by international agreements to which other subjects of international law were also parties. Perhaps a new paragraph 1 might be inserted at the beginning of draft article 73, to read:

"The provisions of the present articles shall not prejudice any question that may arise in regard to a treaty concluded between two or more States and one or more international organizations in consequence of a succession of States, or by reason of the international responsibility of a State or in consequence of the outbreak of hostilities between States."

45. The position of international organizations was entirely different from that of States. It was not possible, for example, to speak of hostilities between an international organization and another international organization or a State. Enforcement measures that might be taken in accordance with the Charter of the United Nations against a State or another subject of international law could not, even if they involved the use of armed force, be considered as hostilities. Similarly, as Sir Francis Vallat had observed, the notion of succession, as defined in the 1978 Vienna Convention, did not apply to international organizations. The notion of responsibility of international organizations was not yet very clear, but it had to be mentioned.

46. Some special cases should be taken into consideration, or should even be the subject of a saving clause in the draft articles. It could happen that a State member of an organization and party to a treaty with it withdrew from the organization. It could also happen that a State member of an organization was excluded from that organization and that a multilateral treaty existed to which that State was a party and which imposed on it as a member State obligations towards the organization. The State and the organization in question might be bound by a technical assistance treaty establishing relations between them by virtue of the State's membership of the organization concerned. It was also conceivable that an international organization might, in accordance with its constitution, take action vis-à-vis a member State or even vis-à-vis a non-member State. What would be the repercussions of such legitimate action on a treaty between the State and organization concerned? The question was related in part to article 27,¹⁰ but it would be desirable to consider it in the context of draft article 73.

47. To avoid making article 73 too cumbersome, and in particular to avoid changing its title, the Commission might add, after article 73, an article dealing with the relationship between an international organization and one of its member States, or a non-member State, in cases where that organization had concluded a bilateral or multilateral treaty to which the State concerned was a party and where a situation arose which had consequences not covered by the relevant draft articles.

48. Mr. TSURUOKA said that, in his view, the three areas mentioned in the corresponding provision of the Vienna Convention should be excluded from the scope of the draft articles. Aside from the questions raised by Mr. Ushakov and Sir Francis Vallat, what was essentially required was to make drafting changes in article 73 of the Vienna Convention that would take account of questions concerning international organizations.

¹⁰ See 1585th meeting, foot-note 3.

49. He suggested that the phrase “from a succession of States, from a succession of international organizations or from a succession of a State to an international organization or of an international organization to a State” should be simplified by replacing it with the phrase “from a succession concerning a State or an international organization or a State and an international organization”. He further suggested that the words “between States” at the end of the article should be deleted so as not to exclude cases concerning international organizations. If that was unacceptable, the words “between States” might be replaced by the words “between the parties to the treaty”.

50. Mr. SCHWEBEL said that, unless a better term could be found, he would have no objection to the use of the term “succession of international organizations” in draft article 73. His recollection was that when the Commission had divided the topic of succession into various components, it had referred to the succession of international organizations,¹¹ and he did not think that that term had been challenged at that time. There were indeed cases of succession of international organizations, stellar examples of which were the succession of the International Court of Justice in substance to the Statute, rules of procedure and jurisprudence of the Permanent Court of International Justice, and the functional succession of the United Nations to the League of Nations.

51. He noted that the question of the responsibility of international organizations had been considered even in the most classical circumstances, such as in the case of *Reparation for Injuries Suffered in the Service of the United Nations*,¹² when the capacity of an international organization to maintain an international claim for damages against a State had been sustained, and in the case of *Certain Expenses of the United Nations*,¹³ in which expenses authorized by the General Assembly and paid by the Secretary-General had been held to be expenses of the organization within the meaning of Article 17, paragraph 2 of the Charter.

52. In the circumstances, he thought that the addition of a draft article 73 *bis* in order to accommodate the singularities of international organizations would be reasonable.

53. Mr. RIPHAGEN said the Commission should bear in mind that, since the draft articles contained paragraph 3 of article 42,¹⁴ which provided that the suspension of the operation of a treaty could take place only as a result of the application of the treaty or of the present articles, draft article 73 was, for purely legal reasons, absolutely essential. Without it, no other

circumstance could ever lead to the suspension of the operation of a treaty, because it would not be governed by the draft articles.

54. In adapting the wording of article 73 of the Vienna Convention, the Commission should take account of treaties to which international organizations were parties and of the responsibility of those organizations. It should also consider the possibility of referring, in draft article 73, to the dissolution of an international organization since the Vienna Convention was, quite naturally, silent on the question of the effect of the dissolution of an international organization on a treaty between States.

55. Referring to the question of hostilities, he said he was of the opinion that an international organization, and in particular the United Nations, could be engaged in hostilities with a State, and that such hostilities might lead to the suspension of the operation of a treaty between that organization and that State. That point also had to be taken into account because of the existence of article 42.

56. He said he had the feeling that cases in which an international organization was a party to a treaty to which some of its member States were also parties might not always be treated in the same way as cases of treaties between an international organization and a State which was not a member of that organization.

Organization of work (continued)*

57. The CHAIRMAN announced that the Enlarged Bureau had drawn up the following tentative timetable for the Commission's consideration, in the order given, of the topics before it at the thirty-second session:

| | |
|--|-------------|
| 1. Question of treaties concluded between States and international organizations or between two or more international organizations (item 3) | 14 meetings |
| 2. Jurisdictional immunities of States and their property (item 5) | 4 meetings |
| 3. Succession of States in respect of matters other than treaties (item 1) | 5 meetings |
| 4. Law of the non-navigational uses of international watercourses (item 4) | 5 meetings |
| 5. State responsibility (item 2); first part of the topic | 13 meetings |
| 6. State responsibility (item 2): second part of the topic | 4 meetings |
| 7. International liability for injurious consequences arising out of acts not prohibited by international law (item 7) | 3 meetings |
| 8. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (item 6) | 3 meetings |

The tentative timetable was approved.

The meeting rose at 1.05 p.m.

¹¹ See *Yearbook* . . . 1968, vol. II, p. 214, document A/7209/Rev.1, para. 34.

¹² *Advisory Opinion, I.C.J. Reports 1949*, p. 174.

¹³ *Advisory Opinion, I.C.J. Reports 1962*, p. 151.

¹⁴ See 1585th meeting, foot-note 3.

* Resumed from the 1584th meeting.

1592nd MEETING

Friday, 16 May 1980, at 10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/327)

[Item 3 of the agenda]

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

ARTICLE 73 (Cases of State succession, succession of international organizations, succession of a State to an international organization and succession of an international organization to a State, responsibility of a State or of an international organization and outbreak of hostilities¹ (*concluded*))

1. Mr. RIPHAGEN said that treaties to which an international organization could be a party differed widely, although broadly speaking they fell into three main categories: first, those which placed an international organization on the same footing as the other parties, such as a headquarters agreement between the United Nations and a host country; secondly, those which placed an international organization in a somewhat inferior position because it did not enjoy full participation, as in the case covered by subparagraph 3 (b) of draft article 19 *ter*;² and thirdly, those treaties which placed an international organization in a superior position, such as the mandate agreements between the League of Nations and a Member State.

2. In his view, the draft articles were not sufficiently clear as to the different effects that the various categories of treaty could have on the position of international organizations that were parties to them. It did, however, contain certain indications. For instance, subparagraph 3 (a) of draft article 19 *ter*, which laid down a procedural rule, provided that the tasks assigned to the international organization by the treaty would affect that organization's position regarding reservations, while article 62,³ which laid down a substantive rule relating to a fundamental change of circumstances, suggested that different considerations

would apply when the parties to the treaty were not in a position of complete equality. In his opinion, a problem of a general nature was involved, since the differences in treaties to which an international organization might be a party could result in departures from the general rules. The Commission might wish to consider how that problem affected the wording of draft article 73.

3. The CHAIRMAN, speaking as a member of the Commission, said that he recognized the need for a provision along the lines of article 73 of the Vienna Convention,⁴ so as to cover the cases to which the treaty principles did not apply.

4. The use of the term "succession" had given rise to considerable discussion in the Commission. It had rightly been noted that, in the context of "succession of States", the meaning of that term had crystallized in the specific sense of succession to rights in regard to territory, but the same meaning did not apply in the case of replacement of one organization by another, or of an international organization by a State, or of a State by an international organization. For want of a better term however, he had no objection to the use of "succession" in the context of draft article 73, since it introduced the idea of an orderly and uninterrupted transfer of powers from one entity to another, without prejudice to the extent of the powers so transferred. Such transfer could be partial or complete, but it was obvious that the predecessor State or organization could not transfer to the successor State or organization greater powers than it actually possessed. The Drafting Committee might, however, have some more appropriate term to suggest for the Commission's consideration.

5. Like Mr. Tsuruoka and other members of the Commission, he thought that the title of the draft article was unduly long. It could simply be: "Succession, international responsibility and outbreak of hostilities", since those matters were elaborated upon in the body of the draft article.

6. Mr. REUTER (Special Rapporteur), summing up the discussion, noted that, on the whole, the members of the Commission were in favour of a provision such as draft article 73. They hoped that it would be drafted in the light of the corresponding provision of the Vienna Convention, but many of them had wondered whether it would not be advisable to supplement, clarify or expand the cases enumerated in the Vienna Convention. The wording to be used for that purpose posed some difficulties. Mr. Tsuruoka had taken the view (1591st meeting) that the text should depart as little as possible from that of the Vienna Convention. Mr. Ushakov had suggested (*ibid.*) that the draft article should be split in two, bearing in mind article 3 of the Vienna Convention, which reserved the possibility of

¹ For text, see 1591st meeting, para. 22.

² See 1585th meeting, foot-note 3.

³ For text, see 1586th meeting, para. 33.

⁴ See 1585th meeting, foot-note 1.

applying the Convention to the relations of States as between themselves under international agreements to which other subjects of international law were also parties.

7. It was not the treaties covered by the draft article that he himself was disinclined to dissociate, but the relations in question, whether they were relations between States, or relations between one or more States and one or more international organizations, or between several international organizations. Not only would such dissociation lead to complications, it would not be keeping with the intention of the authors of article 73 of the Vienna Convention. That provision existed because of the fears expressed at the United Nations Conference on the Law of Treaties in connexion with part V of the Convention. Article 42 had been drafted in order to allay those apprehensions, and it was apparent from that article that the only cases in which a treaty could be invalidated, terminated or suspended were those provided for in the Convention. Article 73 had been prepared because it was obvious that the Convention did not cover every possible case; it was a safeguard clause listing three matters on which there were perhaps some rules that, in cases not provided for by the Vienna Convention, would have the effect of terminating or suspending a treaty (not to mention the highly unlikely case in which it would be void). One such matter, included as the result of an amendment proposed by Hungary and Poland,⁵ was an outbreak of hostilities. In that respect, the Conference had not had to decide whether there was still a rule of international law which established that certain treaties were suspended or terminated in the event of hostilities. With regard to those three matters, it had simply adopted a negative attitude, and it was apparent that the Vienna Convention did not rule out the existence, in other fields, of cases in which treaties would be suspended or terminated.

8. Consequently, if the Commission sought in draft article 73 to improve on the text of the corresponding provision of the Vienna Convention and to mention other cases it would in no way be stating that such cases did exist. It would simply be recognizing the existence of areas that still had to be explored, like the *terra incognita* of the ancient geographers. That would be so if it mentioned the responsibility of international organizations.

9. However, the Vienna Convention had entered into force and the Commission would be assuming a heavy responsibility if it endeavoured to interpret that instrument by trying, for example, to assess the scope of such expressions as "succession of States" and "outbreak of hostilities". In doing so, it would run the

risk of creating uneasiness not only among States that were planning to ratify or accede to the Vienna Convention but also among those which were already bound by the Convention. It was therefore more prudent to consider the background of the Convention and to interpret the matters listed in article 73 in their broadest sense.

10. It could be assumed, for example, that the expression "succession of States" had been used at the Conference on the Law of Treaties in a very broad sense. Could it be asserted, without giving rise to doubts among certain States parties to the Vienna Convention, that the concept of succession of States in respect of treaties excluded succession of Governments? After all, some States maintained that succession of Governments had certain effects on treaties. Such a Government held that a number of treaties concluded on behalf of the State which it represented had been concluded by a usurper, so that the State was no longer bound by them. However, other treaties dating from the reign of the usurper had been concluded by a Government which it recognized as the Government of that State. Moreover, in the age of monarchies, it had been thought that treaties would lapse upon the death of the monarch and that they had to be renewed by the succeeding monarch. Accordingly, it would be wise for the Commission to refrain from asserting that no economic or social change could have any effect on treaties and that it considered that the expression "succession of States" referred to all problems connected with the concepts of the continuity and the identity of the State.

11. It was obvious that the expression "responsibility of a State" did not cover only the cases referred to in the set of draft articles being elaborated on the subject; it could extend to sanctions and countermeasures. As to the question of whether the expression "outbreak of hostilities" extended to armed action preceded by other measures of coercion, he observed that coercive measures, even if taken by a State, could be legal in character only when they took the form of application of sanctions or countermeasures. It was important, therefore, to refrain from interpreting such expressions in the Vienna Convention and, in cases of doubt, to take them in their broadest sense.

12. Some of the suggested amendments or additions would, if accepted, have consequences both for the treaties referred to in the draft and for treaties between States. Adding more to the article under consideration than was in the corresponding article in the Vienna Convention would sometimes bring out certain flaws in that instrument. That risk was not in itself serious enough for the Commission to abandon the undertaking, but it did call for hesitation.

13. For instance, the Vienna Convention contained nothing about recognition, since that question was highly political. It might well be asked, however, whether the legal rules that might exist on recognition and withdrawal of recognition had an effect on treaties.

⁵ 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. 199, document A/CONF.39/14, para. 636 (a).

Some people would take the view that the question came under the concept of "succession of States", if indeed that expression also covered succession of Governments—in other words, the whole topic of the continuity and the identity of the State.

14. Moreover, if the article under consideration covered, if not an outbreak of hostilities by an international organization, then at least certain measures that could be taken by an international organization, such an assumption would, as often as not, have repercussions on the relations between States and would reveal a lacuna in the Vienna Convention. For that reason, he would have preferred not to depart from that Convention, although, after hearing the discussion, that no longer seemed possible. If the subject were not so complicated, the Commission might solve the problem by affirming, as the General Assembly had done for the purposes of the definition of aggression, that the term "State" included the concept of a group of States.

15. Above all, it was necessary to take the problems one by one and to begin with the easiest. Since article 73 of the Vienna Convention referred to "responsibility of a State" and not just "responsibility", it seemed only right, in the article under consideration, to refer to the "responsibility of a State or of an international organization". The question of an outbreak of hostilities was therefore made simpler. After all, once it was recognized that the responsibility of an international organization did exist and that the question of responsibility could be extended to cover sanctions and countermeasures, the problems that arose in connexion with the notion of an outbreak of hostilities came under the heading of responsibility. Accordingly, the expression "outbreak of hostilities between States" did not create any difficulties; at most, it could be supplemented—as Sir Francis Vallat had suggested at the previous meeting—with a phrase such as: "whether or not involving an international organization".

16. The question remained of possible changes in the relations between an international organization and its member States. He had used the term "succession" in all cases because it was based on a certain amount of common sense. In private law, succession related to rights and obligations; as applied to States, it was also connected with the transfer of rights and obligations.

17. Unlike Mr. Riphagen (1591st meeting), he thought that the establishment of an international organization, in the same way as the dissolution of an international organization, could have effects on treaties other than treaties concluded between States. For example, twelve States might conclude a convention on the publication of customs tariffs and four of those States might then establish a customs union. Would the obligations assumed by those four States under the convention in question come to an end? Would the international organization become a party to that convention as a matter of right? Those

questions undoubtedly fell within the purview of the Vienna Convention, since they involved a treaty concluded between States, but they had been passed over in silence in that instrument. Conversely, if some twenty States concluded a treaty with a pre-existing customs union and six of them subsequently decided to set up another customs union, the question would be that of the effects of the establishment of that international organization on a treaty between States and an organization.

18. Mr. Ushakov, for his part, at the previous meeting had envisaged the case in which an international organization, after concluding a treaty, found that member States withdrew from the organization. The problem of the effects of such a situation on treaties was bound up with that of the identity and the continuity of international organizations, for which no solution had yet been found. The effects of the expulsion of a member State came within an equally unknown field. It was nevertheless true that situations of that kind could have effects on treaties, and that a reservation was absolutely necessary.

19. Perhaps the Drafting Committee might make a reservation in cases in which a question arose "because of a change in the relations between the organization and its member States", a formula that covered not only cases of the birth or dissolution of an organization and withdrawal of a member State but also cases in which the competence of an international organization was changed without any change in its member States.

20. Mr. USHAKOV said he endorsed the Special Rapporteur's appeals for caution in interfering too much with the text of the Vienna Convention. The proposed wording for the article under consideration had the disadvantage of unduly enlarging the scope of the Convention, and particularly article 3 thereof. Draft article 73 covered any "treaty" of any kind. Hence it might be inferred, for example, that a State succession could affect a treaty concluded between international organizations, that the responsibility of an international organization could affect the relations between States parties to a treaty which they had concluded with one or more international organizations, or again, that an outbreak of hostilities between States could affect a treaty concluded between international organizations. For that reason, he had already proposed that relations between States under the Vienna Convention should be singled out for separate treatment by specifying that, in the case of a treaty concluded between two or more States and one or more international organizations, the situation was that envisaged in the Vienna Convention. The Commission could then deal with the other cases. The Drafting Committee, taking due account of the need to avoid broadening the scope of the Vienna Convention, might try to word the article under consideration from that point of view.

21. Mr. REUTER (Special Rapporteur) expressed the hope that Mr. Ushakov would submit a written proposal to the Drafting Committee.

22. On the one hand, Mr. Ushakov would like to divide the article under consideration into two subparagraphs, the first relating to treaties between two or more States and one or more international organizations and the second to treaties between international organizations. With regard to treaties in the latter category, it was often more difficult to invoke the matters enumerated in article 73. On the other hand, with regard to treaties in the first category, Mr. Ushakov would like to single out relations between States in order to ensure that such relations were subject exclusively to the Vienna Convention, since relations between international organizations, and especially relations between international organizations and States, might call for a lengthier enumeration. It would be more difficult to convince him (Mr. Reuter) about the latter point than about the division of the draft article into two paragraphs.

23. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft article 73 to the Drafting Committee.

*It was so decided.*⁶

ARTICLE 74 (Diplomatic and consular relations and the conclusion of treaties)

24. The CHAIRMAN invited the Special Rapporteur to introduce draft article 74 (A/CN.4/327), which read:

Article 74. Diplomatic and consular relations and the conclusion of treaties

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States and one or more international organizations. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

25. Mr. REUTER (Special Rapporteur) said that draft article 74 was on the same lines as article 63,⁷ which had already been considered by the Commission and was related to the over-all problems of diplomatic or consular relations on the one hand, and the law of treaties on the other.

26. He drew attention to an ambiguity, for which he was responsible, in the second sentence of the draft article. In that provision the word "treaty" did not signify every kind of treaty but a treaty "between two or more States and one or more international organizations", a point that should be made clear.

27. Mr. QUENTIN-BAXTER noted that the first sentence of draft article 74 was so condensed that it defeated the intention. The relations referred to in that sentence were in fact the relations between States that were parties to treaties between two or more States and one or more international organizations.

28. He therefore suggested that the last part of the first sentence, following the word "prevent", should be amended to read: "the conclusion between those States of treaties between two or more States and one or more international organizations". The Special Rapporteur's point could then be met by rewording the first part of the second sentence to read: "The conclusion of such a treaty . . .".

29. Mr. USHAKOV supported the idea of clarifying the meaning of the word "treaty" in the second sentence of the draft article by adding the words "between two or more States and one or more international organizations". It might also be useful to make it clear that the first sentence referred to treaties "between two or more of those States and one or more international organizations". He would not press that point for the moment, however. His comment was principally intended for the Drafting Committee.

30. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft article 74 to the Drafting Committee.

*It was so decided.*⁸

ARTICLE 75 (Case of an aggressor State)

31. The CHAIRMAN invited the Special Rapporteur to introduce draft article 75 (A/CN.4/327), which read:

Article 75. Case of an aggressor State

The provisions of the present articles are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

32. Mr. REUTER (Special Rapporteur) pointed out that the corresponding article of the Vienna Convention, which had been adopted by an overwhelming majority, none the less gave rise to certain legal and political problems. At the time, the Conference on the Law of Treaties could envisage only treaties between States, but it was now conceivable that the problem covered by article 75 might arise in the case of a treaty falling under the terms of the present set of draft articles; hence the need to make such a provision.

33. Draft article 75 related only to aggression by a single State, yet he had not considered it necessary to

⁶ For consideration of the text proposed by the Drafting Committee, see 1624th meeting, paras. 30 *et seq.*

⁷ For text, see 1587th meeting, para. 40.

⁸ For consideration of the text proposed by the Drafting Committee, see 1624th meeting, paras. 30 *et seq.*

expand on that idea. General Assembly resolution 3314 (XXIX), setting out the Definition of Aggression, was not binding on States, but practice and the approval of States conferred some importance on the Definition, which covered the case of aggression by a group of States.

34. On a question which he had hitherto overlooked, he wondered whether the word "treaty" should be taken in its broadest sense or whether it should be viewed in a narrow sense. In the case covered by the Vienna Convention, an aggressor State which had not expressly participated in the adoption of measures taken in conformity with the Charter could, by virtue of articles 34 to 37, concerning the inapplicability of treaties to third parties, claim that it was not bound by the treaty. Article 75 would thus be a derogation from the rule of the relativity of treaties, in which case the expression "in relation to a treaty" should be retained; however, he experienced some doubt in that regard.

35. Mr. ŠAHOVIĆ said that there was no difficulty as to the substance of the draft article, but clarification was needed on certain points, and particularly on the interpretation to be given to the expression "aggressor State". He was not opposed to the idea that, in the Definition of Aggression, the term "State" might include the concept of "a group of States", but he wondered whether international organizations could be completely assimilated with groups of States.

36. An international organization was indeed a group of States, but he questioned whether it was possible to dispense with explanations in the context of the draft articles, since the concept of an international organization had to be very broad. The problem also depended on the Commission's practice and on the interpretation given by States to the expression "international organization". That expression had already been clearly defined in article 2⁹ and in article 1 of the 1975 Vienna Convention,¹⁰ under which international organizations comprised intergovernmental organizations, and some of them, such as the United Nations and the specialized agencies, were of a universal character. He was convinced that the Special Rapporteur would find a satisfactory answer to that question, which should at least be referred to in the commentary.

37. Mr. USHAKOV said that the expression "in relation to a treaty" gave rise to difficulties, since certain obligations could also derive from a treaty, such as a treaty between international organizations. The result would be a corollary to the corresponding provision of the Vienna Convention. As for "measures taken in conformity with the Charter of the United Nations", such measures could not include those taken in the case of an outbreak of hostilities—an eventuality

that was covered by draft article 73 and one to which he had already raised objections. The consequences of the measures taken against an aggressor State, even against a member State, might be treated as *terra incognita* in the context of the draft articles, but provisions applicable to the relations between international organizations and the member States would have to be included. Lastly, with reference to foot-note 49 of the report (A/CN.4/327), he did not consider it possible for an international organization to be viewed as a group of States. Draft article 75 could therefore be referred to the Drafting Committee.

38. Sir Francis VALLAT said that one point of concern was the concept of the use of armed force by a group of States, whether acting individually or through an international organization. It was all too easy to push the possibility to one side on the assumption that it would never happen, but he doubted whether that was the right attitude. For example, Article 53 of the Charter of the United Nations provided for the possibility of enforcement action taken under regional arrangements or by regional agencies. It was not putting any undue interpretation on that Article to say that a regional arrangement or agency might, and indeed did, include an international organization, or to say that enforcement action might and did include the use of armed force. It could perhaps be argued that action under Article 53 of the Charter must be taken only with the authorization of the Security Council, except in the case of an enemy State or former enemy State. But life was not so simple. It was perfectly possible that a regional agency might, in an emergency, take armed action before obtaining such authorization. Would that not be a case of aggression in substance, even if it did not fall strictly within the definition of the term—and should it not therefore be covered by draft article 73 or, if such authorization was granted in conformity with the Charter, by article 75? The whole question merited examination within the context of those two draft articles, which, as Mr. Šahović had rightly pointed out, were interrelated.

39. Mr. REUTER (Special Rapporteur) said he too was of the opinion that a group of States did not necessarily constitute an international organization. The General Assembly had chosen such a vague term devoid of legal substance so as to cover all possible cases, including that of international organizations properly speaking. In the context of draft article 75, the international organizations in question would be those which, as such, had treaty-making capacity, i.e. to act in the sphere of international law. Hence, it was not a question of placing international organizations on the same footing as groups of States, but the Definition of Aggression, which applied to so vague a notion as that of a group of States, must also apply to international organizations.

40. Mr. USHAKOV, referring to Sir Francis Vallat's comments, said that it was not the Commission's task to interpret the Charter, and specifically Article 53

⁹ See 1585th meeting, foot-note 3.

¹⁰ See 1587th meeting, foot-note 12.

thereof. He wished to point out, however, that in his opinion regional organizations could not take coercive measures against a State without the authorization of the Security Council.

41. Sir Francis VALLAT observed that there were circumstances in which the Commission had to take a position with regard to the obvious meaning of an international instrument. He fully agreed that, in principle, a regional organization should not take coercive action without the authorization of the Security Council. Nevertheless, his point had been that perhaps the Commission could not afford to overlook the possibility that a regional organization might take such action without obtaining the necessary authorization.

42. The CHAIRMAN, noting that there were no further comments, invited the Commission to refer draft article 75 to the Drafting Committee.

*It was so decided.*¹¹

ARTICLE 76 (Depositaries of treaties)

43. The CHAIRMAN invited the Special Rapporteur to introduce part VII of the draft articles (Depositaries, notifications, corrections and registration), and specifically draft article 76 (A/CN.4/327), which read:

Article 76. Depositaries of treaties

1. The designation of the depositary of a treaty may be made by the negotiating States and the international organizations having participated in the negotiations, either in the treaty itself or in some other manner. The depositary may be one or more States, one or more international organizations or the chief administrative officer of one or more international organizations.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State or an international organization and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

44. Mr. REUTER (Special Rapporteur) said that part VII of the draft consisted mainly of technical articles, which required careful reading but did not appear to pose any serious difficulties. The principles enunciated in article 76 of the Vienna Convention had been adopted unanimously. In order to adapt that provision to the present set of draft articles, it had been necessary to refer to international organizations along with States.

45. There was a minor problem in that the Vienna Convention had provided for the possibility of more than one depositary, a practice that had become widespread in order to honour certain States and to

meet political requirements. The question therefore was whether the option of designating more than one depositary should be extended to international organizations. He had considered it useful to provide for that possibility, since there was no reason to deny international organizations the benefit of such an arrangement, but he would support any solution favoured by members of the Commission.

The meeting rose at 11.55 a.m.

1593rd MEETING

Monday, 19 May 1980, at 3.05 p.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/327)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPOREUR (continued)

ARTICLE 76 (Depositaries of treaties)¹ (concluded)

1. Mr. USHAKOV proposed that, in order to bring the wording of the first sentence of draft article 76, paragraph 1, into line with that of the following articles, the words "or by the international organizations having participated in the negotiations" should be added after the words "by the negotiating States and the international organizations having participated in the negotiations". He also noted that the words "the chief administrative officer of one or more international organizations" might give rise to incorrect interpretations.

2. The text of article 76 of the Vienna Convention² did not rule out the possibility of the States parties to a treaty designating two international organizations as depositaries, although no such case had yet occurred in practice. The list given in the article was indicative rather than exhaustive; the Commission might therefore reproduce the text of the Vienna Convention word for word, so as to avoid conflicts of interpretation between the draft articles and the Convention.

¹¹ For consideration of the text proposed by the Drafting Committee, see 1624th meeting, paras. 30 *et seq.*

¹ For text, see 1592nd meeting, para. 43.

² See 1585th meeting, foot-note 1.

3. Mr. FRANCIS said that article 76, paragraph 1, of the Vienna Convention, which provided that an international organization or the chief administrative officer of the organization could be the depositary of a treaty, reflected the practice of designating the United Nations or the Secretary-General of the United Nations as the depositary of multilateral treaties. In view of the subject-matter of the Convention, that article could hardly have referred to the possibility of having several depositary international organizations, but he did not think it too far-fetched to say that, in the case of treaties between international organizations, there could be the same multiplicity of depositaries as in the case of treaties between States. If it was agreed that article 76, paragraph 1, of the Vienna Convention could be interpreted to mean that more than one international organization could be depositaries of a treaty, he would have no objection to the inclusion of such a provision in draft article 76, paragraph 1.

4. Mr. ŠAHOVIĆ said that he would like the commentary to draft article 76 to explain the relationship between the three categories of depositaries enumerated in paragraph 1 and, in particular, why the text expressly mentioned "the chief administrative officer of one or more international organizations".

5. Mr. TABIBI said that the rule relating to depositaries embodied in draft article 76 was an important one because it conferred universality, legality and finality on international conventions and treaties. He therefore fully supported the draft article.

6. Nevertheless, the commentary to the draft article should, for the sake of clarity, explain in what "other manner"—apart from in the treaty itself—the designation of the depositary of the treaty might be made by the negotiating States and the international organizations having participated in the negotiations.

7. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft article 76 to the Drafting Committee.

*It was so decided.*³

ARTICLE 77 (Functions of depositaries)

8. The CHAIRMAN invited the Special Rapporteur to introduce draft article 77 (A/CN.4/327), which read:

Article 77. Functions of depositaries

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States and international organizations or the contracting international organizations, as the case may be, comprise in particular:

(a) keeping custody of the original text of the treaty and of any full powers delivered to the depositary;

(b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States and international organizations entitled to become parties to the treaty;

(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State or international organization in question;

(e) informing the parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(f) informing the States and international organizations entitled to become parties to the treaty when the number of signatures or of instruments of ratification, formal confirmation, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

(g) registering the treaty with the Secretariat of the United Nations;

(h) performing the functions specified in other provisions of the present articles.

2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention, as the case may be, of the signatory States and organizations and of the contracting States and organizations, or of the signatory organizations and the contracting organizations or, again, where appropriate, of the competent organ of the international organization which assumes the functions of depositary.

9. Mr. REUTER (Special Rapporteur) said that draft article 77 was a technical provision which, in the Vienna Convention, had been adopted unanimously, together with the other articles that made up the corresponding part of that instrument.

10. The adaptation of article 77 of the Vienna Convention to the set of draft articles nevertheless involved a problem of presentation, one to which Mr. Ushakov had rightly drawn attention in connexion with draft article 76 and which would arise later in connexion with draft article 79,⁴ since the three articles expressly referred to the various categories of signatory and contracting entities.

11. There were three possible solutions. The first would be to divide draft article 77 into two parts (or even two articles), the first relating solely to treaties between States and international organizations, and the second to treaties between two or more international organizations. Such a solution would be clumsy and might surprise Governments, especially since the Government of Canada had already suggested that the wording of the draft should be simplified.⁵ The second solution would be the one

⁴ For text, see para. 38 above.

⁵ See *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 41st meeting, para. 34; and *ibid.*, *Sessional fascicle*, corrigendum.

³ For consideration of the text proposed by the Drafting Committee, see 1624th meeting, paras. 30 *et seq.*

followed in the draft article, namely, to use the words “the contracting States and international organizations or the contracting international organizations”. Lastly—and the Commission had already met with the problem in connexion with draft article 16—it would be possible to propose a new introductory definition and then refer in the text to “contracting parties” and “signatory parties”. When the Commission came to consider draft article 79, it would be able to decide whether the second solution made the wording of the draft article too cumbersome.

12. Subparagraph 1(*f*) referred to “formal confirmation”, which did not appear in the corresponding subparagraph of article 77 of the Vienna Convention. He pointed out that when the Commission had considered the conclusion of treaties it had been of the opinion that the final approval of treaties by international organizations could not be referred to as ratification. “Formal confirmation” by international organizations thus corresponded to ratification in the case of States.

13. Lastly, he drew attention to an inaccuracy in the text of the Vienna Convention which was also found in the draft articles. Article 77, paragraph 1 (*g*), referred to the registration of treaties, although in United Nations practice the term “registration” could not be used in the case of treaties to which no party was a Member of the United Nations. In such instances, use was made of the terms “filing and recording”, which did in fact appear in the text of article 80 of the Vienna Convention. An involuntary error had thus been made in the drafting of article 77 of the Convention. The Commission must therefore decide whether to remain faithful to the text of the Convention and draw attention to the error in the commentary or to amend it at the risk of highlighting the inaccuracy.

14. Mr. CALLE Y CALLE said that, although draft article 77 did not in his opinion give rise to any great difficulties, the distinction between “registration of treaties” and “filing and recording of treaties” that had been explained by the Special Rapporteur had not been clearly spelled out in the Spanish text of foot-note 59 in the Special Rapporteur’s commentary, which referred to “registro” and “archivar y registrar”. That distinction was made clearly, however, in draft article 80, paragraph 1,⁶ which used the terms “registro” and “archivo e inscripción”.

15. At the end of draft article 77, paragraph 2, the words “the competent organ of the international organization which assumes the functions of depositary” should be replaced by the words, “the competent organ of the depositary international organization”, in order to maintain a correlation with article 77 of the Vienna Convention on the Law of Treaties, which referred to “the competent organ of the international organization concerned”.

16. Mr. USHAKOV said that, in principle, he endorsed the text of the draft article.

17. He wished, however, to draw attention to a problem posed by subparagraph 1 (*g*). Article 102 of the Charter required every Member of the United Nations which entered into a treaty or international agreement to register it with the Secretariat of the United Nations as soon as possible, but was the Secretary-General allowed to register, file or record treaties entered into by international organizations? If not, the beginning of subparagraph 1(*g*) should be amended to read: “registering, where appropriate, the treaty . . .” in order to provide for the possibility of making a distinction between different types of contracting parties.

18. In subparagraph 1(*a*), the words “or powers” should be added after the words “full powers” so as to allow for cases in which international organizations were involved. In subparagraph 1(*b*), the words “or to the international organizations” should be inserted after the words “international organizations”; and in subparagraph 1(*f*), the words “or the international organizations” should be added after the words “the States and international organizations”.

19. In paragraph 2, the words “or, again, where appropriate,” should be replaced by the words “or, as the case may be,”; and in the last line, the phrase “which assumes the functions of depositary” should be deleted, in accordance with the proposal made by Mr. Calle y Calle.

20. Sir Francis VALLAT, referring to the problem connected with draft article 77, subparagraph 1(*g*), said that the wording of the introductory part of paragraph 1, which stated that “The functions of a depositary . . . comprise in particular”, made it quite clear that the list of functions given in subparagraphs (*a*) to (*h*) was not an exhaustive one. The omission of the function of “filing and recording” from subparagraph 1(*g*) was thus less important than it would have been if the list of functions were exhaustive.

21. In view of the terms of Article 102 of the Charter of the United Nations, a difference did exist between article 80 of the Vienna Convention and draft article 77, subparagraph 1(*g*). In his opinion, subparagraph 1(*g*) had been drafted in contemplation of the obligation to register treaties imposed by Article 102 of the Charter. Whether it should also have contemplated the obligation embodied in article 80 of the Vienna Convention was another matter. There was, however, a clear distinction between “filing and recording” (an obligation under article 80 of the Vienna Convention) and “registration” (an obligation under Article 102 of the Charter). The distinction was not without significance, because Article 102, paragraph 2, of the Charter imposed a sanction that would not apply in the case of article 80 of the draft or article 80 of the Vienna Convention. The sanction could not apply to an international organization, particularly in the

⁶ For text, see para. 42 below.

context of Article 102, paragraph 1, which referred expressly to any treaty entered into by any Member of the United Nations. Hence Article 102 of the Charter distinguished between States and international organizations, for the latter could not be Members of the United Nations.

22. What had happened was that draft article 77, paragraph 1 (g), had followed the technique of Article 102 of the Charter rather than the technique of article 80 of the Vienna Convention. In his opinion, the absence of a provision in paragraph 1 (g) concerning the function of "filing and recording" in the case of a treaty between two international organizations was not too serious because the function was one that could readily be performed by an international organization. He therefore thought that the wording of draft article 77, paragraph 1 (g), should be based on that of article 77, paragraph 1 (g), of the Vienna Convention and that the problem should be explained in the commentary.

23. Mr. REUTER (Special Rapporteur) said that he had no objection to the comments concerning the wording of the draft article. Mr. Ushakov's remarks were very much to the point, and it also seemed possible to delete from paragraph 2 the phrase "which assumes the functions of depositary", as Mr. Calle y Calle had proposed.

24. As to paragraph 1 (g), Sir Francis Vallat's view seemed to be akin to that of Mr. Ushakov; in other words, the obligation under Article 102 of the Charter related solely to registration. It was a matter of interpreting article 77 of the Vienna Convention and of determining whether it constituted an authorization or actually established an obligation.

25. Mr. CALLE Y CALLE said that Article 102 of the Charter did not stipulate that all of the parties to a treaty to be registered must be Members of the United Nations. If only one of the States parties to a treaty between several States and one or more international organizations was a Member of the United Nations, that State was under an obligation to register the treaty, in accordance with Article 102, paragraph 1; otherwise, it would not be able to invoke the treaty before any organ of the United Nations because of the terms of Article 102, paragraph 2. The obligation to register a treaty could, however, be shifted to the depositary of the treaty. In other words, a State that was required to register a treaty could fulfil its obligation through the depositary.

26. Mr. REUTER (Special Rapporteur) said that the difficulty stemmed from the fact that there were two concepts of "registration": the Charter obliged Member States to register any treaty to which they were parties, but in United Nations practice the terms "filing and recording" were used for treaties to which an entity other than a Member State was a party. Article 77 of the Vienna Convention seemed to relate to the first concept of registration, whereas article 80 aimed

specifically at distinguishing between the two situations possible. If that was so, the words "or, as the case may be," should be introduced in paragraph 1 (g), in line with the proposal made by Mr. Ushakov.

27. Sir Francis VALLAT said that the Commission might be needlessly complicating the matter under consideration because the draft articles did in fact cover the question of filing and recording. Draft article 80, paragraph 2, stated that:

The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

Accordingly, "filing and recording" would be covered even if they were not mentioned in draft article 77, paragraph 1 (g).

28. Moreover, something approaching an obligation for a depositary State or depositary international organization was created in draft article 80, which provided in paragraph 1 that "Treaties *shall* ... be transmitted ...", and in paragraph 2 that "The designation of a depositary *shall* constitute authorization ...". In view of that obligation, the problem posed by draft article 77, paragraph 1 (g), might be considered relatively unimportant.

29. Mr. REUTER (Special Rapporteur) suggested that the Commission should refer the draft article as a whole to the Drafting Committee.

30. In his opinion, there was no doubt that the general functions of a depositary included that of performing all of the acts mentioned in draft article 77. The words "or, as the case may be" should therefore be added to paragraph 1 (g) and the commentary should indicate that the list of acts was simply indicative and did not rule out the possibility of the depositary performing other similar acts, and in particular that of filing and recording treaties.

31. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft article 77 to the Drafting Committee.

*It was so decided.*⁷

ARTICLE 78 (Notifications and communications)

32. The CHAIRMAN invited the Special Rapporteur to introduce draft article 78 (A/CN.4/327), which read:

Article 78. Notifications and communications

Except as the treaty or the present articles otherwise provide, any notification or communication to be made by any State or any international organization under the present articles shall:

(a) if there is no depositary, be transmitted direct to the States and international organizations for which it is intended, or if there is a depositary to the latter;

⁷ For consideration of the text proposed by the Drafting Committee, see 1624th meeting, paras. 30 *et seq.*

(b) be considered as having been made by the State or international organization in question only upon its receipt by the State or international organization to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(c) if transmitted to a depositary, be considered as received by the State or international organization for which it was intended only when the latter State or organization has been informed by the depositary in accordance with article 77, paragraph 1 (e).

33. Mr. REUTER (Special Rapporteur) said that draft article 78 was a basic and relatively straightforward provision. Its interpretation might nevertheless give rise to difficulties, which he had carefully avoided by simply adapting the wording of the corresponding article of the Vienna Convention.

34. Mr. USHAKOV said that it was chiefly the application, rather than the content, of the draft article that would give rise to difficulties.

35. He proposed that, in subparagraph (a), the words "or to the international organizations" should be inserted after the words "to the States and international organizations".

36. Mr. CALLE Y CALLE pointed out that the wording of the introductory part of the Spanish text of draft article 78, which employed the words "un Estado", should be brought into line with the introductory part of article 78 of the Vienna Convention, which spoke of "cualquier Estado".

37. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft article 78 to the Drafting Committee.

*It was so decided.*⁸

ARTICLE 79 (Correction of errors in texts or in certified copies of treaties)

38. The CHAIRMAN invited the Special Rapporteur to introduce draft article 79 (A/CN.4/327), which read:

Article 79. Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the signatory States and international organizations and the contracting States and organizations or the signatory organizations and contracting organizations, as the case may be, are agreed that it contains an error, the error shall, unless the said States and organizations or, where appropriate, the said organizations, decide upon some other means of correction, be corrected:

(a) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

(b) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or

(c) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and international organizations and the contracting States and organizations or the signatory organizations and contracting organizations, as the case may be, of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

(a) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a *procès-verbal* specifying the rectification and communicate a copy of it to the parties and to the States and organizations entitled to become parties to the treaty;

(b) an objection has been raised, the depositary shall communicate the objection to the signatory States and international organizations and to the contracting States and organizations or to the signatory organizations and contracting organizations, as the case may be.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and organizations and the contracting States and organizations or the signatory organizations and contracting organizations, as the case may be, agree should be corrected.

4. The corrected text replaces the defective text *ab initio* unless the signatory States and international organizations, and the contracting States and organizations, or the signatory organizations and contracting organizations, as the case may be, otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a *procès-verbal* specifying the rectification and communicate a copy of it to the signatory States and international organizations, and to the contracting States and organizations, or to the signatory organizations and contracting organizations, as the case may be.

39. Mr. REUTER (Special Rapporteur) said that article 79 of the Vienna Convention had been adopted without difficulty at the Conference on the Law of Treaties, and that a similar text should be included in the present draft articles. That caused a problem in the wording of the draft article, as he had already noted in the case of article 77. The solution chosen in draft article 79 was admittedly, cumbersome, and the Commission might wish to seek a better solution.

40. Mr. USHAKOV proposed that in paragraph 2 (a) the words "or to the organizations" should be inserted after the words "to the States and organizations".

41. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft article 79 to the Drafting Committee.

*It was so decided.*⁹

ARTICLE 80 (Registration and publication of treaties)

42. The CHAIRMAN invited the Special Rapporteur to introduce draft article 80 (A/CN.4/327), which read:

⁸ *Idem.*

⁹ *Idem.*

Article 80. Registration and publication of treaties

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

43. Mr. REUTER (Special Rapporteur) said that the text of the article was identical to that of article 80 of the Vienna Convention, and should be considered together with article 77. He therefore proposed that draft article 80 be referred to the Drafting Committee.

44. Mr. USHAKOV said he noted from the commentary that the Special Rapporteur considered that the wording of the draft article covered the case of treaties concluded between international organizations. The Commission should, however, ask itself whether that interpretation was borne out by the practice of the Secretariat of the United Nations and whether paragraph 1 of the draft article would place a duty on international organizations to transmit to the Secretariat treaties concluded solely between themselves. It would also be advisable to ascertain whether paragraph 2 imposed an obligation on the Secretariat to file and record agreements between international organizations.

45. Mr. SCHWEBEL said that, in his opinion, draft article 80 meant that treaties between international organizations had to be registered. In other words, international organizations were under an obligation to transmit treaties to the Secretariat of the United Nations for filing and recording. Since international organizations were intergovernmental organizations, and since States, as Members of the United Nations, had to fulfil the obligation set forth in Article 102, paragraph 1, of the Charter, it seemed to follow that, when States acted collectively through an international organization (or, in other words, as an international organization), they also had an obligation to register the treaties that they concluded. Since no question of invidious status arose when a sovereign State registered a treaty with the United Nations, there was no reason why such a question should arise in the case of an international organization. Having regard to the object and purpose of Article 102 of the Charter and to the need for conformity between the texts of the Vienna Convention, the draft articles and the Charter of the United Nations, the correct view was undoubtedly that international organizations were obliged to transmit their treaties to the Secretariat of the United Nations for registration or filing and recording.

46. Mr. REUTER (Special Rapporteur) said that the English version of draft article 80 dispelled any ambiguity, since the word "shall" implied an obligation, which would none the less be incurred only by organizations to which the draft articles applied. The same problem also arose in regard to the application of the Vienna Convention, under which a State that was

not a member of the United Nations yet a signatory of the Convention would, when it became a party to a treaty, be required to transmit the treaty to the Secretariat of the United Nations for filing and recording.

47. Mr. FRANCIS said that, in his view, paragraph 1 of draft article 80 imposed a mandatory obligation upon international organizations to transmit treaties concluded by or between them to the Secretariat of the United Nations for registration. His interpretation of that paragraph was based on the fact that one of the main considerations underlying Article 102 of the Charter of the United Nations and one of the reasons why the Vienna Convention on the Law of Treaties provided that registration should be mandatory so far as States were concerned, had been to discourage secret agreements. If international organizations were allowed to enter into agreements without making them public, the spirit, if not the letter, of that principle would be violated.

48. Mr. ROMANOV (Secretary to the Commission) pointed out that, under General Assembly resolution 33/141A, which responded to the need to reform

the publication procedure currently provided for by the General Assembly regulations to give effect to Article 102 of the Charter of the United Nations in order to adapt it to the evolution of international treaty activities, with due respect for the spirit and intent of the Charter,

the Assembly had amended article 12 of those regulations to provide that the Secretariat would have

the option not to publish *in extenso* a bilateral treaty or international agreement belonging to one of the following categories:

(a) Assistance and co-operation agreements of limited scope concerning financial, commercial, administrative or technical matters;

(b) Agreements relating to the organization of conferences, seminars or meetings;

(c) Agreements that are to be published otherwise than in the series mentioned in paragraph 1 of this article by the United Nations Secretariat or by a specialized or related agency.

49. Since international organizations could enter into agreements falling within those three categories, it would seem that draft article 80—at least in its English version—imposed a binding obligation on the United Nations Secretariat to publish each and every treaty transmitted to it by an international organization or a State if an international organization was a party to the treaty in question. In the circumstances, the Commission might wish to consider the possibility of including in the draft article a reference to the relevant article of the General Assembly regulations.

50. Mr. CALLE Y CALLE said that the main purpose of Article 102 of the Charter of the United Nations, which, the Commission would recall, was based on the corresponding article (Art. 18) of the Covenant of the League of Nations, was to provide for the registration and publication of treaties with a view

to preventing the secret negotiation and conclusion of international agreements. Accordingly, if a treaty was not registered, its provisions could not be invoked before any organ of the United Nations as binding on the parties.

51. Mr. FRANCIS said he did not think that draft article 80 would be affected by the amendment to article 12 of the General Assembly regulations, since General Assembly resolution 33/141 had been adopted for a different purpose, namely, to deal with delays in the registration and publication of treaties.

52. Mr. REUTER (Special Rapporteur), summing up the discussion, said that, unlike the previous articles, draft article 80 had given rise to difficulties of substance rather than form. The question of the relationship between the draft article and Article 102 of the Charter had been raised. The members of the Commission had been unanimous in recognizing that the concept of registration, as embodied in the Charter, bore a special meaning, and that the obligation concerning registration created therein fell within the framework of the Charter. It was therefore necessary to determine whether the concept was exactly the same in the case of draft article 80, and whether the article provided, in principle, for a separate obligation that did not apply to the same subjects.

53. The Charter pertained to the Members of the United Nations, whereas draft article 80 pertained to the States and organizations that would be parties to a convention adopted on the basis of the draft articles or States or that, without becoming parties to the convention, would be bound by it in some other way. It was apparent, particularly from the English version, that draft article 80 created a binding obligation. Moreover, the act of registration provided for in the Charter was very general, but United Nations practice differentiated between registration and recording. The wording used in draft article 80, however, had been borrowed from United Nations practice. Consequently, should a separate obligation be created under article 80?

54. In the light of the English version of the provision, most members of the Commission were in favour of such an obligation; but what would it consist of and to whom would it apply? For States, it was simply a question of transmitting the treaties. Only in paragraph 2 of article 80 was it established that, in the event of designation of a depositary, the latter could perform the acts of registration, filing and recording on behalf of States. The authors of article 80 of the Vienna Convention had never intended, nor had he ever intended, to create an obligation to register or publish. Once the obligation to transmit the treaties was fulfilled, the official to whom those treaties were transmitted might in any event find that he was bound by regulations which prevented him from publishing them.

55. The Secretary to the Commission had referred to the restrictions imposed, largely for the sake of economy, on the publication of treaties. Under the existing regulations, all treaties and agreements to which the United Nations, a specialized agency or a United Nations body were parties were filed. In the present situation, it seemed that the Secretary-General could take the view that he was not authorized to file an agreement between two regional international organizations. Consequently, an obligation might exist to transmit a treaty but the Secretary-General was not necessarily empowered to file and publish such an instrument.

56. If the Drafting Committee agreed with his interpretation, it might wish to retain draft article 80 as it stood. Alternatively, it could supplement the provision in the way suggested by the Secretary to the Commission or add a more general reservation regarding the possibility of performing the acts in question. Also, it would be interesting to know how many agreements concluded by international organizations, other than the specialized agencies, had been registered. At the present time, the United Nations Secretariat was instructed to rank the United Nations, the specialized agencies and the United Nations bodies alongside non-member States. If the Drafting Committee decided not to modify the draft article, an explanation could be included in the commentary.

57. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft article 80 to the Drafting Committee.

*It was so decided.*¹⁰

ANNEX (Procedures established in application of article 66)

58. The CHAIRMAN invited the Special Rapporteur to introduce the draft annex (A/CN.4/327), which read:

[ANNEX.

Procedures established in application of article 66

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present articles and any international organization to which the present articles have become applicable shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph. A copy of the list shall be transmitted to the President of the International Court of Justice.

1. *Cases in which, in reference to a treaty between several States and one or more international organizations, an objection as provided for in paragraphs 2 and 3 of article 65 is raised by one or more States with respect to another State*

2. *When a request has been made to the Secretary-General under article 66, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:*

¹⁰ *Idem.*

The State or States constituting one of the parties to the dispute shall appoint:

- (a) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and
- (b) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

II. *Cases in which an objection as provided for in paragraphs 2 and 3 of article 65 is raised by one or more international organizations or with respect to an international organization*

2 *bis*. The request referred to in article 66 shall be submitted to the Secretary-General; however, if the request is made by or directed against the United Nations, it shall be submitted to the President of the International Court of Justice. The Secretary-General or, as appropriate, the President of the International Court of Justice, shall bring the dispute before a conciliation commission constituted as follows:

If one or more States constitute one of the parties they shall appoint:

- (a) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and
- (b) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

One or more international organizations constituting one of the parties or the international organizations constituting both of the parties shall appoint:

- (a) one conciliator, who may or may not be chosen from the list referred to in paragraph 1; and
- (b) one conciliator included in the list on an initiative other than their own.

The four conciliators chosen by the parties shall be appointed within 60 days following the date on which the Secretary-General or, as appropriate, the President of the International Court of Justice, receives the request.

The four conciliators shall, within 60 days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General or, as appropriate, by the President of the International Court of Justice within 60 days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General or, as appropriate, by the President of the International Court of Justice either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3 *bis*. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4 *bis*. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5 *bis*. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6 *bis*. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General or, as appropriate, with the President of the International Court of Justice and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7 *bis*. The Secretary-General shall provide the Commission either directly or, as appropriate, through the intermediary of the President of the International Court of Justice with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.]

59. Mr. REUTER (Special Rapporteur) suggested that, in view of the length of the draft annex, the Commission should first consider paragraph 1, which was in a sense the preamble, then section I, which was reproduced word for word from the Vienna Convention, and lastly section II, which introduced major changes by comparison with the Convention and called for comment.

60. At the 1590th meeting, the Commission had decided to refer draft article 66 to the Drafting Committee with the recommendation that the square brackets he had placed around it should be deleted. The annex, too, had been placed between square brackets, for the same reason as article 66, namely, because both of them related to the final clauses and both of them had been drafted by the Conference on the Law of Treaties. However, the Commission had taken the view that articles 65 and 66 had been incorporated in the body of the Vienna Convention because they related to procedures which were closely linked to matters of substance and were crucial for the acceptance of part V of the Convention. Furthermore, it should be noted that the difficulties posed by draft article 66 related to the procedure for the settlement of disputes arising out of the application or interpretation of *jus cogens*, and not to the conciliation procedure which was the subject of the annex. That conciliation procedure had been introduced, both in the Vienna Convention and in the draft articles, as a method for settling not every kind of dispute but solely disputes that arose in connexion with part V.

61. In transposing the annex to the Vienna Convention to the draft articles, it was first necessary to differentiate between disputes in which States alone were involved and disputes in which either organizations or organizations and States were involved. The conciliation machinery, and particularly the first steps in the proceedings, such as the appointment of conciliators, could not be governed by the same rules whether the claimant and the respondent were, or were not, respectively a State and an international

organization. One part of the annex dealt with each of those categories of disputes.

62. As noted by the Commission in connexion with article 66, provision should also be made for the case of a dispute arising out of a multilateral treaty that occurred not only between States themselves but also between one or more organizations and one or more States. It was conceivable that, pursuant to section I, a State might institute conciliation proceedings against another State in connexion with a dispute arising out of a multilateral treaty to which an international organization was likewise a party and that the organization might institute proceedings pursuant to section II. In order to avoid such a situation, should a procedural measure be introduced requiring all the parties to a multilateral treaty to be informed of the institution of conciliation proceedings? In preparing the draft annex, he had not borne that possibility in mind, but during the Commission's consideration of paragraph 1 of the annex it should take a decision on that point.

63. Section I did not call for any comment, since it was reproduced in full from the Vienna Convention, but section II required at least some preliminary clarification. The conciliation procedure provided for under the Vienna Convention was organized entirely around the Secretary-General of the United Nations. In the draft annex, the same function had been vested in him, except in the case of disputes to which the United Nations might be a party. The Secretary-General had been chosen as an independent third party placed above the parties, and it was difficult to see how he could act in such a capacity for that category of dispute when he was, after all, an organ of the United Nations. For that reason, he (Mr. Reuter) had proposed that in such cases the Secretary-General should be replaced by the President of the International Court of Justice. In order to relieve the Court of the material problems which conciliation proceedings entailed, he had nevertheless suggested that the functions of the President of the Court should be confined to decision-making, since the administrative functions could be carried out by the Secretary-General with complete impartiality.

64. Lastly, he stressed that the nationality of the conciliators was always of great importance in constituting a conciliation commission between States. The conciliation procedure applicable to cases involving an international organization had had to be modified somewhat, since there was no nationality link between an individual and an organization.

65. The CHAIRMAN suggested that the Commission should consider paragraph 1, section I and section II of the annex, one by one, as proposed by the Special Rapporteur.

It was so decided.

The meeting rose at 6 p.m.

1594th MEETING

Tuesday, 20 May 1980, at 10.05 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/327)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (continued)

ANNEX (Procedures established in application of article 66)¹ (continued)

1. Mr. REUTER (Special Rapporteur), introducing paragraph 1 of the annex, said that the paragraph differed in only two minor respects from the corresponding paragraph of the annex to the Vienna Convention.² Paragraph 1 referred to a phase prior to any dispute, the drawing up of the list of conciliators. In the draft annex it had been necessary to make provision not only for the nomination of conciliators by States but also for the nomination of conciliators by international organizations. The reason why his draft used the words "any international organization to which the present articles have become applicable" was that he did not want to prejudge the question as to how the organizations might become bound by the articles. For example, they might become parties to a convention incorporating the draft articles or, without being parties to it, they might declare themselves bound by the convention. At the end of the paragraph he had added a clause to the effect that a copy of the list should be transmitted to the President of the International Court of Justice. If the Commission accepted the suggestion that the President of the Court should intervene in the event of a dispute in which the United Nations was involved, it would of course be necessary for the President to have cognizance of the list.

2. The risk of several procedures being instituted simultaneously was not, he thought, a real one. The annex to the Vienna Convention itself referred to the case of a dispute in which several States were joint parties, for it spoke of "the State or States constituting

¹ For text, see 1593rd meeting, para. 58.

² See 1585th meeting, foot-note 1.

one of the parties to the dispute” and “the State or States constituting the other party to the dispute”, expressions which clearly envisaged such a case. The authors of the Vienna Convention had fully realized that in the case of a multilateral treaty several States might, for example, invoke a ground for invalidating or voiding the treaty and that one and the same objection might be raised by more than one State. Accordingly, that eventuality was covered in the annex to the Vienna Convention. The point still to be settled was under what conditions, when, and how several States took joint action. They would have to adopt the same position as to substance and rely on the same ground in any particular case. There would be as many actions, and consequently as many possible cases of conciliation, as there were different causes of invalidity of a treaty invoked by States, or as there were different grounds for the objections raised by States.

3. Under paragraph 1 of article 65 of the Vienna Convention, the party to a treaty which intended to invoke either a defect in its consent to be bound by the treaty or a ground for impeaching the validity of the treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. In that way, the States parties learned if one of the grounds mentioned in part V of the draft was invoked by several States, or if the same objection was raised by several States, and they would then decide how to proceed under the terms of article 65. What happened if one State invoked a ground bringing part V into operation, another State raised an objection, and the other States parties to the multilateral treaty remained silent? Did the latter, which had notice of the ground invoked under part V—though not perhaps of the objection, since notice of the objection did not have to be given under article 65—forfeit the right to invoke a clause of the treaty after the expiry of the three-month deadline?

4. On that point the Convention merely stated, in paragraph 2 of article 65, that in the absence of any objection, the party which had made the notification was free to carry out the measure which it had proposed. That did not mean that the parties which had kept silent automatically forfeited the right to invoke any of the clauses of invalidity, termination, withdrawal or suspension which might be contained in the treaty. Paragraph 3 of the annex to the Vienna Convention stipulated that, with the consent of the parties to the dispute, the Conciliation Commission might invite any party to the treaty to submit to it its views orally or in writing. That provision would be meaningless if a party to a treaty which had not become party to a dispute did not have the right to press legal arguments.

5. Paragraph 3 of article 65 of the Vienna Convention contained another ambiguity. It stated:

If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

The parties in question were not, as might be thought, the parties to the treaty, but the parties to the dispute, as was clear from subparagraphs (a) and (b) of article 66.

6. Under the terms of the Vienna Convention, all the States parties to a treaty were therefore informed of the setting in motion of the procedure referred to in article 65. If the conciliation procedure was subsequently initiated in conformity with subparagraph (b) of article 66, it would be between parties to an already existing dispute. For the purposes of the treaties that were the subject of the draft articles, it was important to determine when the parties should take joint action. It was either States, or international organizations, or States and international organizations, which could take joint action. In all cases, the parties to the treaty must have taken a position on the existence of the dispute by the time of the expiry of the three-month time limit. Thereafter, an international organization, for example, would not be able to claim, in the case of a dispute between two States for which the procedure referred to in section I of the draft annex had been set in motion, to take part in the dispute and to join in the action of one of the States. In order that the international organization should obtain a hearing before the Conciliation Commission, it would have to be invited by that Commission, with the consent of the parties to the dispute, to submit to it its views orally or in writing, unless the Commission had made express provision in its procedure for the possible intervention by the organization. What mattered was that there should not be several procedures under way once the dispute had arisen.

7. Mr. EVENSEN suggested that the Drafting Committee might clarify the way the draft was presented, since the method of numbering paragraphs was somewhat confusing.

8. Paragraph 1 was generally acceptable to him. In particular, he considered that the last sentence, which stated that a copy of the list of conciliators should be transmitted to the President of the International Court of Justice, was an improvement, since it would greatly assist the President in carrying out not only the functions entrusted to him under subsequent parts of the annex but also the more general functions regarding the appointment of conciliators. It would however be preferable if the last sentence were placed after the first sentence of paragraph 1.

9. He agreed that, as the list of conciliators would in any event be made available to all Member States, there was no need to provide expressly for its circulation to parties to the treaty.

10. Mr. USHAKOV thought that it would be useful to make a distinction, not only in the annex under discussion but also in article 66, between three categories of disputes: disputes between two or more States parties to a treaty concluded between two or more States and one or more international organ-

izations, disputes between two or more international organizations parties to a treaty concluded either between one or more States and two or more international organizations or between international organizations alone, and disputes between one or more States and one or more international organizations parties to a treaty concluded between one or more States and one or more international organizations.

11. Furthermore, the annex was closely linked with articles 65 and 66; why then did draft article 66 contain a cross-reference to paragraphs 2 and 3 of draft article 65, whereas article 66 of the Vienna Convention did not refer to the corresponding paragraphs in article 65? Nor was it clear to him why those paragraphs should be mentioned in the two section titles of the draft annex.

12. The passage "any international organization to which the present articles have become applicable" in paragraph 1 of the draft annex was not as innocuous as it appeared, since it raised the question of the participation of international organizations in the future convention. The question should not be discussed until the second reading, when the Commission would be making recommendations concerning the disposition of the draft articles. Moreover, if all the international organizations to which the future convention became applicable were to nominate conciliators, the list might well be a long one, in view of the great number of international organizations both large and small. Another question was whether the persons so nominated could be officials of the international organization concerned, officials of another organization, or even nationals of a particular State.

13. Referring to paragraph 2 (b) of section I of the draft annex, he said that the list in question—described in paragraph 1—was not identical with that provided for in the Vienna Convention, a fact which in itself constituted a departure from the procedure applicable to disputes between States in accordance with that Convention. It might indeed be better not to mention the list of conciliators in the draft annex, for the Commission would then not need to discuss the question of the nomination of conciliators by international organizations

14. Mr. SCHWEBEL, referring to Mr. Ushakov's point regarding the appointment of conciliators by international organizations, said the fact that there were a large number of international organizations was not in itself a great drawback. There were also a large number of States, many of which had appointed boards of arbitrators and conciliators; the Permanent Court of Arbitration was a case in point. In the main, however, such lists lay dormant and the fact that they were not drawn upon posed no great problem.

15. A more interesting point raised by Mr. Ushakov concerned the character of the nominees of international organizations and although, there again, there was no great difficulty, he considered that in practice

international organizations would have to proceed with care. The fact that provisions existed for the participation of organizations in international arbitration presumably meant that they would appoint arbitrators: for instance, in a dispute arising under a headquarters agreement between the United Nations and the United States of America, the Secretary-General could have recourse to arbitration against the United States. There was no reason in theory why that procedure could not extend to conciliation or why the conciliator so appointed could, or could not, be an official of the organization. Almost certainly such an official would be a national of some State, but that posed no more of a difficulty than the election of a judge who was also a national of a State but, when acting in his judicial capacity, did so, or should do so, with due regard to his oath as a judge and within the confines of his responsibility. In the same way, the Secretary-General, Director-General or competent organ of an international organization should be able to appoint a conciliator who, though a national of a given State, would act not as an official of that State but within the confines of his responsibility as a conciliator and in a way in which an international servant acted or should act.

16. Sir Francis VALLAT said that the Commission, which until that point had been dealing with the codification of rules and principles, had moved into an entirely different sphere involving matters of application and procedure. He therefore had some doubts whether the technique of adaptation adopted initially was appropriate for dealing with the settlement of disputes, which, after all, was a political matter. What made him feel a little uneasy was not that the Commission was going too far in its adaptation but that it might not be going far enough.

17. There had been significant developments regarding the settlement of disputes since the United Nations Conference on the Law of Treaties in 1969, and procedures that had been regarded with considerable hesitation by many States had become much more widely acceptable. One point that had concerned him about the Vienna Convention was that the disputes procedure was applicable only to Part V of the Convention. He had felt that the possibility of disputes relating to Parts I to IV of the Vienna Convention was just as real as the possibility of disputes relating to Part V, and that, even though the former would not affect the validity or continuation of a treaty as such, they might be just as important for the States concerned as disputes which went to the root of the treaty. Indeed, the questions which had come before the International Court of Justice and other international tribunals had on the whole related not to Part V but to other parts of the Vienna Convention, and in particular to articles dealing with the rules or principles of interpretation. His fear, therefore, was that, if the pattern of the Vienna Convention were followed too closely, it would stifle the progressive development of international law in the direction of the more liberal application of

disputes procedures. He had the same kind of misgivings regarding conciliation and, while he recognized that the Commission's mandate was to adapt the provisions of the Vienna Convention, he did feel that, as a member of the Commission, the least he could do was to express those misgivings in the hope that they would be reflected in the summary record and also in the Commission's report to the General Assembly.

18. Referring to specific points raised during the discussion, he said that he would first echo Mr. Schwebel's comments. His initial reaction on reading paragraph 1 of the annex was that if each international organization nominated two conciliators the procedure might be rendered unduly cumbersome. On reflection, however, he did not think that was a serious problem, partly because it was unlikely that all organizations would fall within the category of those to which the draft articles became applicable, but also because he doubted whether the actual number of names on the list really mattered.

19. One problem which did deserve the Commission's special attention, however, concerned the possibility of placing some limitation on the kind of person or the particular character of the person who might be nominated as a conciliator. Specifically, he had in mind the possibility of providing at the outset that an international organization should not nominate one of its own officials as a conciliator; in his view, there would be an element of reason and justice in such a restriction. Certainly, in subsequent paragraphs of the annex, a distinction should be drawn between officials of the international organization and other persons; that, however, was probably as near as one could come to a distinction between nationals and non-nationals.

20. Lastly, he considered that if separate provisions were to be retained for international organizations, the last sentence of paragraph 1 of the annex should be modified.

21. Mr. CALLE Y CALLE, agreeing that the Commission was examining a point of procedure and not one of substance, said that, in his view, the procedure provided for in the annex should follow as closely as possible that laid down in the Vienna Convention.

22. Although under the Statute of the International Court of Justice an international organization could not be a party to a dispute before the Court, that restriction did not apply in the case of other international courts. Under the Andean system, for instance, a court had been established to settle disputes arising out of agreements such as the Cartagena Agreement.³ Also, when it was not possible to reach an amicable agreement, recourse could be had to conciliation. In the case of international organizations, the conciliation procedure was carried out by conciliators

appointed from a list containing the names of persons nominated by States and international organizations. After the conciliation procedure had been completed, a report was submitted, although its conclusions were not binding on the parties and were simply referred to the parties with a view to promoting an amicable settlement.

23. Mr. JAGOTA, agreeing that the question under consideration had procedural and political implications, said that the Conference on the Law of Treaties had had great difficulty in working out the compromise which had finally been agreed with regard to the settlement of disputes. At that time, however, it had not been possible to predict the importance which the concept of compulsory conciliation had come to assume at other conferences, including the Third United Nations Conference on the Law of the Sea.

24. The points on which opinions had differed at that conference were whether compulsory conciliation should be the only method of settling disputes or whether it should be accompanied by other methods such as arbitration and adjudication, and, in the latter eventuality, whether the dispute should be referred to the I.C.J. or whether a new institution, such as a law of the sea tribunal, should be established for the purpose. There had been a marked change of position among those who had supported adjudication in preference to arbitration, the paramount rule now being that the question of the compulsory settlement of disputes should be left to the choice of the parties.

25. The Third Conference on the Law of the Sea had also been concerned with three broad categories of disputes relating, in turn, to the interests of the land-locked and geographically disadvantaged States, the exercise of rights in the exclusive economic zone of a State, and the delimitation of the maritime boundary. The negotiating groups appointed to consider the procedure for the settlement of those three categories of dispute had each opted for a system of compulsory conciliation and, in so doing, had in his view been guided by article 66 of the Vienna Convention as well as the annex to it. More recently, reference had again been made to compulsory conciliation within the context of the consideration of the settlement of disputes arising out of marine scientific research operations carried out at a distance of more than 200 miles from a coastal State. Even countries that had been completely opposed to third party settlement had now largely reconciled themselves to compulsory conciliation.

26. From all those developments it could be inferred that the conciliation procedure conceived at the Conference on the Law of Treaties would exercise a continuing influence in other forums. Although, both under the Vienna Convention and under paragraphs 6 and 6 *bis* of the annex as proposed by the Special Rapporteur, compulsory conciliation would not be binding on the parties to a dispute, the views of a conciliation commission, particularly if unanimous,

³ Subregional integration agreement [Andean pact] (Bogotá, 26 May 1969).

would carry considerable persuasive authority. It could not therefore be argued that the Special Rapporteur's proposed procedure would be of only little practical value.

27. The annex to the draft articles was inevitably somewhat cumbersome, given the nature of its subject matter. There were two separate aspects to both section I and section II, the first of which related to the parties to the dispute and the second to the subject matter of the dispute. Section I, however, was concerned solely with cases in which an objection under article 65, paragraphs 2 and 3 affected two States. Since the procedure was modelled on that laid down in the Vienna Convention and reflected settled law, there had been no need to introduce any change. In section II, on the other hand, which laid down the procedure that would apply in cases where an objection was raised by an international organization, or indeed by a State against an international organization, it had been necessary to make certain adjustments to make allowance for the competence of international organizations.

28. In that connexion, he suggested two minor drafting changes. In the heading of section I, the expression "several States" might well be replaced by the expression "one or more States". Secondly, in the heading to section II, he suggested that the words "when raised by a State or an international organization" be added before the words "with respect to an international organization"; that would make it quite clear that section II applied to cases where the subject matter of a dispute involved an international organization. Indeed, his point was borne out by the opening clause under paragraph 2 *bis* of the annex, which read, "If one or more States constitute one of the parties . . .", and thus clearly contemplated the possibility that a dispute could be between States and international organizations.

29. An important question, and one which to his mind related to joinder of issues, had been raised regarding the procedure to be followed in the event that several disputes arose out of the subject matter of the same treaty. He fully agreed that the Commission should consider whether separate conciliation commissions should be appointed to deal with such disputes, irrespective of whether or not those disputes occurred simultaneously, or whether some procedure should be evolved whereby the same commission could deal with disputes between the same parties to a treaty, with a view to avoiding a multiplicity of procedures.

30. Another point raised related to cases where an international organization, though not initially a party to a dispute between States, subsequently indicated that it considered itself to be involved and that it would prefer, rather than filing a written submission under paragraph 3 of section I of the annex, to become a direct party to the dispute by way of intervention or otherwise. The question then to be decided was whether the conciliation commission established under

section I would become *functus officio*, so that a new commission would have to be appointed under section II, or whether some other procedure should be found. In his view, there were two possibilities which merited the Commission's careful consideration: either the first commission could cease its work and refer the matter to the Secretary-General of the United Nations or to the President of the International Court of Justice with a view to the appointment of another conciliation commission under section II (which would be a time-consuming procedure); or two more members could be nominated by the international organization wishing to become a party to the dispute to serve on the existing commission.

31. Lastly, with regard to disputes between international organizations, it might be useful to refer by way of comparison to the annex on conciliation procedure that had been prepared in connexion with the United Nations Conference on the Law of the Sea.⁴ He noted, for example, that the annex to the draft articles provided that the costs of conciliation procedure would be borne by the United Nations, which might not be appropriate in cases where the subject matter of a dispute between two international organizations was technical and of interest only to those organizations. Under the conciliation procedure provided for at the Conference on the Law of the Sea, the costs of such procedures would be borne by the parties to the dispute, and the Commission might therefore wish to consider whether the full costs should be defrayed by the United Nations or whether some other procedure should be evolved.

32. Mr. USHAKOV drew a distinction between three cases of the use of the list of conciliators provided for in paragraph 1. In the case of a dispute between States, it was the States which had to choose, from that list, persons designated by States. On the other hand, if the parties to the dispute were exclusively international organizations, it might be provided that the conciliators would be chosen from a list of persons designated by international organizations. Lastly, if the parties to the dispute were States and international organizations, it would be necessary to determine what list would be used for the choice.

33. In order to avoid that type of problem, it would perhaps be better, in the final analysis, that the draft should make provision for only a single list for the three categories of disputes.

34. Mr. QUENTIN-BAXTER said it would be unfortunate if it could be argued that the Commission's loyalty to the provisions of the Vienna Convention on the Law of Treaties was freezing progress. Indeed, he felt that all members of the Commission tended to agree with the emphasis which the Special Rapporteur had placed on the need to remain within the para-

⁴ See "Informal Composite Negotiating Text/Revision 2" (see 1586th meeting, foot-note 10), annex V.

meters of the Vienna Convention. Time and again, the Commission had made the point that it was extending the scope of an existing system. If the time came when that system needed updating in certain respects, that updating could be expected also to affect the draft articles under consideration. The Commission was therefore right, as the Special Rapporteur had pointed out in paragraphs (9) and (10) of the commentary to the draft annex (A/CN.4/327), to note that, if the draft articles were not governed by the Vienna Convention, they might present a different emphasis to take account of recent developments in international practice, but that there was, at present, an overwhelming advantage in maintaining as much parallelism as possible with the Vienna Convention.

35. With regard to the question of parallelism, he said he was of the opinion that the Special Rapporteur had been justified both in dividing the draft annex into a section I devoted exclusively to cases of disputes between States and a section II devoted to cases in which the objection provided for in draft article 65 was raised by or with respect to an international organization, and in raising the question whether States and international organizations could have the same interests in a dispute.

36. Since the distinction between such cases had been imposed upon the Commission by the structure of the Statute of the International Court of Justice, it would be desirable to keep the provisions relating to disputes between States parallel with the corresponding provisions of the Vienna Convention. Although it might not make a great deal of difference that, in one case, a multilateral convention happened to be concluded by States only and that, in another, a single international organization happened to be a party to such a convention, nevertheless, from the point of view of substance, that factor affected the methods for the settlement of disputes.

37. It was, however, quite impossible to separate the role of States from that of international organizations parties to a treaty so far as the interests involved were concerned. It could hardly be assumed that, when there was a dispute, those which had one particular interest would always be either States or international organizations and that the opposite point of view would always be held only by States or only by international organizations. It therefore seemed to him that section II of the draft annex must take account of the case in which some States and an international organization challenged an objection made by a State—or, in other words, of the possibility that the parties to certain disputes could be not only one or more international organizations, but also one or more international organizations and one or more States.

38. To his mind, the meaning of draft article 66 was clear: when an international organization party to a treaty asserted its position, either by raising an objection or by responding to an objection, the dispute would come under section II of the draft annex, even

though a State might also have raised the same objection. It seemed to him that the plain meaning of that draft article and the logic of the situation to which it referred required the Commission to recognize that, when once an international organization was involved in a dispute, section II of the draft annex automatically applied. It also seemed to him that the procedure for requesting an advisory opinion from the International Court of Justice which had been discussed in connexion with draft article 66 was entirely adequate as a means of dealing with the case in which both States and international organizations were involved as parties to a dispute.

39. In view of the need for parallelism with the Vienna Convention and of the fact that States and international organizations were different when they were parties to treaties, the Commission had to do its best to provide a parity of position between them. It should therefore place in square brackets the words “and any international organization to which the present articles have become applicable” in paragraph 1 of the draft annex. The final form in which that passage would be drafted would, in his opinion, depend on questions that had quite deliberately been left aside at the current stage of the discussion. For example, account would subsequently have to be taken of the role which international organizations might play in the adoption of a convention based on the draft articles under consideration and of the question whether they could become parties to such a convention. For the time being, therefore, he suggested that it might be better to draft the passage in question to read: “any international organization which is a party to a treaty to which the present articles apply”.

40. Mr. EVENSEN said it was obvious to him that international organizations should be allowed to nominate conciliators. Moreover, he agreed with the idea that the persons so nominated might be required to have some special qualifications. It might, however, complicate matters if there was one list of conciliators for States and another list for international organizations. Any list drawn up would, of course, give the names of the nominees and their nationalities and would thus show who had nominated whom.

41. In his view, the Secretary-General of the United Nations was the obvious choice as the person who should maintain the list of conciliators, because the United Nations was a general international organization and that function went well with the Secretariat's obligation to register treaties.

42. He had found Mr. Ushakov's proposal for distinguishing three categories of parties to disputes an intriguing one, but had had second thoughts about it when Mr. Jagota had expressed concern about an increase in the number of categories of parties and types of disputes.

43. The CHAIRMAN, speaking in his capacity as a member of the Commission, said that, since the

Commission had decided to remove the square brackets from draft article 66 and to refer it to the Drafting Committee, it should also agree to remove the square brackets from the draft annex under consideration.

44. In connexion with what Sir Francis Vallat had called the technique of adaptation, he inquired whether the Special Rapporteur had considered the possibility of providing for further methods for the settlement of some categories of disputes and, in particular, those involving international organizations only. Such methods might include advisory opinions with binding effect, or even compulsory arbitration.

45. His second question related to the difficulty involved in making a clear-cut distinction between two parties to a dispute, when the possibility of differing interests was almost infinite. In that connexion, he referred to the case in which a dispute existed between three international organizations, the first of which was a lending institution, the second, an executing agency, and the third, the recipient of funds from the first. The interests at stake in such a case could vary considerably.

46. With regard to the question of the parallel institution of procedures which had been raised by the Special Rapporteur, he mentioned the example of an agreement to which at least two States and two international organizations were parties. If one of the States raised an objection with respect to the other State, the dispute would come under section I of the draft annex. If, on the other hand, one of the international organizations raised an objection and tried to bring the dispute within the scope of section II of the draft annex, it could be said that parallel procedures were being instituted and that they were the type of procedures to which the Special Rapporteur had referred. In his opinion, the lack of a device by which all the parties could be brought together in the conciliation procedure or by which the procedures in one section could be subordinated to the procedures in the other section would leave room for doubt as to the interpretation of the meaning of the draft annex.

47. Mr. REUTER (Special Rapporteur) noted that the comments of the members of the Commission on paragraph 1 fell into two categories. First, there had been very specific proposals concerning the form of the text; those proposals would be considered by the Drafting Committee. Secondly, the members of the Commission—specifically Mr. Ushakov and Mr. Schwebel—had expressed some very general opinions. The Commission would have to decide whether to make recommendations concerning the form of the final text of the draft articles. It would even have to determine whether to make such recommendations at all, and, if so, at what time.

48. The Commission could not, obviously, make up its mind before receiving the comments of Governments. However, it should enter into consultations with the international organizations of the United Nations

family without waiting for those comments. In fact, representatives of those organizations ought to attend some private meetings of the Commission, at which they would be able to speak freely. The Commission should not be under any illusions: the international organizations were not favourable to the draft articles, not least because the draft was deliberately aimed at limiting their liberties.

49. Many questions had been raised concerning international organizations. The most basic issue was certainly whether those organizations could be parties to an international dispute. If they could not, there was little point in continuing the work on the topic assigned to him.

50. The Commission had decided not to keep the text of draft article 66 in square brackets. If it maintained that decision, there would no longer be any justification for keeping the text of the annex in square brackets. On the other hand, he approved Mr. Quentin-Baxter's proposal for putting in square brackets the passage "and any international organization to which the present articles have become applicable" in paragraph 1 of the draft annex.

51. Mr. Ushakov had stated his objections with regard to the system of the list of conciliators, and had argued that the point would have to be settled in the light of the Commission's choice concerning the position to be attributed to international organizations. He (Mr. Reuter) could not agree with that point of view and thought that, if there was to be a list, the international organizations should share in the designation of the conciliators on the list. On the other hand, he was prepared to reconsider the entire procedure to be envisaged.

52. The essence of the system was that there should be, from the beginning, machinery for appointing the Chairman of the Conciliation Commission and for taking the necessary steps in any case where the parties failed to act. It was admittedly possible to dispense with the list altogether, in which event there would be no problem, and in addition greater latitude would be given to the parties and to the organ responsible for appointing the Chairman of the Conciliation Commission. The experience of the Bank for International Settlements and the Permanent Court of Arbitration, for example, indicated that the system of a list of conciliators was quite ineffectual. In his personal opinion, lists of conciliators were of hardly any use and hence, if only for that reason, he would not object if the reference to them was dropped from the draft articles.

53. The main question, however, was whether the Commission wanted to follow the Vienna Convention fairly closely, whether it wanted to propose a system of its own, or whether it declined to offer any solution. A solution must be found, and the Commission would certainly have some difficulty in taking a decision, to judge by the diversity of the opinions reflected in the statements of the members of the Commission.

54. With regard to the effectiveness of conciliation, Mr. Jagota had rightly drawn attention to one favourable precedent. Actually, nobody yet had any clear idea of what conciliation was, for the procedure was not very well defined and practice had hardly more than a dozen cases to show.

55. The most important aspect of the Vienna Convention concerning that point was that it attributed the central role to the Secretary-General of the United Nations. If the Commission decided to set up some general conciliation machinery, it would have to be very cautious about the role of the Secretary-General, for all international disputes involved an international treaty, and the future machinery would therefore become applicable to all future disputes. The discussions seemed to show that the Commission wished to adhere to the main lines of the machinery established by the Vienna Convention.

56. The Chairman, speaking as a member of the Commission, had asked several questions that broadened the horizon of its work. The problem of parallel procedures touched on extremely complex subjects, which it might be better to consider in the Drafting Committee rather than in plenary. Concerning the other points, he (Mr. Reuter) thought that the report might mention the possibility of specific procedures for certain specified cases. He added that the decision on the subject of the annex would necessarily have repercussions on the drafting of draft article 66 and the commentary thereto.

The meeting rose at 1.05 p.m.

1595th MEETING

Wednesday, 21 May 1980, at 10.15 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Calle y Calle, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/327)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR (continued)

ANNEX (Procedures established in application of article 66)¹ (continued)

1. Mr. REUTER (Special Rapporteur), introducing section I of the draft annex, said that the text as a whole called for few additional comments.

2. In his view, the question whether a distinction should be made between two types of case, as in the draft articles, or three types of case, as suggested by Mr. Ushakov at the previous meeting, should be considered when the Commission discussed section II of the annex.

3. Section I merely reproduced the provisions of the Vienna Convention.² The heading of the section in the draft would certainly have to be amended and subsequently brought into line with the final heading of section II, and should be as concise as possible.

4. Mr. Ushakov had raised an important point, and it would be for the Commission to decide whether it should depart substantially from the Vienna Convention by dispensing with the provision concerning the list of conciliators or whether to keep the reference to the list. If the reference to the list was dropped, the States, the Secretary-General of the United Nations and the President of the International Court of Justice would be given full latitude; that would raise no great difficulty from the merely technical viewpoint, but there might be two major objections: in choosing that course the Commission would be departing from the Vienna Convention and, at the same time, from the general trends in the matter of conciliation and arbitration as reflected, *inter alia*, in the most recent draft texts of the Third United Nations Conference on the Law of the Sea, which provided for conciliation machinery based on a list of conciliators.³

5. The question of the number of lists, if any, should preferably be considered in connexion with section II of the annex.

6. He added that a number of members of the Commission had rightly expressed the view that the discussion on section I of the annex should offer them an opportunity for making some additional observations on the problem of parallelism.

7. Mr. RIPHAGEN said that, during the discussion of draft article 66 (1589th and 1590th meetings) and the draft annex, he had been struck by the paradox that, as international lawyers, the members of the Commission were used to the situation in which sovereign States unilaterally determined the extent of their obligations under international law and even the extent of the obligations of other sovereign States under international law and then drew therefrom conclusions concerning their own conduct. However,

¹ For text, see 1593rd meeting, para. 58.

² See 1585th meeting, foot-note 1.

³ "Informal Composite Negotiating Text/Revision 2" (see 1586th meeting, foot-note 10), annex V.

now that the members of the Commission had taken the step forward of allowing an impartial body to play a role in determining how States should act in the case of disputes with other States, they were suddenly frightened of parallel procedures and of the possibility that different impartial bodies might express different opinions.

8. It was, however, quite natural that the settlement of a dispute should be a bilateral affair—a matter of deciding between two conflicting views resulting from a specific situation and determining the resulting legal relationship between the two parties to the dispute. It was also quite natural that both the specific situation which had given rise to the dispute and the legal rules to be applied by the impartial body should, and almost always did, involve third parties. That was obvious when the rules to be applied by the impartial body were rules of general international law or rules laid down in a multilateral convention. The interpretation and application of such rules could not but interest entities which were not parties to the dispute.

9. The decision of the impartial body could also affect the interests of entities which were not parties to the dispute. For example, in a case where one of two parties to a multilateral treaty invoked a fundamental change of circumstances as a ground for suspending, in its relations with the other party, the operation of the treaty as a whole, the impartial body might recommend that only part of the treaty should be suspended or that another arrangement should be made by the parties to the dispute. In that connexion, he noted in passing that draft articles 41 and 58⁴ limited the possibility of such bilateral arrangements because of the need to take account of interests of third parties to the multilateral treaty. It was nevertheless theoretically possible that, if the parties to the dispute followed the recommendation of the impartial body, other disputes might arise between them and a third party. In actual fact, however, the chances that two different impartial bodies might arrive at incompatible conclusions were much smaller than the chances that States parties to a treaty might arrive at different conclusions. The proof was that the legal decisions taken by one body almost always referred to similar decisions taken by other bodies. Moreover, binding judgements by impartial bodies often served only as a basis for an amicable settlement between the parties to the dispute.

10. From the point of view of efficiency, there was something to be said for a system bringing together all the entities interested in the legal consequences of a given situation in a procedure that would lead to a settlement *erga omnes*. Such a system would, however, require the establishment of an international organization *ad hoc*. In a typical system for the settlement of disputes, moreover, the possibilities of arriving at more efficient procedures were very limited indeed, and

interested third parties did not take part in the settlement procedures on an equal footing with the parties to the dispute.

11. Even under Article 59 of the Statute of the International Court of Justice, for example,

The decision of the Court has no binding force except between the parties and in respect of that particular case.

Under Articles 62 and 63 of the Statute, the possibilities for intervention by a third interested State were very limited, and if such a State should decide that it had an interest of a legal nature which might be affected by the decision in the case, it would be for the Court to decide whether or not that State could be allowed to intervene. With regard to an interest in the construction which the Court might give to rules of general international law, there was no possibility of intervention at all. It was, moreover, quite probable that an intervening State would have no right to choose a judge *ad hoc*. In the *North Sea Continental Shelf* cases, the Court had treated the Netherlands and Denmark as parties “in the same interest”,⁵ and had practically forced them to present identical pleadings. Similarly, the Court of Justice of the European Communities allowed third parties to intervene only in order to support the arguments of one of the parties to the dispute.⁶

12. Referring to conciliation as a method for the settlement of disputes, he said that a bold step in the direction of greater efficiency seemed to have been taken in the most recent version of the Informal Composite Negotiating Text of the United Nations Conference on the Law of the Sea,⁷ which in Annex V, article 3 (*h*), stated that:

In disputes involving more than two parties, the provisions of subparagraphs (*a*) to (*f*) shall apply to the maximum extent possible.

(Subparagraphs (*a*) to (*f*) related to the constitution of the Conciliation Commission.) Unfortunately, the Informal Composite Negotiating Text threw no light on what that “maximum extent” was, when more than two parties were involved, or whether it was relevant that some of the parties were parties in the same interest.

13. Only considerations of efficiency could tempt the Commission to try to improve on the procedures provided for in the Vienna Convention, which at least had the merit of recognizing how important it was to all States that a treaty was or became void if it came into conflict with *jus cogens*. In the case of a dispute arising in that connexion, the Vienna Convention allowed for arbitration, which was an *ad hoc* procedure. There was no reason to try to improve on that

⁴ See 1585th meeting, foot-note 3.

⁵ *Order of 26 April 1968, I.C.J. Reports 1968*, p. 9.

⁶ See, for example, United Nations, *Treaty Series*, vol. 298, p. 154, article 37 of the Protocol on the Statute of the Court of Justice of the European Economic Community (EEC).

⁷ See 1586th meeting, foot-note 10.

system by devising complicated rules designed to avoid parallel or subsequent procedures relating to the same situation. It would be better to leave well enough alone and follow the suggestions made in that respect by the Special Rapporteur, who had, after all, pointed out that the procedure of conciliation could be applied under draft article 66 only if no solution had been reached under draft article 65, paragraph 3, within a period of twelve months following the date on which an objection had been raised. If, in the case of a multilateral treaty, one of the parties indicated to all the other parties the "measure proposed to be taken" under draft article 65, paragraph 1, the other parties could then assess their interest in the matter. Since there were presumably many parties to the treaty, more than one objection would probably be raised. In any case, under draft article 65, paragraph 3, all the parties to the treaty were required to seek a peaceful solution. If they wished to do so by calling a conference, the stage of the "international organization *ad hoc*" would have been reached, and every interested party would participate in it on an equal footing. If a settlement was not reached at that stage, the parties having the stamina to do so could then turn to a bilateral procedure for the settlement of the dispute. Even then, some multilateral elements might be introduced, but if they were not introduced or were considered insufficient from the point of view of efficiency, parallel or subsequent procedures could be instituted. Such procedures would, in his opinion, be quite possible to accept.

14. Mr. USHAKOV said that in principle he did not object either to the list of conciliators or, consequently, to paragraph 1 of the draft annex. He had merely wished to draw attention to the difficulty raised by the simultaneous reference in the paragraph to international organizations and to States. In the corresponding provision of the Vienna Convention, it was clear that the phrase "or a party to the present Convention" referred to States parties to the Vienna Convention which were not Members of the United Nations. The text of the draft articles, on the other hand, appeared to distinguish expressly "every State which is a Member of the United Nations or a party to the present articles" from "any international organization to which the present articles have become applicable", thus creating two categories of entity concerned; it was that differentiation which was a source of difficulty. He had done no more than query the meaning of that passage in paragraph 1. He was not pressing for the omission of the reference to the list, but merely wished to draw attention to the potential difficulties.

15. Commenting on section I of the annex, he said that the provisions of that section were closely linked to draft article 66 and hence indirectly to draft article 65. In the Vienna Convention, the reference to article 66 was clear, since paragraph 2 of the annex could apply only to the case of a dispute between States. The situation was otherwise in the draft articles, and

consequently the Commission would have to consider the structure of the annex.

16. If article 66 distinguished three possible categories of dispute, it would certainly be logical to divide the provision into three paragraphs. It followed that, if article 66, paragraph 1, provided for the case of an objection by one State with respect to another State, the annex should contain an express cross-reference to article 66, paragraph 1. Similarly, a reference to the case of an objection by an international organization with respect to another international organization in article 66, paragraph 2, should be echoed by an express cross-reference to that clause in the annex. And thirdly, if article 66, paragraph 3, provided for the case of an objection by a State with respect to an international organization or by an international organization with respect to a State, an express cross-reference to that paragraph 3, should appear in the annex. Another section of the annex might then deal with the Conciliation Commission.

17. The language to be used in each of the various provisions might, he thought, be modelled on the terms of the Vienna Convention as far as disputes between States were concerned. In the provisions concerning disputes between international organizations, the following formulas should be used: "the organization or organizations constituting one of the parties to the dispute" and "the organization or organizations constituting the other party to the dispute". As regards mixed disputes, which would form the subject of a section III, he suggested the following wording: "the State or States or the organization or organizations constituting one of the parties" and "the State or States or the organization or organizations constituting the other party". The situation might, of course, be even more complex in practice, but it was quite impossible to envisage all eventualities in the draft text. On that point, the Commission might perhaps use the model of the draft being considered by the United Nations Conference on the Law of the Sea.

18. The Commission might therefore divide the annex into three sections to take account of the three main categories of dispute, and might provide that in any other situation the rules should be followed as closely as possible.

19. The remainder of section I was modelled on the corresponding provision of the Vienna Convention, but it would have to be amended in the light of the decision to be taken on the question of the list.

20. Lastly, he emphasized the capital importance of the words "with the consent of the parties to the dispute", in section I, paragraph 3 of the annex.

21. Mr. ŠAHOVIĆ said that, having considered the views expressed at the previous meeting, he had come to the firm conclusion that the Commission should endorse the proposals of the Special Rapporteur.

22. There were two types of problem to be solved: problems of principle and technical and adaptation problems. As far as the problems of principle were concerned, he gathered that many members regarded the debate on the annex as an opportunity for considering the general lines to be followed by the draft, since the questions raised by the use of various methods of settlement of disputes had to be dealt with at that stage. In that respect, he considered that the Commission should follow the Vienna Convention, since the annex was principally concerned with Part V of the draft, relating to the invalidity, termination and suspension of the operation of treaties, and particularly to section 4 thereof, on procedure. It would not be desirable to extend the scope of articles 65 and 66, nor, consequently, that of the annex. The authors of the Vienna Convention had made a choice, and, as the Special Rapporteur had said, the Commission should follow that precedent.

23. With regard to problems of adaptation, he considered that, if the Commission adhered to principles, it would be able the more easily to adapt the text of the Vienna Convention to take account of the special features of the situations to be covered in the draft articles. Accordingly, he supported the view of the members of the Commission who considered that the solution for the annex should be closely linked with that for the substance of draft articles 65 and 66. In his view, it was the Drafting Committee's responsibility to settle those problems.

24. He fully understood Mr. Ushakov's position concerning the list of conciliators. The Commission should consider what benefits there were in the list system; the 1975 Vienna Convention⁸ provided, in article 85, for the establishment of a conciliation commission composed of persons designated by the parties independently of any pre-established list. Yet, he doubted that it would be desirable to depart from the text of the Vienna Convention on the Law of Treaties in the drafting of provisions relating to the very substance of the law of treaties. If the Commission nevertheless decided to use the list system, the co-existence of two separate categories of entities should not prevent the compilation of a single list containing both categories of conciliator.

25. He added that as yet the Commission was considering the draft articles only in a first reading, and was only formulating proposals for submission to States with a view to obtaining their opinion. The wording of the various provisions was certainly of capital importance, but the essence would be contained in the commentary to the draft articles. He hoped that the Commission would reflect in its report all the opinions expressed during the discussion, so as to obtain the reactions of States before working out final texts.

26. With regard to parallel procedures, he thought that perhaps the Special Rapporteur had overstressed that aspect from the outset, for the essential point was to ensure that the decisions of the Conciliation Commission and other bodies for the settlement of disputes were binding on all parties to a treaty or agreement.

27. Mr. TSURUOKA said that, preferably, parallel procedures or successive procedures at short intervals should be avoided, for the sake of the conventional, or even international, legal order. The Commission should write a particularly full commentary on section I, paragraph 3, of the annex. In his opinion, that paragraph should remain as it stood in the draft, because its wording followed broadly the model of the Vienna Convention.

28. In order to avoid parallel or successive procedures it would be very desirable, however, that parties to a treaty which were involved in a dispute or in points raised by a dispute should be able to express their opinions freely before the Conciliation Commission.

29. Accordingly, the part of the commentary concerning the words "with the consent of the parties to the dispute" might indicate that in the Commission's view the parties to a dispute covered by section I of the annex should give their consent to other parties to the treaty being invited to submit their views. Equally, the Commission might indicate that the words "may invite" were intended virtually to mean "should invite". Such an interpretation would go a long way towards avoiding parallel or successive procedures that might disturb the conventional legal order. Moreover, such an interpretation would make it possible to settle disputes in a manner wholly satisfactory to all parties, since what was involved was a dispute concerning an objection to an interpretation. In such a case the Conciliation Commission should, with the consent of the parties to the dispute, invite all parties to the treaty to express their views before it. The machinery would therefore be made less rigid, to the benefit of the common sense which should always guide conciliation.

30. Mr. THIAM said that he hoped the Commission would not depart too far from the Vienna Convention and urged it to follow the Special Rapporteur's proposal on that point.

31. However, paragraph 3 of section I of the annex was a source of difficulty. The first sentence of the paragraph provided that the Conciliation Commission should decide its own procedure, but went on to limit its power. If the members of the Conciliation Commission wished to ask a party to the treaty for its opinion, it was hardly desirable that a party to the dispute should be able to object. Either the provision should be drafted differently from the corresponding clause of the Vienna Convention or else the commentary should state that it was preferable that any party to the treaty

⁸ See 1587th meeting, foot-note 12.

should be given a hearing if the Conciliation Commission so wished.

32. Mr. REUTER (Special Rapporteur) noted that in his comments on the general structure of the annex Mr. Ushakov distinguished three theoretical situations: a dispute between States, a dispute between international organizations, and a dispute between States and international organizations. He also thought that it might be necessary to differentiate those three cases in the body of draft article 66 as well as in the annex. The Commission should therefore make a decision on the matter.

33. In the draft annex, he (Mr. Reuter) had devoted section I to the first case and had covered together in section II the case of disputes between international organizations and that of disputes between States and international organizations. The final decision would of course depend above all on whether the differentiation of the three cases was justified by important differences in the treatment of the last two cases. If the differences were minor, there was hardly any justification for repeating the same provisions in two successive sections.

34. As regards the lists of conciliators, he considered that the Commission could keep one single list, provided that it did not wish to stipulate conditions for inclusion in the list other than those contained in the Vienna Convention. If, however, it decided to require additional qualifications, a list divided into two categories, as proposed by Mr. Šahović, might then be appropriate. Speaking as a member of the Commission, he expressed reservations on that point generally.

35. In his opinion, a good deal remained to be done in order to work out satisfactory wording for section I of the annex, and the Drafting Committee would have to take into account, *inter alia*, the proposals concerning paragraph 3.

36. He then introduced section II of the draft annex. He explained that the heading of the section and the system of paragraph numbering would have to be changed, either by the Drafting Committee, or by the Commission during the second reading of the draft.

37. Paragraphs 3 *bis*, 4 *bis* and 5 *bis* of section II were identical to the corresponding paragraphs of the annex to the Vienna Convention. Actually, only two questions arose in connexion with section II: a question of principle related to the possibility of the United Nations being a party to a dispute, and the practical question of the presentation of the different cases covered by section II.

38. So far as the first question was concerned, he considered that if the United Nations was a party to a dispute the Secretary-General would not be able to perform the function attributed to him by the annex to the Vienna Convention; at least, he would not be able to discharge his essential responsibilities. Those responsibilities would have to be entrusted to the

President of the International Court of Justice, although the Secretary-General might provide the Conciliation Commission with the necessary assistance and facilities referred to in the Vienna Convention. It was that consideration which explained the provision in paragraph 7 *bis* that such assistance and facilities would be provided "directly or, as appropriate, through the intermediary of the President of the International Court of Justice". Accordingly, the two issues to be settled were whether the draft should deal with the special case of a dispute to which the United Nations was a party, and whether the Special Rapporteur's approach was acceptable.

39. The second question concerned the contents of paragraph 2 *bis*. That provision dealt with two cases: the case of a dispute between one or more international organizations and one or more international organizations, and the case of a dispute to which one party was constituted by at least one State or at least one international organization. The reason why the case in which one or more States constituted one of the parties had been framed in the conditional form was that it did not occur in all the situations covered by paragraph 2 *bis*, which covered also cases where none of the parties included any State. The second case, by contrast, was not presented in the conditional, for one or more international organizations must necessarily constitute one of the parties, and it might happen that international organizations constituted both of them. The phrasing of the provisions describing that case was not entirely satisfactory, particularly in the versions other than the French.

40. It would be for the Commission to decide whether the subject could be divided in that way, with certain drafting changes, or whether the case in which both parties were constituted of one or more international organizations should be treated separately.

41. He wished to make two criticisms of his own draft. He should have mentioned the simplest case, that in which both parties were constituted of one or more international organizations, before the more complicated case. Secondly, he had omitted to mention the case in which one party was constituted of one or more States and one or more international organizations having to appoint conciliators. That case, which should be mentioned after the other two, might be covered by a clause in the following terms:

"If one or more international organizations and one or more States constitute one of the parties they shall appoint:

"(a) one conciliator who may or may not be chosen from the list referred to in paragraph 1; and

"(b) one conciliator not of the nationality of any of the States parties to the dispute and not included in the list on the initiative of an international organization party to the dispute."

42. The second-mentioned sole conciliator appointed by one or more States and by one or more inter-

national organizations must therefore fulfil both the requirements for appointment by a State and the requirements for appointment by an organization: he should not have the nationality of a State party nor should he have been included in the list of conciliators on the initiative of an international organization party to the dispute. It was the latter condition which best satisfied the condition requirement that there must not be any nationality link for the appointment of the second conciliator by one or more States. The authors of the Vienna Convention had intended that there should be no nationality link between a State and the conciliator appointed by that State. The only equivalent link which might exist between an international organization and an individual would be that resulting from the inclusion of that individual, on the initiative of the organization, in the list of conciliators. It might of course be stipulated that an official of an international organization party to a dispute would not be eligible for appointment, but the members of the Commission who had referred to such a stipulation had been thinking of the appointment of the first conciliator as well as that of the second.

43. Mr. USHAKOV said that the case where the United Nations was a party to a dispute should be taken into consideration, but felt that in such a case the President of the International Court of Justice should not necessarily act in lieu of the Secretary-General. According to the machinery established in the annex, the Secretary-General acted not as an interested party but in an impartial capacity. If, in the context of the Vienna Convention, a State not a Member of the United Nations raised an objection to a notification by a Member State made under article 65, the Secretary-General, in the exercise of the functions entrusted to him in the annex, would not be acting on behalf of the Member State. Besides, the Secretary-General was the depositary of the Vienna Convention, and all communications relating to the Convention would be transmitted through him, even in the case of a dispute to which the United Nations was a party. It might be, after all, that in a dispute to which the United Nations was a party the other party or parties would agree to the Secretary-General exercising the appointing functions mentioned in the annex. Consequently, it would be better to make provision for a mere faculty for the President of the International Court of Justice to exercise those functions.

44. Under the terms of paragraph 6 *bis*, the report of the Conciliation Commission was deposited with the Secretary-General of the United Nations or, as appropriate, the President of the International Court of Justice. He (Mr. Ushakov) considered that the report should in all cases be addressed to the Secretary-General, even if the President of the I.C.J. performed the appointing functions. Paragraph 6 *bis* might apply to all cases covered in section II.

45. Under the terms of paragraph 7 *bis*, the Secretary-General provided the Conciliation Commis-

sion either directly or, as appropriate, through the intermediary of the President of the International Court of Justice, such assistance and facilities as it might require. He considered that, even in cases where the President of the Court was empowered to make appointments, the assistance and facilities which the Conciliation Commission might require should be provided directly by the Secretary-General, who might surely be expected to provide such assistance and facilities completely impartially. Like paragraph 6 *bis*, paragraph 7 *bis* might apply to all the cases indicated in section II.

46. Mr. RIPHAGEN said that, while he did not question the independence of the Secretary-General, he would point out that Article 100 of the Charter of the United Nations provided that the Secretary-General should not seek or receive instructions from "any other authority external to the Organization". That was a clear indication that the Secretary-General was not completely independent of the authority of the Organization. He therefore agreed that, in the case of disputes to which the United Nations was a party, the President of the International Court of Justice, rather than the Secretary-General of the United Nations, should appoint conciliators. Any impression that certain functions involved in the settlement of disputes were vested in one party to the dispute would then be dispelled.

47. He likewise agreed that, in the case of conciliators appointed by an international organization, the nationality test should not apply and that such conciliators should be drawn from a list of persons nominated by the organization in question. The special link which was said to exist by virtue of the nationality of a person had no counterpart in the case of an organization, but the inclusion of a person's name in such a list was presumably an indication of the organization's confidence in that person.

48. Mr. SCHWEBEL said that Mr. Riphagen's point was well taken. If, for example, a Member State contested a majority decision of the Organization, would that State feel at ease if, in the ensuing conciliation process, the Secretary-General was the appointing authority? And if, as was conceivable, the acts which were the subject of the dispute had been performed at the Secretary-General's initiative, should he then appoint a conciliator? There was no doubt that, in such cases, the Secretary-General would act impartially, but for the sake both of legal principle and of appearances he should be replaced by a substitute, and the President of the International Court of Justice would appear to be eminently suitable. Moreover, the arbitration provisions that were traditionally incorporated in treaties between States and international organizations provided that the third arbitrator would be chosen by agreement of the parties or should be appointed from a third source, typically the President of the International Court of Justice. He saw no need to make a distinction between that process and the process of conciliation.

49. He would be grateful if those members who had taken part in the United Nations Conference on the Law of Treaties could enlighten him on the following point. Had consideration been given—and, if not, should it now be given—to the advisability of not initially making public the recommendations of conciliators? There seemed to him to be a difference between an arbitral or judicial decision, which by its very nature required immediate publication, and the recommendations of a conciliation panel. In the latter case, the findings of the conciliators might be based not so much on the law as on the need to arrive at a compromise position, in which case the possibilities of a practical accommodation could perhaps be furthered if those findings were not published straightaway. He was thinking, in particular, of the process of mediation, the successful outcome of which could depend to a large extent on secrecy for a certain limited period of time, although he was not suggesting that secrecy should be indefinite. Perhaps the paragraphs which dealt with the deposit of the award should be more explicit on that score, while making clear that publication would be required after a time.

50. Lastly, with regard to the questions raised in paragraph (9) of the commentary to the annex (A/CN.4/327), he considered that it would be desirable to broaden the scope of application of the provisions rather than limiting them to Part V of the draft. The Commission might wish to take a step in the direction of the progressive development of international law by making a proposal to that effect with a view to ascertaining the reaction of Member States.

51. Mr. JAGOTA said that the main question dealt with in section II of the annex, the constitution of a conciliation commission and the selection of its members, posed no great difficulty and could be resolved by drafting changes. A more substantive question was whether there was any need for section II at all. Although, under paragraph 1 of the annex, the members of a conciliation commission would be drawn from a list which included the names of persons nominated either by States or by international organizations, subparagraph (a) of the second paragraph of paragraph 2 *bis* provided that an international organization could appoint a conciliator who “may or may not be chosen from the list referred to in paragraph 1”. In other words, in the event of a dispute between two international organizations or between one international organization and a State, the organizations could appoint anyone at will.

52. He wondered, however, whether, when such disputes arose out of the same treaty, it was really necessary to provide for two or more procedures to be applied according to the parties to, and the subject matter of, the dispute, and whether it would not be preferable to refer the matter to the same conciliation commission, irrespective of the category into which the disputes fell. That was a question which merited careful reflection in view of its relevance for other

conferences, including the Conference on the Law of the Sea, which had yet to consider the specific issue involved. Whatever decision the Commission reached would inevitably have persuasive authority in other forums; members should therefore be intellectually convinced of the need to draw a distinction between sections I and II of the annex.

53. Furthermore, subparagraphs (a) and (b) of the third paragraph of paragraph 2 *bis*, as drafted, applied only to disputes to which one of the parties was an international organization or a group of organizations. Those subparagraphs should therefore be redrafted to make it quite clear that two categories of dispute were envisaged, namely, those between a State and an international organization, and those between one international organization and another.

54. Lastly, with regard to paragraphs 6 *bis* and 7 *bis*, he agreed with the Special Rapporteur’s proposal regarding the distinction to be drawn between the functions of the Secretary-General of the United Nations and the President of the International Court of Justice but considered that careful consideration should be given to the question of the categories of dispute to which the United Nations could become a party. For instance, would the United Nations be a party to the future convention and, if not, would the provisions of the convention apply to the United Nations? In the case of action taken pursuant to the provisions of Part V of the draft, would not the terms of the Charter prevail by virtue of its Article 103? It was clear that the United Nations could be a party to a dispute arising out of any agreement into which it had entered—for instance, a headquarters agreement—but in such cases the procedure for the settlement of disputes would probably be prescribed by the agreement itself.

The meeting rose at 1.05 p.m.

1596TH MEETING

Thursday, 22 May 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Calle y Calle, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (continued)
(A/CN.4/327)

[Item 3 of the agenda]

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

ANNEX (Procedures established in application of
article 66)¹ (*concluded*)

1. Mr. QUENTIN-BAXTER said that, in the light of the discussion, it looked likely that a way could be found through the problems of detail posed by the draft annex, since some general revision was contemplated by all members of the Commission who had spoken in the debate. So far as conciliation was concerned, the Commission was not obliged to observe the strict division imposed upon it in regard to judicial settlement by the terms of the Statute of the International Court of Justice. It would therefore be possible to condense or elaborate, as appropriate, the distinctions which seemed important to members, and on that basis the Drafting Committee would undoubtedly be able to arrive at a solution that was acceptable to all.

2. He wished, however, to reflect on some of the broader issues that had become fleetingly apparent throughout the Commission's lengthy debate on the draft articles. There had probably never been a codification exercise which presented quite the same features, involving, as it did, minimalist solutions within the framework of the Vienna Convention² and a certain consciousness of the maximalist implications for the nature and future of international society. Earnest consideration had been given to such questions as whether an international organization could perform an act of ratification and whether it was possible to refer to the representatives of an organization as having full powers. The painstaking classification of the different relations between international organizations and between international organizations and States had resulted in a degree of elaboration that would undoubtedly cause some difficulty for those who worked in foreign ministries and the secretariats of international organizations. At times, the Commission, no longer on the familiar ground of State practice, had had to rely on shreds of information about organizational practice, imparted in confidence by the Special Rapporteur.

3. It was therefore not surprising if, occasionally, some members had seemed to hear the music of Dukas and to dream the dream of the Sorcerer's Apprentice. He did not personally share in their concern, for he did not believe the Commission was moving in an area where international organizations would, by virtue of their number and complexity, bring disorder into a world that was essentially a community of States. If an

allusion of a literary kind were needed, he would seek it in a reversal of the Pirandello theme of characters in search of an author: it seemed to him that, as the Commission viewed the empty structure which it was building and dreamt of its being inhabited, it was more like an author in search of characters. Nowhere was that more apparent than in paragraph 1 of the annex. In that provision, either the Special Rapporteur's minimalist solution could be adopted, by referring to international organizations to which the articles had become applicable, or his own (Mr. Quentin-Baxter's) maximalist solution, by referring to international organizations which had become party to treaties to which the present articles applied. Both solutions, however, were no more than a form of words which would have to be changed before the point was reached when the draft articles would be transformed into an international convention. The provision might, therefore, be likened to a motorway intersection, inasmuch as it was designed to promote the growth of international traffic, albeit one that had yet to be linked to the arterial mainstream of international life.

4. In submitting the draft articles to the General Assembly for the first time, the Commission should above all ascertain whether States were prepared to make use of the structure in which the Commission had invested its time and effort. That in turn involved the question of the relationships between international organizations and States. International organizations, although created by States to serve States, must be actors in their own right upon the international stage and be capable of entering into treaty arrangements with States. Consequently, States should not be afraid that the Commission's proposals would in any way disturb the balance between States and international organizations. The true test of the relationship between the two would be whether States were prepared to encourage the international organizations with which they were connected, to enter into consultations with the Commission at some future point, and to offer their own experience as organizations in relation to the draft articles, failing which the Commission would clearly have been wasting its time.

5. Mr. TABIBI said that he fully endorsed the approach adopted by the Special Rapporteur in the annex to the draft articles. Conciliation procedures now had the support of all Member States of the United Nations and were provided for in many international conventions. He considered, therefore, that, irrespective of the nature of the dispute involved, it would make little difference if conciliators were selected from the same list. International organizations, as the collective voice of the community of nations, should be able to appoint conciliators in the same way as States, subject to the proviso that the persons so appointed would be those best qualified for the purpose. In that connexion, he was perfectly satisfied with the procedure outlined in paragraph (9) of the commentary to the annex. He agreed also with the view that, in the case of disputes to which the

¹ For text, see 1593rd meeting, para. 58.

² See 1585th meeting, foot-note 1.

United Nations was a party, the Secretary-General should be replaced in his function in that connexion by the President of the International Court of Justice.

6. On the question of costs incurred in cases in which the President of the Court acted, he considered that in principle they should be borne by the parties to the dispute, in view of the International Court's budgetary constraints. Alternatively, once the future convention had been concluded, an additional budgetary appropriation could perhaps be made to cover such costs.

7. Lastly, since the whole question of conciliation was to be submitted to Governments and international organizations for comment and since, moreover, it was also to be considered by the General Assembly, he recommended that the draft annex should be referred to the Drafting Committee forthwith.

8. Mr. FRANCIS, also expressing support for the approach adopted by the Special Rapporteur, said that the most important question raised in the annex related to the role of the Secretary-General in the case of disputes to which the United Nations was a party. For instance, if the chairman or any member of the panel of conciliators had not been appointed within the period specified in section II of the annex, the Secretary-General could be asked to make the appointment. Clearly, that might place the Secretary-General in a very invidious position in the case of disputes to which the United Nations was a party. On balance, therefore, he agreed that in such cases the President of the International Court of Justice should replace the Secretary-General in the functions vested in him by the annex.

9. Mr. TSURUOKA said that he would submit to the Drafting Committee a proposal for simplifying the text of the draft annex.

10. Mr. REUTER (Special Rapporteur), summing up the discussion on section II of the draft annex, noted that the comments had touched on two questions of substance and on one question of form.

11. In general, the members of the Commission had spoken in favour of retaining, as the equivalent of the nationality link, the link existing between a person and an international organization by reason of the fact that that person's name had been entered on the list of conciliators by the organization in question.

12. In his comments on the special case in which the United Nations was a party to a dispute, Mr. Ushakov had expressed the opinion (1595th meeting) that the intervention of the President of the International Court of Justice should preferably be optional, not mandatory. He had added that, when once the Conciliation Commission had been set up, the President of the Court would not need to intervene at all, since the Secretary-General of the United Nations possessed all the necessary guarantees of impartiality. Other members of the Commission had taken the view that it was

not so much the Secretary-General's impartiality that was at issue as the drawbacks which such a solution would involve for him, for the consequence would be that he would suffer the loss of the freedom he so badly needed as head of the Secretariat to defend the cause of the United Nations. Hence, it would be better that the President of the International Court should intervene in such cases.

13. The suggestion that the intervention of the President of the Court should be optional and that the functions of the Secretary-General should be enlarged was attractive, but, on reflection, he (Mr. Reuter) felt unable to accede to it. The impartiality of the Secretary-General was beyond question, but there was a danger that, if the intervention of the President of the Court was made optional, the State requesting such intervention might in so doing imply that the Secretary-General was somehow at fault. In order to avoid placing a State in an invidious situation of that kind, the intervention of the President of the Court would have to be automatic.

14. It was not only during the first stage, when the Conciliation Commission was being set up, but also during the second stage, when it was actually performing its functions, that Mr. Ushakov wanted the role of the Secretary-General to be enlarged. But it was precisely during the second stage that the intervention of the President of the Court was so important. In practice the question would, of course, depend on the procedure established by each conciliation commission. Generally, provision was made for a written procedure which required specifying time-limits for filing the documents. Sometimes it was so hard to determine which party was the claimant and which the respondent that a single date was fixed for the filing of documents in the written procedure. In order to ensure that both parties remained on an equal footing, it was important that the time-limits should be strictly observed. If the United Nations was a party to a dispute, it was essential that it should not also be responsible for ensuring that the formalities were observed by the parties. Even if the Secretary-General made one department responsible for conducting the litigation and another for performing the practical functions, he would be placed in an embarrassing situation which might well continue throughout the entire procedure. In practice, the Conciliation Commission would request the President of the Court to designate an official, possibly a member of the Registrar's staff or even an official of the United Nations Secretariat, who would act under the President's responsibility. The Secretary-General of the United Nations would then be free to concentrate on his essential task of defending the interests of the United Nations in an action to which it was a party. Consequently, it was the solution proposed in the draft annex which seemed the most appropriate.

15. The question concerning the form of section II arose out of the imperfect distinction he had made

between disputes in which one or more States constituted one of the parties, disputes in which only international organizations were parties, and disputes in which one or more States and one or more international organizations were parties. That classification had led to the laborious drafting of paragraph 2 *bis* and had resulted in unnecessary repetition.

16. Because sections I and II contained very similar provisions with regard to the functions of the Conciliation Commission, he suggested that the Drafting Committee might try to produce a text dealing first with the role of the Secretary-General of the United Nations or the President of the International Court of Justice as well as the constitution of the Conciliation Commission, and secondly with that Commission's functions. The first part of the text would have to identify each of the three possible situations, and in the second part a single clause could cover the three possibilities, with specific provision for the case in which the United Nations was a party to a dispute.

17. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer the draft annex to the Drafting Committee.

*It was so decided.*³

The meeting rose at 11 a.m.

³ For consideration of the text proposed by the Drafting Committee, see 1624th meeting, paras. 30 *et seq.*

1597th MEETING

Tuesday, 27 May 1980, at 3.10 p.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

State responsibility (A/CN.4/330)

[Item 2 of the agenda]

PRELIMINARY REPORT ON THE CONTENT, FORMS AND DEGREES OF INTERNATIONAL RESPONSIBILITY (PART 2 OF THE DRAFT ARTICLES)

1. The CHAIRMAN invited the Special Rapporteur to introduce his preliminary report on the content, forms and degrees of State responsibility, which constituted part 2 of the draft articles on State responsibility (A/CN.4/330).

2. Mr. RIPHAGEN (Special Rapporteur) said that, since his report was a preliminary one, he had endeavoured to make a systematic and theoretical analysis of the problems with which the Commission would have to deal in preparing draft articles on the content, forms and degrees of State responsibility. Accordingly, the report contained very few references to what Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice called "the teachings of the most highly qualified publicists of the various nations" or to judicial decisions and State practice. The report was also preliminary in nature in the sense that any conclusions it contained were designed solely to provoke criticism. Indeed, what he was seeking at the current stage was the Commission's guidance for the preparation of further reports and draft articles on the topic.

3. In part 1 of the draft articles on State responsibility,¹ the Commission had defined the internationally wrongful act of a State. Such an act created a situation which called for a response; part 2 would therefore deal with allowable and sometimes compulsory responses under international law.

4. Paragraphs 1 to 9 of his report were purely historical, describing the consideration of part 2 of the topic by the Commission and the General Assembly.

5. Paragraphs 10 to 26 dealt with what might be called the overlap between part 1 of the draft articles and the future part 2. Paragraphs 11 to 13 made it clear that some of the distinctions which had been irrelevant to part 1 would have to be made for the purposes of part 2. For example, paragraph 11 stated that, while it had been possible to refer in part 1 to an obligation of a State under international law without necessarily mentioning another entity towards which such an obligation existed, the word "responsibility" seemed to imply another entity towards which a State was responsible. Indeed, in part 1, the term "international responsibility" had been used to mean "all the forms of new legal relationship which may be established in international law by a State's wrongful act".² Because the word "relationship" was used in that context, it would be necessary in part 2 to determine the entities with which such a relationship existed or for which it could be created by an internationally wrongful act. As he stated in paragraph 12 of this report, part 2 could not, moreover, ignore the origin—and, in particular, the conventional origin—of the international obligation breached. It must also take account of the fact that the subject-matter of the obligation breached, or, in other words, the content of the primary rule of international law involved, might influence the legal

¹ For the general structure of the draft, see *Yearbook ... 1979*, vol. II (Part II), p. 89, document A/34/10, paras. 66–67. For the text of the draft articles so far adopted by the Commission, *ibid*, pp. 91 *et seq.*, document A/34/10, chap. III, sect. B.1.

² *Yearbook ... 1971*, vol. II (Part One), p. 211, document A/CN.4/246 and Add. 1–3, para. 43.

consequences of such a breach. Indeed, for the purposes of part 2, it was quite probable that the content of the primary rule of international law would influence the responsibility arising from the breach of that rule. Part 1 did not refer to the degree of seriousness of the breach or of the situation created by the breach. That quantitative element might well influence the allowable or compulsory response to that breach and must therefore be dealt with in part 2.

6. Paragraphs 14 to 26 of his report dealt with a number of other questions which had been "announced" in part 1 and which would have to be answered in part 2. For example, paragraph 14 referred to articles 27 and 28, dealing with the international responsibility of a State other than the one which committed an internationally wrongful act. In part 2, it would be necessary to define the relationship between those two States. As noted in paragraph 18 of his report, chapter V of the draft raised the question of the legal consequences that arose from acts committed in circumstances precluding wrongfulness. At its thirty-first session, the Commission had deliberately refrained from taking a decision on the question whether those legal consequences should be dealt with in part 2 or in the context of its consideration of the topic of "international liability for injurious consequences arising out of acts not prohibited by international law".³ Since he considered that the Commission now had to decide how it would deal with such legal consequences, he had suggested in paragraph 19 of the report that that matter should be dealt with in part 2 of the draft articles on State responsibility, in order to avoid any misunderstanding concerning the fundamental distinction to be made between acts which were illegal, but which might, in certain circumstances, preclude wrongfulness, and acts which were *a priori* legitimate, but which might, in certain circumstances, entail some sort of liability.

7. In paragraphs 20 to 25 of the report, reference was made to the question of the contributory conduct of a State to a situation implying a wrongful act. There were a number of articles in part 1 which seemed to indicate that, although an act was not immediately attributable to a State, the conduct of that State might nevertheless contribute to an illegal result. The Commission would therefore, have to deal with the question of the legal consequences of such contributory conduct.

8. Starting in paragraph 27, he had made an analysis of possible responses to internationally wrongful acts and, in the course of that analysis, has made three main distinctions. The first was to be found in paragraph 28, which identified the three parameters that appeared in drawing up a systematic catalogue of possible legal consequences of internationally wrongful

acts. The second distinction, referred to in paragraphs 74 to 76, was that between allowable and compulsory responses. The third was the distinction made in paragraph 79 between quantitative and qualitative proportionality between the wrongful act and the response thereto.

9. Those three distinctions were theoretical in nature and were not meant to establish any definite categories. Indeed, there were obvious connexions between them. For example, with regard to the first parameter, namely, the duty of the guilty State, it could be said that a response was compulsory, while with regard to qualitative proportionality it was questionable whether a response was allowed at all. The distinction between the three parameters referred to in paragraph 28 also gave rise to the problem of changing from "rules" to "relationships", as noted in paragraph 96, and to difficulties resulting from the existence of international organizations, as pointed out in paragraphs 68 to 73, 77, 78 and 89. Moreover, a general problem that arose in connexion with all three of the distinctions was that of relating "quality" to "quantity", as stated in paragraphs 36, 94 and 95.

10. With regard to the first of the parameters mentioned in paragraph 28, it had been assumed (para. 29) that the guilty State was obliged to "make good". Since, however, the situation which would have prevailed if no breach of the international obligation had occurred could never be fully re-established, a distinction had to be drawn between three aspects of the general duty to make good, taking into account the time element involved. Paragraphs 30 and 31 thus differentiated between the *ex nunc* aspect, the *ex tunc* aspect and the *ex ante* aspect. The *ex tunc* aspect typically envisaged the payment of damages as a reparation for the injurious consequences caused by the wrongful act, while the *ex ante* aspect related to a kind of "guarantee" against future breaches of the same obligation, and the *ex nunc* aspect, which was centred on the position of the injured State, envisaged the re-establishment of a right which had been taken away by the wrongful act.

11. It nevertheless remained to be seen whether the distinction between those three time elements had any relevance to the various types of breaches of international obligations or, in other words, whether there was any correlation between the content of the primary rule breached and the content of the new obligation of the guilty State to make good.

12. In that connexion, he noted that there was always a quantitative proportionality between the breach and the content of the new obligation. The Commission would, however, have to consider whether there was also a qualitative proportionality, and whether a distinction could be made between primary obligations by saying that a primary obligation gave rise to a duty of the guilty State either *ex nunc*, *ex tunc* or *ex ante*.

³ See *Yearbook* . . . 1979, vol. II (Part Two), p. 133, document A/34/10, chap. III, sect. B.2, para. (39) of the commentary to article 31, *in fine*.

13. Another problem that arose in connexion with the first parameter was what distinction should be made between the parties to a convention stipulating a primary obligation and the parties to a convention stipulating the obligation of the guilty State to make good. In that connexion, he considered that it was the origin of the primary obligation that was important, because, normally, if a primary obligation was stipulated in a bilateral treaty, only the other party to the bilateral treaty could claim a *restitutio in integrum*. The situation could, of course, arise in which a treaty created rights and obligations for States which were not parties to that treaty. In such a case, the consequences of the breach of an obligation laid down in the treaty would be the same for the third States and for the parties to the treaty.

14. In the case of multilateral treaties, the situation was more complicated, as shown in paragraph 39 of the report. That paragraph referred to article 60 of the 1969 Vienna Convention on the Law of Treaties,⁴ which distinguished between “a party specially affected by the breach” of a multilateral treaty and any other party to the treaty. The question arose whether the parties to the treaty not especially affected by the breach had the same rights as the injured States. Although the Vienna Convention answered that question in the negative, the Commission might like to look at it more closely in the context of the topic of State responsibility, paying particular attention to the examples given and ideas put forward in paragraphs 41 and 42 of his report.

15. The second parameter, discussed in paragraphs 44 to 61, related to new rights of the injured State which might arise as a consequence of the internationally wrongful act. Two different types of rights could be distinguished: first, those arising out of non-recognition of the situation created by the wrongful act and, secondly, those to which the maxim *exceptio non adimpleti contractus* applied. Within the context of the latter group of rights, the report considered (in its paragraphs 58 to 61) the scope of the principle underlying article 60 of the Vienna Convention and noted, in particular, that the International Court of Justice, in its advisory opinion on the legal consequences of the continued presence of South Africa in Namibia,⁵ had extended that principle to all types of relationships between States.

16. The third parameter, which was discussed in paragraphs 62 to 73, concerned the legal position of third States in the event of the breach of an international obligation. The basic principle was that

the legal relationship created by an internationally wrongful act was bilateral in character (guilty State/injured State), but there were cases where a third State had a right to take a non-neutral position in regard to such an act. Three types of exception to the basic principle were, therefore, considered; those exceptions related, respectively, to cases where there might be more than one “directly” injured State; cases where the bilateral relationships between States parties to a multilateral treaty were so interconnected that an exception to the bilateral relationship between the guilty State and the directly injured State had to be made; and cases where certain rules of international law protected a fundamental interest that was not solely an interest of an individual State. In regard to the third exception, reference was made in paragraph 66 of his report to article 19 of the draft on State responsibility, which dealt with international crimes, and the Commission might wish to consider whether it was only with respect to such crimes that third States could adopt a non-neutral position. He, for his part, would be inclined to answer that question in the negative. On the other hand, it seemed, as stated in paragraph 67, that the legal consequences of the various international crimes covered by article 19 were not necessarily identical. For example, the consequences of the crime of aggression, which were provided for in the Charter of the United Nations, were not necessarily the same as the consequences of pollution, which were not provided for in the Charter. Reference was also made, in connexion with the third exception, to the possible need for a collective decision regarding the response to a wrongful act (paragraphs 68 to 73).

17. Paragraph 74 dealt with the possible duty, as distinct from the right, of a third State to take a non-neutral position in regard to a wrongful act committed by another State. Paragraphs 75 and 76 considered, first, the “sacrifice” which that duty might require of such a State (so far as certain of its interests were concerned) and, secondly, the sacrifice in which a third “innocent” State might be involved as a result of countermeasures taken by another State. In the latter connexion, reference was made to Articles 48 to 50 of the Charter of the United Nations.

18. A further aspect of the legal consequences of an internationally wrongful act, which was dealt with in paragraphs 77 and 78, related to the effect of countermeasures taken within the framework of an international organization on the rights of a member State of that organization. As explained in paragraph 89, a situation could arise where a member State would be superseded in a right by the power of the organization to take such measures as it deemed fit. That would, however, depend on the nature and rules of the organization concerned.

19. Paragraphs 79 and 80 considered the impact of a rule of *jus cogens* on the qualitative proportionality between the wrongful act and the response thereto, and

⁴ For the text of the Convention (hereinafter called the “Vienna 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.

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

also raised the question of the retroactive force of a *jus cogens* rule. As pointed out in paragraphs 81 and 82, there were cases, although they were not common, of treaties which laid down a primary rule of international law and provided for an admissible or mandatory response in the event of a breach of that rule. In that connexion, paragraphs 83 and 84 discussed the impact of Article 103 of the Charter of the United Nations on the content of State responsibility, and paragraph 85 dealt with the special problem of the non-fulfilment of a primary obligation arising under a multilateral treaty—particularly as the question related to articles 41 and 58 of the Vienna Convention—and also with the question of the admissibility of certain countermeasures taken pursuant to article 60 of that Convention. Paragraphs 86 to 89 dealt with another aspect of the impact of a breach of a primary rule of international law, namely, its impact on a mechanism of consultation and negotiation, on machinery for the settlement of disputes, and on an international organization in cases where the organization was empowered to take measures in response to an act that was wrongful within the context of that organization.

20. Paragraphs 90 *et seq.* considered whether there were certain obligations under international law which could never be breached in response to the internationally wrongful act of another State. In that regard, the principle underlying paragraph 5 of article 60 of the Vienna Convention was perhaps relevant to situations other than those specified in that paragraph. Within the context of qualitative proportionality, certain distinctions should be drawn between, for instance, primary obligations of a reciprocal character, special international régimes and—to cover cases where the content of the primary obligation determined the admissible or mandatory response—what might be termed parallel obligations. In that connexion, paragraph 95 referred to the impact of qualitative proportionality on quantitative proportionality and, specifically, to the problems which arose, in international as in national legal affairs, when translating quantity into quality and vice versa. Another very general problem, referred to in paragraph 96, concerned the change from “rule” to “relationship”. It often fell to be decided in municipal law, as it might well do in international law, whether a breach of an obligation imposed by legislation constituted a wrongful act as between the guilty party and any other person having a material interest in the performance of that obligation. At the same time, it was a phenomenon of modern legal practice that a contract which embodied clauses designed to protect the interests of third parties could give rise to obligations vis-à-vis those third parties in the event of a breach of the contractual relationship. Such difficult borderline cases, which reflected the structural changes both in national and in international society, made it difficult to lay down hard and fast rules governing the response to any given internationally wrongful act.

21. It was in the light of those considerations that the problem of method was discussed in paragraphs 97 to 100. Since it was not possible to deal with each and every case of the breach of an international obligation, together with the corresponding admissible or mandatory response, it was suggested that the Commission should proceed by way of approximation. On that basis, it might wish to consider the limitations of possible responses under the three headings listed in subparagraphs 99 (a), (b) and (c).

22. Lastly, the Commission was requested, in paragraph 101, to decide whether to include a provision in part 2 of the draft articles to cover loss of the right of an injured or third State to invoke the new legal relationship which arose as a consequence of an internationally wrongful act.

23. Mr. USHAKOV said that if the Commission should decide to reopen, in part 2 of the draft articles, the question of the origin of responsibility, in other words the occurrence of an internationally wrongful act, it might be giving the impression that part 1 did not adequately cover the subject.

24. Referring to the terms of draft article 3, as adopted by the Commission,⁶ he said that the objective feature of the internationally wrongful act was the breach of an international obligation owed by the State. Accordingly, it was legitimate to inquire in what circumstances and at what point that obligation arose, and it was the Commission's task to consider whether it ought to answer the question in its draft articles.

25. Secondly, with reference to draft article 30 concerning countermeasures in respect of an internationally wrongful act, in that context likewise the Commission should probably also determine whether it was its task to define the meaning of “legitimate” countermeasures or whether no definition was necessary because the question was settled by existing international law.

26. Thirdly, he expressed the opinion that, so far as the proportionality of countermeasures was concerned, the Commission had to decide, in the context of the draft articles, which of the two prevailed in cases where both primary and secondary rules co-existed.

The meeting rose at 4.40 p.m.

⁶ See foot-note 1 above.

1598th MEETING

Wednesday, 28 May 1980, at 10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Calle y Calle, Mr. Diaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr.

Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Point of order raised by Mr. Ushakov (concluded)*

1. The CHAIRMAN, before giving his ruling on the point of order raised by Mr. Ushakov at the Commission's 1589th meeting, invited the representative of the Secretary-General to address the Commission on a point of information.

2. Mr. SCOTT (Representative of the Secretary-General) said he wished to inform the Commission that Mr. Suy, Legal Counsel of the United Nations, had recently had a meeting in New York with a member of the Permanent Mission of Afghanistan to the United Nations. In the course of that meeting, the Legal Counsel had explained that, under the Statute of the Commission, the Secretary-General was not competent to declare a casual vacancy in the Commission in the circumstances concerned, since its members were elected in a personal capacity for a fixed term, and in nearly every case upon the nomination of many more Governments than one. That conclusion was based upon the express provisions of the Statute of the Commission and the practice developed thereunder by the Commission, which had in the past taken a similar stand with regard to its own authority.

3. The CHAIRMAN said that, on 12 May 1980, a copy of a letter addressed to the Secretary-General of the United Nations by the Minister for Foreign Affairs of Afghanistan had been distributed to members under cover of a compliments slip from the Legal Counsel of the United Nations. The letter had stated that Mr. Tabibi could not "represent the legal system of the new Afghanistan". It had requested the Secretary-General to declare a seat on the Commission vacant on the ground of non-compliance with article 8 of the Commission's Statute and also requested the Commission to fill such vacancy in accordance with article 11 of its Statute.

4. The letter had been brought before the Commission at its 1589th meeting by Mr. Ushakov. On the proposal of Mr. Tsuruoka, supported by Sir Francis Vallat, the Commission had decided to postpone discussion on the question of whether or not the Commission could be seized of the matter raised by Mr. Ushakov.

5. Following consultations and an examination of the provisions of the Commission's Statute referred to in the letter, his ruling was that it was beyond the competence of the Commission to decide the issues that could arise in connexion with the matter raised by Mr. Ushakov, and that the Commission could not therefore be seized of it.

6. Mr. USHAKOV said that he was opposed to the Chairman's decision. Under article 11 of its Statute, the Commission took account, when filling a casual vacancy such as the one for which Mr. Tabibi had been elected, of "the provisions contained in articles 2 and 8 of this Statute". Just as the Commission took account of those provisions and, in particular, ensured that the persons called upon to take part in the Commission individually met the required conditions, it could also consider, in a particular case, that a member of the Commission no longer met the requirements. The questions raised in the letter from the Afghan Government were therefore within the competence of the Commission, which was in a position to remedy the situation thus created.

7. The CHAIRMAN, in accordance with rule 71 of the rules of procedure of the General Assembly, put to the vote Mr. Ushakov's appeal against his ruling.

The result of the vote was 1 in favour of the appeal and 13 against.

Accordingly, the ruling of the Chairman was upheld.

8. Mr. ROMANOV (Secretary to the Commission) added, for the sake of clarification, that the Secretariat of the Commission had circulated the letter from the Minister for Foreign Affairs of Afghanistan in response to a request received from the Legal Counsel of the United Nations.

9. The CHAIRMAN said that the Commission had thus concluded its consideration of the point raised by Mr. Ushakov and that he did not propose to allow any speakers on the issue of the competence of the Commission, which had just been decided by a vote.

10. Mr. DÍAZ GONZÁLEZ said that, while he agreed entirely with the Chairman's ruling, he considered that instead of stating that the Commission could not consider the issue it would have been more correct to state that it did not have legal capacity under its Statute to decide the issues raised in the letter from the Minister for Foreign Affairs of Afghanistan.

11. Mr. JAGOTA said that he had not taken part in the vote because the motion had related more to the content of Mr. Ushakov's statement than to the ruling given by the Chairman. If the question posed had related to the competence of the Commission to deal with the matters raised, he would have voted one way or the other.

12. Mr. FRANCIS said that he deeply regretted the stand which the Commission had been obliged to adopt. Although, strictly speaking, the Chairman's ruling was correct, the right course to follow, in his view, would have been for the Legal Counsel to raise the question of the competence of the Commission or, for that matter, of the General Assembly, with the Government of Afghanistan, after which the relevant correspondence should have been forwarded to the Commission, a course of action which would have precluded any discussion of the matter by the

* Resumed from the 1589th meeting.

Commission. He did not, however, attribute any blame to the Government of Afghanistan for raising a political issue, since that was the business of Governments, nor to Mr. Ushakov for having raised the matter before the Commission.

13. Mr. USHAKOV said that he had voted against the Chairman's decision since he considered that Mr. Tabibi no longer met the "qualifications required", as provided for in article 8 of the Statute of the Commission.

14. Mr. SCHWEBEL said that he had welcomed the information provided by the representative of the Secretary-General but agreed with Mr. Francis as to the way in which the matter should have been handled.

15. He found it most objectionable that any member of the Commission should have raised and pursued the matter. It prompted disturbing questions as to that member's concept of the character of the Commission and of his responsibilities. Moreover, had further discussion of the question not been declared out of order, there would, in his view, have been virtually no sentiment in favour of any motion of that kind regarding Mr. Tabibi.

State responsibility (*continued*) (A/CN.4/330)

[Item 2 of the agenda]

PRELIMINARY REPORT ON THE CONTENT, FORMS AND DEGREES OF INTERNATIONAL RESPONSIBILITY (PART 2 OF THE DRAFT ARTICLES) (*continued*)

16. Mr. TSURUOKA congratulated the Special Rapporteur on his excellent preliminary report (A/CN.4/330), in which he had shown both open-mindedness and moderation. Clarification on two points would be useful.

17. In paragraph 40 of the report, it was stated that a third State could not claim damages *ex tunc*, since by definition there was no injury to its material interest, but that a re-establishment *ex nunc* to the direct benefit of the injured State and a guarantee *ex ante* against further breaches might well be in the non-material interest of that State, in particular in the case mentioned in article 60 of the Vienna Convention¹—in other words, if the treaty was of such a character that a material breach of its provisions by one party radically changed the position of every party with respect to the further performance of its obligations under the treaty. He wondered whether it was not going too far in protecting a third State to assimilate it to a directly injured State, and whether a line should not be drawn between third States and directly injured States. Such a distinction would probably facilitate acceptance of the draft articles by some States.

18. Paragraphs 62 to 76 of the report involved the question of a collective decision by the international community as a basis for the adoption of certain countermeasures. He endorsed the principle of such a decision, but it should be made clear that an organ or a group of States could take a collective decision of that kind only if it was first empowered to do so. Such a precaution would act as a guard against decisions of an arbitrary nature.

19. Mr. QUENTIN-BAXTER said that the Special Rapporteur's report would enable him to consider his own topic (international liability for injurious consequences arising out of acts not prohibited by international law) in the light of the comments not only on that report but also on Mr. Ago's report, particularly as the latter related to states of necessity (A/CN.4/318/Add.5). It was apparent (particularly from paragraph 19 of the report under consideration) that the Special Rapporteur recognized that there were one or two points at which their respective fields of inquiry touched upon each other.

20. Moreover, as both Mr. Ago and the Commission itself had already noted, there were sequelae to the question of wrongfulness that might require a decision regarding the allocation of certain matters as between the Special Rapporteur's topic and his own. Chapter V of the draft articles prepared by Mr. Ago² was concerned solely with circumstances precluding wrongfulness, and not with wrongfulness itself. The need to consider such circumstances within the context of State responsibility for wrongful acts had all the warrant of doctrine throughout the centuries. However, Mr. Ago had reminded the Commission that he had not been dealing with the obligations which might arise in relation to acts that were not prohibited and had also pointed out that, in the cases of distress and state of necessity, the fact that wrongfulness was precluded did not necessarily prevent a new legal relationship arising between the actor who caused the situation in question and the victim of the situation—a matter that had yet to be dealt with.

21. The Special Rapporteur, for his part, had stated that it was only logical for him to take account of such circumstances within the context of the topic now under discussion. There were excellent reasons why he should do so, the first of them being the history and doctrine of the topic and recognition given to the possibility of a new legal relationship which was not based on wrongfulness.

22. There was, however, a second reason why the Special Rapporteur should regard it as within his mandate to consider the matter. Notwithstanding the title of his (Mr. Quentin-Baxter's) topic, there had been a tendency to consider it in relation to the physical environment of States, and it was by reference to that criterion that the Working Group had defined that

¹ See 1597th meeting, foot-note 4.

² *Ibid.*, foot-note 1.

topic in 1978. According to the Working Group's report, it was characterized in the first instance by the fact that it concerned "the way in which States use, or manage the use of, their physical environment, either within their own territory or in areas not subject to the sovereignty of any State".³ Given the body of doctrine and State practice relating to the physical use of territory and the things which flowed from it, he continued to believe that his own topic should be so limited, although that limitation was not reflected in its title. It therefore seemed that the specific issue of a new legal relationship arising in the absence of wrongfulness was broader than the full extent of his own field of inquiry, since it was clear that such an issue could arise in relation to matters which did not involve the use of the physical environment.

23. For those two reasons, it was entirely proper, and indeed necessary, that the topic should receive some consideration in the context of the Special Rapporteur's work on the present item. One way of reflecting that work in a set of articles might be to have recourse to the kind of negative clause which warned the reader that the conclusions reached in other articles did not preclude liability of a different kind.

24. In general, however, he would be inclined to characterize the situation somewhat differently from the way in which the Special Rapporteur had done so in paragraph 19 of his report, and particularly in the third sentence of that paragraph, which aimed to distinguish between the cases that fell primarily within the Special Rapporteur's subject area and the cases which fell primarily within his own. While the fundamental difference under international law between wrongful and legitimate acts of a State might seem to militate in favour of separate treatment of two types of case, he did not think that it was feasible to make a corresponding distinction between acts that were *a priori* wrongful or *a priori* legitimate. In that connexion, members would recall that, in the title of his own topic, the Commission had decided, advisedly, to speak of "acts not prohibited by international law", rather than of licit acts.

25. Some, though by no means all, of the subject-matter with which he was concerned fell within the shifting category of situations which had yet to be definitively characterized as wrongful. Thus there was a wide spectrum of matters relating to responsibility for acts not prohibited by international law that, in many cases, could have been considered within the framework of the Special Rapporteur's topic. He was thinking, for example, of cases in which wrongfulness could be alleged but in which it was convenient to the parties and in the interests of justice to refer instead to other criteria. In adopting the expression "acts not prohibited by international law", the Commission had possibly had in mind acts in respect of which the victim

might be entitled to redress without the need to allege and prove wrongfulness. That concept, however, was rather different from the concept of obligations that attached, in some curious manner, to the perfectly legitimate actions of the State.

26. If any of the acts encompassed by his own topic were completely untainted by wrongfulness, it was precisely the acts referred to by the Special Rapporteur. In the case of distress and state of necessity, doctrine tended to recognize a choice, albeit a limited one. For example, if a pilot, the agent of the State, had to decide either to land his aircraft in foreign territory or to perish together with those in his charge, under the draft articles he would be required to make a choice with such care as could be exercised in the circumstances, but he would not be entitled to incur even greater danger in order to save his own life. In the case of *force majeure* and fortuitous event, however, there was not even the vestige of a choice. The international person who caused the damage was not an agent but the instrument of the other party's misfortune; he acted as he did either because he was driven to do so by an overwhelming force or because he had no way of knowing that his action was wrongful. Even in those circumstances, however, the Commission had inclined to the view that, as between an innocent actor and an innocent victim, it was not entirely certain whether the loss should fall solely on the innocent victim. Consequently, a new legal relationship might arise. All those questions were central to his own topic, but there would be no harm whatsoever in a degree of overlap.

27. Lastly, on the question of compensation or redress for injury, he fully agreed that the treatment of his own topic should not extend to the issues dealt with in the last part of the Special Rapporteur's report, such as countermeasures and sanctions, but should be concerned solely with the more limited question of just redress for injurious consequences sustained. He would, however, have to gauge his own treatment of the matter against the broader treatment which the mainstream of State responsibility required; in so doing, he would look to the Special Rapporteur for guidance on the specific question of compensation.

28. Mr. VEROSTA said that, since the Commission's discussion of part 2 of the topic of State responsibility should concentrate on matters which the Special Rapporteur considered to be of particular importance, he hoped that the Special Rapporteur would indicate those on which the Commission's guidance would be helpful. For example, it would be useful if the Special Rapporteur could explain whether he thought part 2 should be confined to rules of general international law and should exclude rules applying to international organizations.

29. Mr. RIPHAGEN (Special Rapporteur) said that, on the preliminary question of whether part 2 was needed at all, he had started out from the assumption that it was indeed necessary because both the Com-

³ *Yearbook* ... 1978, vol. II (Part Two), pp. 150-151, document A/33/10, chap. VIII, sect. C, annex, para. 13.

mission and Governments must ascertain the consequences of State responsibility.

30. With regard to Mr. Ushakov's question (at the previous meeting) as to whether part 1 could be considered exhaustive and whether it was essential to answer all the questions left open in it, the Commission had to decide what approach or over-all policy it would follow in part 2 in dealing with the questions raised in part 1. He had, however, prepared his report in the expectation that it would be the wish of the Commission to endeavour to answer those questions.

31. Mr. Ushakov had referred to article 3 (b) of the draft articles⁴ and to article 60 of the Vienna Convention in asking whether it was the Commission's task to decide whether or not a State had a primary obligation vis-à-vis another State. In that respect, it was clear from the title of article 60 of the Vienna Convention that a unilateral measure to terminate or suspend a treaty could be considered as a response to a breach of an international obligation under that treaty, and that such a response came within the framework of the new legal consequences and relationships arising from the breach of an obligation of that kind. The members of the Commission should also bear in mind the fact that the question of the content and origin of international obligations and primary rules of international law had been left aside in part 1. Part 2 would have to deal with it, because the provisions of article 60 of the Vienna Convention could not be overlooked. In that connexion, he referred to paragraphs 41 and 42 of the report, in which he had suggested that it was sometimes difficult to make sharp distinctions between the possible types of legal relationships created by an internationally wrongful act of a State.

32. As to Mr. Ushakov's question of whether the Commission should define the meaning of "legitimate" countermeasures in respect of an internationally wrongful act, which were referred to in draft article 30, he was of the opinion that the matter fell squarely within the subject-matter of part 2 and would therefore require the attention of the Commission.

33. Mr. Ushakov's question of whether or not the Commission had to define the rule of proportionality was a matter of policy. For his own part, he assumed that such a rule did exist and that there must, in principle, be some proportionality between the breach of an obligation and the response thereto. Nevertheless, proportionality was an elastic concept and it would be advisable for the Commission to leave the question of its definition open.

34. Mr. Tsuruoka had made a number of queries in connexion with specific paragraphs of the report, suggesting, with regard to paragraph 40, that it was going too far to assimilate a State that was not directly

injured to one that was directly injured. Although Mr. Tsuruoka may have been right in saying that a line had to be drawn somewhere, account must be taken of the particular type of multilateral treaty in which the obligations of all of the parties were closely inter-related and in which the breach of an obligation by one party necessarily affected all of the parties. That idea, which was clearly stated in article 60, paragraph 2 (a), of the Vienna Convention, should be given further consideration by the Commission.

35. In connexion with paragraphs 62 to 76 of the report Mr. Tsuruoka had referred to countermeasures and the requirement of a collective decision, rightly pointing out that it was necessary to know which States took part in the collective decision and whether they were competent to do so. The term "collective decision" was intended to be used in a very broad sense, and the report had therefore referred to article 60, paragraph 2 (a), of the Vienna Convention, which used the words "unanimous agreement". The Vienna Convention did not, of course, relate to international organizations, but in drafting his report he had had in mind collective decisions taken either by the General Assembly or the Security Council of the United Nations.

36. He fully agreed that his own topic and that of Mr. Quentin-Baxter certainly overlapped on a number of points. He had, moreover, failed to take account of the fact that Mr. Quentin-Baxter's topic would only encompass environmental questions, and shared the view that the matter of compensation should be dealt with in both topics. Nevertheless, he was still of the opinion that the consequences of an act which was prohibited by a primary rule of international law but, in certain circumstances, was not a wrongful act, should be similar to the consequences of a wrongful act.

37. With regard to Mr. Verosta's request that he indicate the main points on which he would like guidance from the Commission, he drew particular attention to the general suggestions contained in paragraphs 97 to 100 of his report. It would be of great assistance if the members of the Commission informed him of their opinions on those suggestions. If they decided that part 2 of the draft articles was necessary, they would face considerable difficulties in formulating ideas on the allowable responses to internationally wrongful acts and in describing specific situations. As he had noted in paragraph 100 of the report, it was impossible to adopt an abstract approach because there were no rules that automatically applied to the allowable responses to internationally wrongful acts. Again, that was particularly true because part 1 of the draft articles was silent on the question of the content and origin of primary rules. Hence, the Commission could give only general indications of the responses that were allowed in particular cases.

⁴ See 1597th meeting, foot-note 1.

38. Regarding Mr. Verosta's second question, namely, whether or not part 2 of the draft should include rules applying to international organizations, he said that part should definitely take account of the possibility that international organizations might be entitled to determine the responses of their members to internationally wrongful acts. On the other hand, it was not quite so clear whether part 2 should also deal with the responses of international organizations themselves—in other words, with the possibility that they might expel or suspend one of their members in response to an internationally wrongful act. The course of action possible in that respect depended entirely on the constituent instrument of the international organization.

39. Mr. VEROSTA said that, in his opinion, use of the expression "guilty State" should be carefully avoided in part 2 of the draft articles on State responsibility because States, and in particular the great Powers, did not like to be characterized as "guilty". The term had different connotations in criminal law and civil law, but the risk of confusion between the two made it preferable to avoid using it during the current discussion.

The meeting rose at 11.40 a.m.

1599th MEETING

Thursday, 29 May 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Diaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

State responsibility (*continued*) (A/CN.4/330)

[Item 2 of the agenda]

PRELIMINARY REPORT ON THE CONTENT, FORMS AND DEGREES OF INTERNATIONAL RESPONSIBILITY (PART 2 OF THE DRAFT ARTICLES) (*continued*)

1. Mr. USHAKOV said that there were a number of points which were of fundamental importance in the present preliminary stage of the work on part 2 of the draft articles on State responsibility.

2. Under the terms of draft article 1,¹ international responsibility could be incurred on one ground alone, namely, the internationally wrongful act of a State. However, it was clear that there was another form of

responsibility which was not identified as such in French terminology but was designated in English terminology by the term "liability".

3. Part 1 of the draft articles therefore seemed to leave a number of questions pending, inasmuch as international law recognized only responsibility properly speaking, whereas internal law also admitted responsibility based on risk. It was not, however, desirable for questions relating to the circumstances and the conditions determining the existence of an internationally wrongful act to remain unanswered. In his opinion, the possible shortcomings revealed by the Special Rapporteur did not fall within the scope of part 2 of the draft. Everything pertaining to the existence of the internationally wrongful act as the basis for incurring international responsibility must be dealt with in part 1; otherwise confusion might arise in the event of discrepancies between the commentaries to two consecutive parts of the set of draft articles.

4. Problems relating to matters other than State responsibility in the strict sense of the term also remained unresolved. The basis for part 1 of the draft was the existence of primary, or substantive, obligations under international law, alongside which there existed secondary rules governing responsibility. A breach of the primary rules brought the secondary rules, or rules of responsibility, into play. It was not for the Commission to say what those substantive or primary rules were, a task that would mean codifying all of international law, including the obligations created in the bilateral treaties that were being concluded almost every day. Clearly, it was not the purpose of the draft articles to define all existing substantive rules of international law.

5. The Commission could, however, examine those rules in order to identify certain categories, as had been done in draft article 19, which differentiated between international obligations in respect of which a breach constituted an international crime and obligations in respect of which a breach constituted an international delict. Obviously, the content of primary obligations (which had some effect on the content, forms and degrees of State responsibility), could not be completely ignored. Nevertheless, it was not for the Commission to concern itself with the existence of rules of substantive international law.

6. The Vienna Convention² did not deal with the question of responsibility; it simply defined the conditions determining the existence or absence of international obligations. For example, article 60 of the Convention merely provided that a breach by one of the parties of its obligations entitled the other party to invoke the breach as a ground for terminating the treaty or suspending its operation. Accordingly, the article did not define the responsibility of the State committing the breach; it established the existence of

¹ See 1597th meeting, foot-note 1.

² *Ibid.*, foot-note 4.

the internationally wrongful act of the State and its consequences on the obligations of the parties to the treaty other than the defaulting State. Hence, reference could not be made to the Vienna Convention, since the point of departure of the draft articles on State responsibility was a breach by a State of its obligations that gave rise to an internationally wrongful act entailing the responsibility of that State. The draft therefore assumed that an obligation existed and had been breached.

7. Moreover, the obligations of States, as covered by the draft, derived not only from treaties but also from customary rules of international law. It was easy to conceive of a situation in which, for some States, an obligation derived from the provisions of a treaty and, for others, it derived from custom. The circumstances dealt with in the Vienna Convention of Diplomatic Relations³ were a case in point. The Commission could not confine the scope of the draft to obligations deriving from treaties between States; it must encompass all the situations that might arise in modern international law, regardless of whether they had their origin in, for example, treaties, mandatory decisions of international bodies or the unilateral acts of States—something that was evident from the terms of draft article 19.

8. As to the meaning of the expression “measure legitimate under international law”, which appeared in article 30, the Special Rapporteur had taken the view that the meaning of the adjective “legitimate” should be clarified in part 2 of the draft. Strictly speaking, any clarification should be supplied in part 1, but his own view was that no clarification was in fact required, since defining legitimate measures was a matter that came under the heading of substantive rules and in particular of the Charter of the United Nations, which had to be interpreted. To follow the course proposed by the Special Rapporteur would be an enormous undertaking and one that was beyond the means of the Commission.

9. Similarly, the rule of proportionality was probably an aspect of the primary rules. If the Commission adopted the principle of proportionality as the basis for part 2 of the draft, it would again be facing a Herculean task; the principle of proportionality did exist in positive law, but its content was still vague and confused, and therefore very difficult to define. If, on the other hand, the rule of proportionality was a primary rule, violation of the rule in itself gave rise to responsibility for States.

10. Finally, he noted the confusion surrounding the concept of “third State”, which he found difficult to understand. In his opinion, it could not be used to designate States that bore no responsibility, or in other words States which were not active subjects, for the only active subjects were States towards which an

obligation existed. The draft was concerned with specific relationships between States in that category; other States were not involved, although they could at times benefit from an obligation *erga omnes* and could be injured to a varying extent, but they could in no way be described as third States.

11. Mr. ŠAHOVIĆ said that the Special Rapporteur’s report provided a synthesis of all the articles to be developed in part 2 of the draft, and, in view of the many ideas advanced, the members of the Commission were required to study *en bloc* all of the problems raised by the topic. To be more exact, the Special Rapporteur had posed a dozen questions which called for an in-depth response. For his own part, he would prefer to consider each problem separately as the Commission’s work proceeded. For the moment, therefore, he would confine himself to general comments.

12. With regard, first of all, to the relationship between parts 1 and 2 of the draft, the Special Rapporteur had analysed at length the problem of the overlapping of their contents. He (Mr. Šahović) considered that the Commission should take part 1 of the draft, in its present form, as the basis for articles in part 2, concerning the content, forms and degrees of State responsibility. His position in that respect was very close to that of Mr. Ushakov. The Special Rapporteur himself had chosen that method but had at times gone further, something which seemed difficult to justify.

13. Moreover, in preparing part 2 of the draft the Commission would inevitably be compelled to verify the solutions adopted in part 1, since the subject-matter was such that the problems to be dealt with could call into question the very foundations of the draft. He had no objection to verifying the principles underlying part 1, but would not agree to any modification of those principles, which served as the basis for the draft as a whole. Part 1, which related to the origin of State responsibility, must be regarded as fixed once and for all.

14. A further consideration was the problem of the relationship between responsibility for an internationally wrongful act and responsibility for an act not prohibited by international law, a matter mentioned by Mr. Quentin-Baxter at the 1598th meeting. In his (Mr. Šahović’s) view, the Commission should continue to deal concurrently with all those problems, indicating possible solutions but taking care not to place too much emphasis on their possible links. Account would also have to be taken of the requirements concerning the line of demarcation between part 2 and part 3, for the latter would concern the “implementation” (*mise en oeuvre*) of international responsibility and would have to deal with specific problems.

³ United Nations, *Treaty Series*, vol. 500, p. 95.

15. The Commission must also recognize that, as yet, it had scarcely begun to discuss the contents of part 2. Above all, the definition of the concept of the content, forms and degrees of responsibility should be clarified. The Special Rapporteur had brought out certain ideas in that respect, but had not given his final views. Greater precision seemed desirable if work was to move ahead. In particular, consideration should be given to the relationship between the concept of content and that of form. As to the problem of the degree of responsibility, it was bound up with the actual content of the primary rules of international law. A more thorough analysis was essential if the Commission was to identify the principles that must serve as a basis for part 2 of the draft.

16. The method followed by the Special Rapporteur with regard to the "new legal relationships" between States after the commission of an internationally wrongful act seemed justified. However, too much emphasis had perhaps been placed on the problem of third States, since the principal new relationship concerned the subjects that were directly affected by the problem of responsibility. The main general rule had to be worked out by establishing the elements that would enable it to be defined. Perhaps it would be possible to draw up a general plan indicating how the matter was to be tackled and how the position of the various subjects, particularly international organizations, were to be analysed.

17. Again, the problem of degree of responsibility seemed to be linked to the principle of proportionality. The Commission would have to study the nature of the principle and the possibility of applying it to the subject under consideration, determining in particular whether a substantive rule was involved, and what place it should be accorded in future work.

18. As to the problem of method, mentioned in paragraphs 97 to 99 of the report, the Commission should adhere to the approach adopted by Mr. Ago—in other words, an empirical approach based on an analysis of State practice—in order to follow the developments of modern international law as closely as possible. He did not favour adopting a normative method for the formulation of articles on the basis of the contents of part 1 of the draft without taking account of the specific requirements of international life, the practice of States and positive law, including jurisprudence. The difficulties pointed out by the Special Rapporteur were clearly inevitable, and it did not seem possible to work more quickly than in the past.

19. The terminology to be employed, which should be free of certain theoretical or doctrinaire connotations, should be in keeping with that used previously and with the concepts already adopted by the Commission. Perhaps the Commission should have included an article on terminology in part 1, in order to fix the meaning of the terms used, for the Special Rapporteur would gradually find himself forced to use and

therefore define new expressions and concepts, an exceedingly delicate task.

20. Lastly, the Commission must pursue its work on the distinction between primary rules and secondary rules, since it was a valuable tool for its deliberations and had enabled the Commission to formulate the draft articles of part 1 satisfactorily. It was to be hoped that the time available would allow the Commission to turn rapidly to some of the specific problems listed by the Special Rapporteur in his report and to analyse them in detail.

21. Mr. VEROSTA said that, in considering the question of treaties concluded between States and international organizations or between two or more international organizations, the Commission had exercised restraint in criticizing its model, the Vienna Convention, because the Convention had already entered into force. In examining part 2 of the draft articles on State responsibility, it was not necessary for the Commission to take the same attitude in connexion with part 1 of the draft, since the latter had not yet been fully drafted and its wording was far from final. Before pronouncing themselves on the articles that made up part 1 of the draft, many States were in fact waiting to see the contents of parts 2 and 3. Part 1—even more than the Vienna Convention, which the Commission had not regarded as sacrosanct despite its entry into force—was in no way immune from change.

22. In order to proceed with the categorizations proposed by Mr. Ushakov, the Commission could draw on the distinction between breaches of treaty provisions and violations of rules of customary international law.

23. Lastly, he suggested that one or two meetings should be set aside at the end of the session to consider the preliminary report so that members of the Commission who were currently absent and members who felt that they had not had the time to give such an important document all the attention it deserved could make their comments at a later stage.

24. The CHAIRMAN, speaking as a member of the Commission, said that the subject was one of the most difficult to come before the Commission, and he therefore wished to be certain that he had fully understood the Special Rapporteur's methods and objectives.

25. It appeared that the Special Rapporteur used the term "responsibility" in the sense of a liability incurred by the State called upon to answer for an act. In other words, new legal consequences arose and were reflected in turn in new legal relationships, and in a new reallocation of interests, following a disturbance in equilibrium created by the wrongful act. The Special Rapporteur had isolated certain factors that determined the extent to which, and the entities in respect of which, new legal relationships arose as a result of the wrongful act. The two main factors were the origin of the obligation and the nature and quality of the

breach. On that basis, the Special Rapporteur had developed the principle of the proportionality of the response, together with a derivative principle whereby a response which was not proportional was not allowable and, accordingly, not legal. In that respect, it would be interesting to hear more about the relevance of the origin of the obligation, which seemed to introduce a degree of pluralism into the philosophy. He wondered whether that was either necessary or practical.

26. He was in general agreement with the scope of the study as proposed by the Special Rapporteur, in which connexion two related questions had first been discussed: to whom did the transgressor State owe the obligation, and in respect of whom did a wrongful act bring about new legal relationships? Clearly, where a State was directly affected a new set of legal relationships would arise, but the Special Rapporteur had also considered an extension of that notion beyond the directly injured State. The Commission might therefore wish to extend it still further to cover the possible joint or collective responsibility of transgressor States. He noted in that regard that the Special Rapporteur had referred to a number of articles in part 1 of the draft, and assumed that the intention had not been to supplement or complement part 1 but rather to use those "interstices" as a signpost to the content of part 2.

27. The Special Rapporteur had then considered the areas with which he and Mr. Quentin-Baxter should each be concerned within their respective topics and, in paragraph 19 of the report, had suggested that the two areas might "tend to 'meet' somewhere, possibly in considerations of risk-allocation". However, it was difficult to see where the line of demarcation fell, and, given the vast and diffuse nature of risk-allocation, further thought should be given to the limits not only of Mr. Quentin-Baxter's topic but also of part 3 of the draft.

28. The Special Rapporteur had proceeded to speak of a catalogue of legal consequences that was to be used as a basis for the further development of the topic. In that connexion, the report referred to three parameters: new obligations of the transgressor State; new rights (and possibly also obligations) of the injured State; and new positions of third States. With regard to the third parameter, although the Special Rapporteur seemed to acknowledge that normally third States would have no new positions, he none the less categorized as third States certain States which were not directly affected but for which a variety of new legal relationships arose. The relevance of that classification was not entirely clear and he would be grateful if the Special Rapporteur confirmed his understanding, namely, that the intention of the catalogue was to develop—assuming there was a generally accepted system of values—a scale of proportionality of allowable responses to the wrongful act. Such a scale would be treated only as a norm,

since it would be recognized that no automatically applicable scale could be developed.

29. The report contained a wealth of new ideas and much food for thought, but he had experienced difficulty with the presentation. It would be extremely helpful if the Special Rapporteur could in future adopt a system of titles and sub-titles and include an outline of the subject-matter dealt with in the report.

30. With regard to terminology, he fully agreed that the expression "guilty State" was not the most apt. He had himself used the expression "transgressor State", but was not suggesting that it was necessarily the best. Perhaps some other neutral expression could be found. Again, a more precise term than "third State" was required in referring to States other than those which were directly injured and in respect of which new relationships arose. He could accept the word "response" in the sense of the response required by law of the guilty or transgressor State, but not in the more technical sense of the response of the injured State, since it was difficult to see what would be required of such a State by way of a legal response. A different term might therefore be used in the case of the injured State. Lastly, he had no objection to the use of the words "qualitative" and "quantitative" but, there again, considered that it was necessary to clarify their meaning and differentiate between their use.

31. Mr. USHAKOV, referring to paragraph 6 of the report, said that, so far as the Commission was concerned, sanctions were one of the possible consequences under international law of an internationally wrongful act of a State. Moreover, it could be seen from paragraphs 1 and 2 of the report that the Commission regarded the application of sanctions as one of the forms of international responsibility. In international law, however, the term "sanction" referred both to coercive measures, such as those that might be taken against an aggressor State, and to all the consequences of an internationally wrongful act. In the legal system of the Soviet Union, all such consequences were termed sanctions, even when they did not imply any resort to coercion. In its commentary to draft article 19 (International crimes and international delicts), the Commission had placed inverted commas around the term "sanction",⁴ which, in that instance, was used in the sense of coercive measure. Hence, the Commission must now decide the meaning to be attached to that term in the draft. Personally, he would prefer it to apply to all the possible consequences under international law of an internationally wrongful act.

32. Sir Francis VALLAT said that, in his view, the use of the term "sanction" to describe all the responses to an internationally wrongful act would create

⁴ See, for example, *Yearbook . . . 1976*, vol. II (Part Two), p. 98, document A/31/10, chap. III, sect. B.2, art. 19, para. (9) of the commentary.

confusion, since the notion usually carried with it the idea of compulsion, as well as an element of punishment. To his mind, and no doubt to many lawyers who derived their thinking from the English legal system, the main objective, in the event of the breach of an obligation, was not to punish the wrongdoer but to repair the damage done; traditionally, the aim in international law had been to secure reparation rather than to inflict punishment.

33. The Special Rapporteur was to be congratulated on the thoroughness with which he had tilled the ground of international responsibility, for he had ploughed deep and exposed much of the subsoil. The ideas he had sown should now be reflected in a specific plan of action for the future, and it was to be hoped that the Commission would concentrate its thinking along those lines so that, in his next report, the Special Rapporteur would be in a position to provide an outline of the way in which he proposed to proceed. The task would be not an easy one, but it had none the less proved possible, even for so abstruse a subject as the origins of international responsibility, to develop a plan and to work systematically. He had every confidence that the Special Rapporteur would respond to what was a very real need.

34. A question that had to be considered, and one that caused him great difficulty, concerned the primary rules of international law which determined the obligations of States. He had long been faced with criticism from lawyers in the United Kingdom about the abstract nature of the Commission's work in that area. For example, he was asked whether the Commission, having spent approximately a decade on the draft articles in part 1, was going to spend another decade on an equally abstruse set of draft articles in part 2, and why the Commission was doing that kind of work when a start had yet to be made on codifying the rules governing one of the most basic aspects of international law, namely, the treatment of aliens on the territory of another State. It was very difficult to find a convincing answer to queries of that kind.

35. The Commission, too, was faced with a dilemma, since it would be extremely difficult in the present state of world affairs to make progress on the substantive rules. There had been a natural tendency to set aside the codification of the more substantive, and hence more complex, aspects of international law and to concentrate on areas which, without the content of the basic obligations, were rather in the nature of unconnected material. Having followed such a course for years, with the approval and indeed under the pressure of the General Assembly, the Commission would find it difficult to do an about-turn on the ground that it had been wasting its time. He was uncertain of the answer to that critical problem. However, in the world of politics, the Commission might well have no choice but to proceed in the same way, although his misgivings were, if anything, heightened by the statement in the Special Rapporteur's

report to the effect that the content of responsibility must, to some degree, reflect the content of the primary obligations. If that was so—and he thought it must be—part 2 of the draft articles would have to take account of those obligations. He was not against the idea of categories mentioned by Mr. Ushakov. However, another possible approach might be to consider specific obligations as examples with a view to determining in each case how a breach of the obligation should be reflected in the definition of the relevant content or degree of responsibility. In a sense, the Commission was seeking to order the furniture for a house without knowing the size and shape of that house. In his view, some thought should be given to the ultimate size of the house.

36. Mr. RIPHAGEN said he wished to point out that, as indicated in paragraph 11 of his report, the term "guilty State" had been used before. He did not like the term, but had adopted it as a convenient shorthand way of referring to the State which committed the wrongful act. The term "transgressor State", however, would be quite acceptable.

The meeting rose at 1.05 p.m.

1600th MEETING

Friday, 30 May 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

State responsibility (continued) (A/CN.4/330)

[Item 2 of the agenda]

PRELIMINARY REPORT ON THE CONTENT, FORMS AND DEGREES OF INTERNATIONAL RESPONSIBILITY (PART 2 OF THE DRAFT ARTICLES) (continued)

1. Mr. THIAM said that the Special Rapporteur, in his excellent preliminary report (A/CN.4/330), had sought to encompass the subject-matter by considering in turn its scope, its substance and the method to be followed in dealing with it.

2. With regard to scope, the Special Rapporteur had asked whether there was not an overlap with the topics entrusted to two other Special Rapporteurs, Mr. Ago and Mr. Quentin-Baxter. The title of the topic being considered by Mr. Riphagen in his capacity as Special Rapporteur, namely "The content, forms and degrees

of State responsibility", might well suggest some overlap with the topic dealt with by Mr. Ago, for he had not found it possible to study the question of the origins of responsibility and to define the concept of the internationally wrongful act without reference to the content of responsibility. Mr. Ago had also had to take up the question of forms of responsibility in distinguishing between the conventional and delictual nature of responsibility, and he had been unable, particularly in proposing the text which became draft article 19, concerning international crimes and delicts, to avoid introducing elements relating to the degree of responsibility.¹ However, the impression that the topics overlapped vanished when the objectives pursued by the two Special Rapporteurs were borne in mind. While Mr. Ago had had to determine the origins of responsibility, Mr. Riphagen had to establish the consequences; seen in that light, the topics were in fact complementary.

3. The topic under discussion could be differentiated just as clearly from Mr. Quentin-Baxter's topic. Mr. Quentin-Baxter had been asked to study the injurious consequences of acts not prohibited by international law, whereas Mr. Riphagen had to consider the consequences of internationally wrongful acts, even if certain circumstances, such as consent, *force majeure* and fortuitous event, subsequently effaced the wrongfulness of the act. What counted was the fact that there had been wrongfulness in the first place.

4. The Special Rapporteur had also asked whether, to some extent, his topic did not concern international organizations. There was no problem in that regard, since the Commission was engaged in a study of State responsibility, regardless of whether the internationally wrongful act injured another State, an international organization or the international community.

5. With regard to substance, the main task consisted in identifying the consequences of internationally wrongful acts and determining the measures to be taken to deal with those consequences. The method to be followed would vary from case to case. Basically, the measures to be taken to deal with those consequences fell within the domain of reparation and sanction. An internationally wrongful act could call for both reparation and sanction, but the aims of the two responses were quite different. Reparation was designed to restore a temporarily disturbed equilibrium between two parties, whereas a sanction was punitive in character. If the parties could not agree upon reparation that would restore the equilibrium, they could turn to an external body, which would pronounce itself through an arbitral or judicial decision. A countermeasure, on the other hand, was decided upon and applied by the party which con-

sidered itself injured. Moreover, a countermeasure involved a punitive aspect that was purely subjective. How could the extent of a countermeasure taken in response to an act causing mainly moral injury be evaluated in material terms?

6. The Special Rapporteur suggested certain guidelines for resolving that delicate question, recommending that the countermeasure should be proportional to the seriousness of the consequences of the wrongful act, and making use of the concept of normality for that purpose. Proportionality and normality, taken together, would provide a criterion for deciding in each case whether a particular countermeasure was appropriate. The solution was an interesting one but very broad. Again, the Special Rapporteur proposed drawing up a list of values that were regarded as essential and indicating an appropriate countermeasure in each instance.

7. Personally, he considered that the task of assessing those values would compel the Commission to take a position on the importance of primary and other obligations. As in the case of internal law, where it was difficult to draw up an exhaustive list of a citizen's duties, it would be an arduous task to list the duties of States. All that could be said was that States had duties and that they committed a breach of an obligation whenever their conduct was not in conformity with one of those duties. Moreover, values changed. For example, in the past, a number of writers had defended the right to colonize, but under the terms of article 19² the maintenance of colonial domination by force was deemed an international crime. Given the changes in the conscience of mankind, the list advocated by the Special Rapporteur would simply be declarative. In his view, a solution to the problem of countermeasures should be found in State practice, despite the fact that such practice did not offer many examples.

8. Mr. FRANCIS said that the Special Rapporteur could perhaps be likened to a pilot who was steering his course not with the aid of any mechanical device but solely by relying on his intellectual faculties and inner convictions. The report was wide-ranging in content, and understandably somewhat difficult to come to grips with, because the Special Rapporteur had sought, at the outset, to lay bare his basic philosophy. The final product, however, would be the outcome of a blending of the views of the Special Rapporteur and those of the Commission as a whole. Moreover, in any new undertaking, there was always an initial preoccupation as to how to proceed and, as several members had already observed, the strength of the final superstructure would, of course, depend on the basic plan.

9. The reference, in paragraph 11 of the report, to the need to define the meaning of "international responsibility" was entirely in keeping with the conclusion

¹ See *Yearbook ... 1976*, vol. II (Part One), p. 31, document A/CN.4/291 and Add. 1 and 2, para. 97.

² See 1597th meeting, foot-note 1.

reached by the Commission in its report to the General Assembly in 1975, which stated that the aim of part 2 of the draft should be

to determine what consequences an internationally wrongful act of a State may have under international law in different hypothetical cases, in order to arrive at a definition of the content, forms and degrees of international responsibility.³

Moreover, a nexus had already been established between parts 1 and 2, as was clear from the statement in the same Commission report that:

It will first be necessary to establish in what cases a State which has committed an internationally wrongful act may be held to have incurred an obligation to make reparation, and in what cases such a State should be considered as becoming liable to a penalty.⁴

10. In paragraph 28 of his report, the Special Rapporteur had pinpointed the content of international responsibility by listing three parameters, but had gone on to affirm, in paragraph 62, that there were three exceptions to the third parameter, which concerned the position of third States in respect of the situation created by the wrongful act. As Mr. Ushakov had rightly pointed out (1599th meeting), the Commission should have a very clear idea as to what the term "third State" covered, and he therefore wondered, for his own part, whether the three exceptions in question were valid.

11. Lastly, he entirely agreed that, in view of its importance and relevance, the principle of proportionality should be reflected in part 2 of the draft and that, as recommended in paragraph 78 of the report, the specific case of a breach of an obligation by a member State of an international organization could more appropriately be dealt with in the context of part 3.

12. Mr. CALLE Y CALLE said that consistency between parts 1 and 2 of the draft was essential. Accordingly, in defining the content, forms and degrees of State responsibility, the Commission should bear in mind that a number of questions left open in part 1, and referred to in paragraphs 14 to 17 of the Special Rapporteur's report, would have to be dealt with in part 2. Moreover, the Commission had given an undertaking, in its 1975 report to the General Assembly,⁵ to determine what consequences an internationally wrongful act of a State might have under international law in different instances.

13. He understood the expression "content of responsibility" to refer to the obligation to make reparation, and not to the primary obligation breached by the wrongful act. Responsibility, in its wider sense, meant a general duty or obligation; in its restricted sense, it meant an obligation which arose for a given

subject of law as a consequence of its wrongful act. Once a wrongful act, as defined in part 1 of the draft, had been committed, responsibility was automatically incurred, thereby giving rise to certain legal circumstances.

14. Mr. Ago's concept of those circumstances was comprehensive, for it covered all forms of new international relations, ranging from those involving the directly injured State and other third, or indirectly affected, States, to the international community as a whole. Under article 19 of the draft, for instance, an international crime would involve the breach of an obligation towards the international community as represented by the United Nations. Professor G. Tunkin had affirmed that the maintenance of international peace was the primary concern of all States and that, consequently, States had a right to take certain measures even if they were not directly injured by a breach of international law. That notion, however, was somewhat different from the notion of the infringement of an interest of a State as a result of the breach of a peremptory norm of international law. As indicated in paragraph 41 of the report, the International Court of Justice had decided not to recognize Ethiopia's interest in the case of *Ethiopia v. South Africa*.⁶ Thus, so far as relations between States were concerned, a State could not assert a claim unless it had been directly affected by the breach of an obligation or one of its citizens had suffered prejudice of a kind that constituted a breach of an obligation between States.

15. A point which had not received sufficient attention was that of damage as a constituent element of the internationally wrongful act. It had, of course, been maintained that a State was not held responsible unless its wrongful act caused damage and that where there was no damage there could be no redress. His own view, however, was that damage meant not only material prejudice, assessable in pecuniary terms, but the mere disturbance of a certain legal equilibrium. It was important to take account of that element in part 2 of the draft because, in their international relations, States had a very practical interest in securing compensation for damage suffered as a consequence of the wrongful act of another State.

16. Another matter that called for consideration was payment of compensation in cases where *restitutio in integrum* was not possible. Such compensation was payable either to a foreign private individual in compensation for property that had been nationalized or expropriated or to a State in cases where an act of nationalization resulting in damage to a citizen of that State also constituted a breach of international law. In some instances, the sums paid out to a State were far smaller than those paid out to a private individual. In that connexion, the Commission would doubtless recall

³ *Yearbook ... 1975*, vol. II, p. 56, document A/10010/Rev.1, para. 43.

⁴ *Ibid.*

⁵ See foot-note 3 above.

⁶ *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319.

that Mr. Bedjaoui had already had occasion to refer to a possible conflict of interests and to stress the need to protect the interests of the State.

17. Compensation, like reparation and sanctions, called into play the fundamental principle of proportionality. A very clear idea of what the principle entailed was reflected in an article of a draft treaty prepared in 1927 by Professor Strupp, to the effect that an injured State was not unlimited in its election of remedies; such remedies should not be incommensurate in severity with the original injury, nor by their nature should they be humiliating.⁷ The reference to the idea of humiliation was particularly important and, in the case of private individuals who had suffered damage as a result of nationalization, it was essential to consider not only the position of the injured State but also the reasons that had caused the other State to act as it had.

18. Lastly, he had been particularly interested in the report's discussion of a possible non-neutral position on the part of third States. Should such States be regarded as having an interest which entitled them to take certain measures? He wondered, in particular, whether the measures adopted by certain States in the light of the current situation regarding the hostages in Iran should be viewed as a political response, or whether those measures had a legal basis inasmuch as they were a response to a breach of an obligation that indirectly affected the States in question.

19. Mr. TABIBI said that State responsibility was a very complex topic and, notwithstanding the keen interest it aroused among international lawyers, it had always been approached with caution. It was not until 1963 that the Commission had approved an outline of the topic and appointed a Special Rapporteur, Mr. Ago,⁸ who had adopted the same cautious approach. Hence, despite the insistence of the General Assembly, only a few draft articles had been adopted each year. Fortunately, the Commission had been able to entrust part 2 of the draft to another eminent jurist who, like Mr. Ago, had wide practical legal experience in the field of State responsibility.

20. His own inclination would be to omit from the Commission's records any reference to the abstract nature of the topic or to the need for part 2 of the draft. Successive chairmen of the Commission had assured the General Assembly that consideration of part 1 of the draft would soon be completed and that a start would be made on part 2. When he had presented the Commission's report to the General Assembly in 1975, he had seen for himself the satisfaction felt by young jurists from the third world in regard to article 19, which reflected the very essence of the Charter of the

United Nations and of many conventions. What would become of that work if the Commission were to go back on its undertaking?

21. As to the report itself, he entirely agreed with the statement in paragraph 27 that the primary object and purpose of part 2 of the draft articles on State responsibility was to determine the legal consequences of the breach of an international obligation entailing the responsibility of a State. The essence of the report lay in the three parameters indicated by the Special Rapporteur (para. 28) for the new legal relationships that would arise as a consequence of a State's wrongful act. In that connexion, he noted, in particular, the right of the injured State not to recognize a situation created by another State as legal if the situation was the consequence of a wrongful act by the other State. In his opinion, the question of measures taken within the framework of an international organization in respect of the rights of a member State under the rules of the organization in consequence of an internationally wrongful act of that member State, as mentioned in paragraph 77 of the report, was one that would have to be dealt with in part 2 of the draft. Among the other important matters discussed were the principle of proportionality between the wrongful act and the response thereto, a possible catalogue of new legal relations, and the methodology, for which the Special Rapporteur wisely advocated a policy of flexibility.

22. However, the report did not cite the teachings of publicists. In his view, future reports should include appropriate references, since Article 38, paragraph 1 (d), of the Statute of the International Court of Justice recognized the importance of those teachings, as did the General Assembly.

23. Lastly, on the matter of presentation, it should be remembered that each Special Rapporteur had his own approach. It was gratifying that the Special Rapporteur on the present topic preferred to proceed by way of an exchange of views and was seeking the guidance of Commission members. The last part of the report contained some valuable suggestions, which should help the Commission to provide the Special Rapporteur with the guidelines that would enable him to proceed with his work.

24. Sir Francis VALLAT, referring to the relationship between parts 1 and 2 of the draft articles, said that the Commission would experience few difficulties with part 2 if it refrained from considering the questions which had been left open in part 1 to be dealt with on second reading and if it also bore in mind the fact that part 2 should be a continuation of part 1 or, in other words, be built on the basis provided by part 1.

25. He was convinced that the key to success in part 2 lay in the right choice and use of terms. The Commission should be careful not to use any terms which had connotations of praise or blame. Terms attaching blame were of course permissible when a

⁷ See *Yearbook ... 1969*, vol. II, p. 151, document A/CN.4/217 and Add.1, annex IX, art. 7.

⁸ See *Yearbook ... 1963*, vol. II, pp. 223-224, document A/5509, paras. 51-55.

State's conduct could be labelled as an international crime, but it would not be wise to use such terms in referring to international relations in the traditional sense. International law was based not so much on the concept of sanction and punishment as on the concept of remedying wrongs that had been committed, more often than not in such a way that the State which paid compensation did so without necessarily having to admit that it had done wrong or was to blame.

26. It would also be advisable for the Commission to avoid terms which had specific technical meanings in particular legal systems. It could therefore follow the example set in part 1, which had been drafted in a neutral form of language and could be applied and interpreted in terms of international law rather than any particular system of internal law.

27. In that connexion, a distinction had to be made between the terms "responsibility" and "liability", which were closely related in the English legal system. "Responsibility", however, was used in a much wider and looser sense than "liability", a term which was normally found in phrases such as "liability to pay damages" or "liability to make good". "Responsibility", on the other hand, suggested the idea of being legally responsible for doing something or for something that had been done. It was also an ambiguous term in law because it could denote both the general idea of the responsibility of a parent for a child and the more specific idea of responsibility for the legal consequences of a certain act.

28. For the purposes of part 2, "liability" was much less acceptable than the broader term "responsibility", which could imply that the legal consequences of a wrongful act were to be seen both from the standpoint of the State which committed such an act and from that of the State affected by the consequent breach of a legal obligation. Although he agreed that international law must bear those two standpoints in mind, he did not share the Special Rapporteur's view that, in matters relating to responsibility for the legal consequences of an illegal act, account should be taken mainly of the possible responses on the part of the injured State. Rather, the first aspect to be examined was the responsibility that fell on the State which breached an international obligation.

29. Again, too much emphasis on countermeasures should be avoided. Ten or fifteen years previously, he would have said that international law tended to be opposed to the concepts of self-help and countermeasures and to favour requiring a State which breached an international obligation to make good the consequences of that breach. He still thought that, in the interests of international peace and security, that was a sound approach, other than in cases of aggression.

30. It was also questionable whether a breach of an international obligation should be viewed from the angle of the new legal relationship created. Admittedly,

a new legal relationship did emerge as a result of the breach of an international obligation, but the essence of the matter was that the breach gave rise to new international obligations. The crucial point was not so much the emergence of a new legal relationship as the continued existence of the original legal relationship. The State which committed the breach of the obligation then had additional duties and the injured State had additional rights resulting from that breach.

31. It could well be said that the concept of proportionality was relevant in the content of part 2, but he very much doubted whether it should be stated in the form of a rule. The concept was indeed germane to questions of reparation and compensation, which involved the determination of what was required in order to rectify or put right—so far as was possible by way of compensation—the injury resulting from the breach of an obligation. However, the concept largely came into play in connexion with what he had previously referred to as self-help or countermeasures, which, as he had indicated, did not form the core of the topic under consideration.

32. He hoped it was clear from his comments that he had definite doubts about the approach to the topic suggested in paragraphs 99 and 100 of the report. In his opinion, it should be given further thought in the light of the views expressed by the members of the Commission.

33. Lastly, although he agreed with the Special Rapporteur that the question of loss of the right to invoke the new legal relationship established by the rules of international law as a consequence of a wrongful act might be dealt with in part 3, there were grounds for the view that it could also be covered in part 2, since the content of responsibility was very closely bound up with that right.

34. Mr. DÍAZ GONZÁLEZ said that, in complying with the Special Rapporteur's request for guidance on the approach to be adopted in dealing with part 2 of the draft, the Commission should bear in mind that it had decided to divide the topic of State responsibility into three parts. If it wished to maintain the unity of the draft, it should base its consideration of part 2 on the draft articles of part 1 already adopted in first reading. There were, of course, a number of gaps in part 1 that would have to be filled—for example, by including an article on the use of terms—but the wording of such an article would depend on the content of part 2.

35. Once parts 1 and 2 of the draft articles had been completed, the Commission would probably conclude that the entire text had to be refashioned. The draft would also have to be submitted to States and to the General Assembly for their comments and observations and further changes would then undoubtedly have to be made. For example, it would have to be decided whether the nature of State responsibility depended on objective criteria or, as many publicists maintained, on the idea of fault. A State could not be

criticized on moral grounds for a failure to act, where an individual could, and the agents, officials or organs of the State which might commit an internationally wrongful act would therefore have to be identified, and the question of the territoriality of acts committed by individuals would call for further examination.

36. In that connexion, the Special Rapporteur had drawn attention in paragraph 24 of the report to the inadvisability of formulating strict rules that would lead to extraterritorial legislation and/or control by the State over what happened within its territory, something which would be contrary to its obligation to respect human rights and fundamental freedoms. He agreed with the Special Rapporteur that that question should be left aside, particularly since it had already been dealt with in draft articles 11, 12 and 14.⁹

37. Lastly, he could but agree with other members of the Commission that use of the term "guilty State" should be avoided.

The meeting rose at 1 p.m.

⁹ See 1597th meeting, foot-note 1.

1601st MEETING

Monday, 2 June 1980, at 3.10 p.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Bedjaoui, Mr. Boutros Ghali, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

State responsibility (*continued*) (A/CN.4/330)

[Item 2 of the agenda]

PRELIMINARY REPORT ON THE CONTENT, FORMS AND DEGREES OF INTERNATIONAL RESPONSIBILITY (PART 2 OF THE DRAFT ARTICLES) (*concluded*)

1. Mr. JAGOTA noted that the Special Rapporteur had defined his role as one of building a framework for the new legal relationships established by the breach of an international obligation and had indicated in paragraph 99 of his report how those relationships could be explained in terms of proportionality and of limitations on possible responses to a wrongful act. The report in fact focused on what were described as the three parameters of the new legal relationships (A/CN.4/330, para. 28). In his opinion; the second parameter was the heart of the matter to be dealt with

in part 2, since the first parameter had been broadly covered in part 1 of the draft articles and, as the Special Rapporteur had indicated, the third parameter did not come within the scope of part 2.

2. The second parameter, namely, the injured State's rights, could be viewed in terms not only of its rights under a treaty specifying the effect of a breach of an obligation created in the treaty but also of its rights under general international law and its rights with regard to possible responses, which might be called countermeasures, reactive measures, measures of self-protection or sanctions. The concept of proportionality was relevant only in the context of that second parameter and was not germane to the rights and obligations of the guilty State, as dealt with in part 1, because the nature of a wrongful act could be described only in terms of its seriousness.

3. Consequently, part 2 of the draft should be confined to matters on which agreement had been reached in part 1, bearing in mind that the latter related solely to responsibility arising from internationally wrongful acts committed by States and not from internationally wrongful acts committed by international organizations, as was pointed out in foot-note 600 of the Commission's report on its thirty-first session.¹ The Commission should be careful not to go too far in its consideration of wrongful acts of international organizations, except in cases where such acts might help to establish State responsibility. Again, it should be remembered that part 1 dealt essentially with what article 1² termed "the internationally wrongful act of the State", while part 2 should deal with what the second part of article 1 termed "the international responsibility of that State". The function of part 2 of the draft would thus be to define such responsibility by spelling out its content, forms and degrees and, in particular, by identifying the new legal relationships arising out of a breach of an international obligation.

4. Such legal relationships would depend on the source of the international obligation breached, which could be a bilateral or multilateral agreement, a special multilateral agreement establishing an international régime, a rule of *jus cogens* or a rule of customary international law. Account would then have to be taken of whether, for example, the agreement stated how the new legal relationships were to be regulated. It might also be relevant to consider the question of countermeasures in discussing the regulation of the new legal relationships. A treaty might well allow certain responses or reactions, such as the withdrawal of privileges, the declaration of a person as a *persona non grata*, the severance of diplomatic relations, the withdrawal of State immunity or the imposition of a countervailing duty by an injured State when export

¹ See *Yearbook . . . 1979*, vol. II (Part Two), p. 119, document A/34/10.

² See 1597th meeting, foot-note 1.

subsidies caused damage to local industry. It would also be possible for the injured State to invoke article 60 of the Vienna Convention³ in response to a material breach of an international obligation.

5. Part 2 must, moreover, deal with the relationship between reparations and reactive measures or responses. Reparation was a purely technical question, involving either restoration of the situation existing before the breach, payment of damages or guarantees of good behaviour in the future. A more difficult question was that of reactive measures or responses, which had a bearing on the relationship between parts 2 and 3 of the draft articles and raised the legal and political problem of whether the injured State could do anything other than what was provided for in the treaty.

6. The Commission must therefore clearly define what it meant by "responses", which could be classified on the basis of "measures 'legitimate' under international law" and "sanctions", which were discussed in the commentary to draft article 30.⁴ It would also be necessary to indicate the kind of unilateral measures permissible and the limitations thereon. The concept of proportionality was certainly relevant in that respect, and its elements must therefore be spelled out. In addition, a decision would be required as to whether a State could take countermeasures without first demanding reparations—in other words, on the question of the preconditions for the exercise of the right to take countermeasures.

7. The Special Rapporteur might give further consideration to the relationship between countermeasures, which involved the concept of proportionality, and part 3 of the draft articles. One aspect of the concept was that, if countermeasures were not proportional, they were themselves a breach of an international obligation and therefore entailed responsibility. Another aspect was that proportionality could act as a mitigating circumstance in the determination by the forum, court or States concerned of the amount of reparation to be paid. In his opinion, part 2 should deal with the validity of countermeasures, while part 3 should deal with the quantum of reparation.

8. Lastly, he was of the opinion that the question raised in paragraph 101 of the report was similar to the subject-matter of chapter 5 of the draft (Circumstances precluding wrongfulness). Nevertheless, once the existence of an internationally wrongful act had been established, it was necessary to decide what circumstances precluded reactive measures, a question that could therefore be dealt with in part 2, as the Special Rapporteur had suggested.

9. Mr. SCHWEBEL said that the draft articles contained in part 1, which had been criticized as abstract, if not abstruse, would necessarily affect the approach to and content of part 2. One reason why the draft articles seemed abstract in nature was that they largely failed to come to grips with the very real problems of the primary rules of State responsibility, on which the Commission had had reason to doubt that it could reach agreement. However, the Commission might also have failed to seize the opportunity to advance the process of the codification and progressive development of the primary rules relating to issues on which it could well have been possible to arrive at an agreement, such as the standing of States to espouse the claims of persons in particular relationships to them. At the same time, it had gone so far as to enunciate in article 19 far-reaching rules on which it was now clear that agreement among States would almost certainly not be reached.

10. The draft articles adopted so far could perhaps be further criticized on the grounds that some of them, such as article 2, seemed to be statements of the obvious, whereas others, such as article 25, were awkwardly cast. Nevertheless, the draft articles had seemed less abstract and abstruse when he had had occasion to take part in their practical application in the case concerning *United States Diplomatic and Consular Staff in Tehran*. The United States memorial in the case had relied heavily on draft article 8 to impute to the Government of the Islamic Republic of Iran responsibility for the acts of the militants who had seized and held hostage United States diplomats and nationals. The International Court of Justice had been gratifyingly responsive to the argumentation that had been based on that draft article and the commentary thereto. Indeed, the Court's decision⁵ that Iran was responsible to the United States for gross and grave violations of its international obligations contained many passages of great relevance to the Commission's work on State responsibility.

11. He cited that case because it demonstrated that a statement of the obvious might not be otiose in present-day international relations. Nothing could be more obvious than that the holding of foreign diplomats as hostages was, in the context of international law and relations, incomprehensible and indefensible. The case also demonstrated that a restatement, bearing the authoritativeness of the Commission, of certain fundamental norms of State responsibility could make a significant and practical contribution to the strengthening of international law and relations. He now felt able to tell the most pragmatic of lawyers who queried the practical use of the Commission's work on State responsibility that they should read the judgment of the Court in the hostages case.

³ *Ibid.*, foot-note 4.

⁴ See *Yearbook . . . 1979*, vol. II (Part Two), p. 116, document A/34/10, chap. III, sect. B.2, art. 30, paras. (3)–(5) of the commentary.

⁵ *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3

12. It was clear that, in drafting part 2 of the draft articles, the Special Rapporteur and the Commission would have to take full account of part 1. The latter could, if necessary, be refashioned on second reading in the light of the comments of States, which might also have an impact on part 2 and which were already sufficient to place draft article 19 in jeopardy. It was quite clear from those comments that a large number of States seriously challenged that draft article on very substantial grounds, one of them being that the draft article was difficult to reconcile with the Commission's decision to avoid dealing with the primary rules of State responsibility.

13. Still more serious were the criticisms that draft article 19 entailed criminalizing State responsibility; that it did so in vague, subjective, selective and open-ended ways which violated the general principle of *nullum crimen sine lege*; that there was little basis in legal principle or State practice for introducing into the Commission's work on State responsibility a distinction between international delicts and international crimes; that to speak of criminal acts of States as though States could be hanged or imprisoned or as though their peoples could be collectively punished was questionable in the extreme; that, among the great authorities on State responsibility, there was antagonism towards, rather than support for, criminalizing State responsibility; that there was so little support because it was dangerous to confuse the centralized legal order of a State with the decentralized legal order of international life; and that the decentralized character of international life was perfectly illustrated in the fact that no international court would have effective jurisdiction to judge the alleged criminal acts of States.

14. The uneasiness about the use of the expression "guilty State" was perhaps indicative of the caution that should be exercised in preparing part 2 of the draft articles—caution which should take account of the fact that article 19 had not attracted, and gave little sign of attracting, the consensual support that would prove necessary if it was to figure in the final version of the draft. The Special Rapporteur might therefore wish to proceed on alternative assumptions—that draft article 19 might, or that it might not, be retained.

15. As to the stimulating report under consideration, he generally agreed with the Special Rapporteur's approach and analysis and thus saw no reason to leave aside the question of sanctions or countermeasures. When a State committed a breach of an international obligation and incurred international responsibility, the injured State was entitled to termination of the breach and to reparation. Reparation was not a unilateral phenomenon, because it reflected a kind of agreement between the transgressor State and the injured State. When, however, there was no such agreement and reparation was not made, the injured State could resort to sanctions within the limits of international law. If the term "sanctions" was to apply only to collective responses, then the injured State could take counter-

measures. It would therefore be incorrect to maintain that reparations applied in the case of a delict and that sanctions applied in the case of a crime.

16. He had been impressed by the idealism of Sir Francis Vallat's remarks at the previous meeting concerning countermeasures and only wished that he was able to agree with them. However, in view of the current decentralized international legal order, the brazen and repeated violations of international law that characterized the present era and the ineffectiveness of international institutions, countermeasures might be the only recourse open to law-abiding injured States. In the world of today, countermeasures might be not only lawful but necessary, something that was rightly recognized in article 30 of the draft, implicitly in the Judgment of the I.C.J. of 24 May 1980 in the case concerning *United States Diplomatic and Consular Staff in Tehran*⁶ and expressly in the arbitral award of 9 December 1978 in the case concerning the *Air Services Agreement of 27 March 1946* between the United States and France.⁷ Hence, part 2 of the draft articles must not fail to deal with the matter of countermeasures.

17. In his opinion, a particularly serious offence could well give rise to a new relationship between the transgressor State and a group of States or, indeed, the entire international community. At the previous meeting, Mr. Calle y Calle had aptly drawn attention to a current example and to the measures of retorsion that were being taken by certain States. The provisions of Articles 62 and 63 of the Statute of the International Court of Justice were also of relevance in that regard.

18. He agreed with the tenor of paragraphs 13 to 21 of the report and noted, with regard to paragraph 22, that the Special Rapporteur's conclusion was supported by the fact that, in the hostages case, the International Court of Justice had decided that one of the elements of Iran's responsibility was its failure to prevent or put an end to the conduct of persons or groups of persons who, initially, had been found not to be acting on behalf of the State. On the other hand, further explanation of the rationale of paragraphs 23 to 25 would be welcome. While it was right to affirm that the principles of human rights were such that the State could not be responsible for everything that happened on its territory or everything done by its nationals, it was, none the less important that the principles of State responsibility should continue to hold a State liable for certain acts, of omission as well as of commission. Again, the three parameters mentioned in paragraph 28 formed an appropriate method of analysis, but in connexion with the first of those parameters it should be noted that *restitutio in integrum* first of all demanded and presupposed the cessation of the transgressor State's illegal conduct.

⁶ *Ibid.*

⁷ See A/CN.4/330, para. 86.

19. The exposition of the three parameters was illuminating, but he did not share the view expressed in paragraph 34 that mere reparation *ex tunc* was required in cases where an obligation concerning the treatment to be accorded to aliens had been breached, since it was easy to conceive of situations in which assurances against future violations might be desirable or necessary.

20. The second sentence of paragraph 53, to the effect that a response to an internationally wrongful act was not necessarily intervention in the affairs of the State committing the act, was one of those statements of the obvious that, in the light of contemporary circumstances, none the less bore repetition because the proposition was accepted neither in the contentions nor in the practice of some of the actors on the international scene. Moreover, like many of his affirmations, the Special Rapporteur's statement in paragraph 64 that a material breach of a multilateral treaty necessarily inflicted a measure of injury on all of the parties to the treaty was also correct. Similarly, the view expressed in the last sentence of paragraph 66 was true, for the answer to the question of whether international crimes constituted the sole category of internationally wrongful acts that entailed a non-neutral position on the part of every other State must definitely be in the negative.

21. On the other hand, he was inclined to doubt the validity of the assertion in paragraphs 71 and 72 of the report that a collective decision was required before third States could take any action in response to a wrongful act. A collective decision might be and probably was needed in order to require third States to take responsive action, but whether it was needed in order to authorize them to take such action was less certain. The question of what constituted a "collective" decision also had to be answered. For instance, was a recommendation of the General Assembly to States to withhold aid from an aggressor such a decision? A recommendation of that kind could not be binding on States, but it might authorize them to take responsive action and thus insulate them against claims based on that action. Admittedly, the case made out in paragraph 74 for a collective decision to impose on third States a duty to react to a wrongful act was a strong one, and the Special Rapporteur's emphasis on observance of the rule of proportionality in that and other paragraphs of the report was sound, yet the argument that a collective decision was required in the case envisaged in paragraph 76 was not altogether convincing.

22. As to the interesting question raised in paragraph 81, it was clear that non-payment of an adequate indemnity was an internationally wrongful act, but it was arguable that the transgressor State was bound to pay more than the "appropriate indemnity" in certain circumstances, such as those involving a denial of justice.

23. Paragraph 87 mentioned an arbitral award in which it had been stated that the power of a tribunal to decide on interim measures of protection minimizes the authority of the injured State to initiate countermeasures. Where the tribunal had the necessary means to achieve the objectives justifying the countermeasures that was, to some extent, reasonable, but where the transgressor State failed to comply with the tribunal's interim measures of protection, it was plain that the injured State was not debarred from applying or maintaining countermeasures. Moreover, measures of retorsion could be applied in any event. The extract in paragraph 94 from the same arbitral award, with its carefully measured words about the legality of countermeasures in the framework of proportionality, deserved quotation. He wished merely to add that, if countermeasures were permissible while negotiations were in progress, they were, *a fortiori*, permissible when the transgressor State refused to negotiate.

24. Lastly, the Special Rapporteur said in paragraph 98 that a mere statement that there should be "proportionality" between response and breach left the question fully open. Personally, he agreed that some specification of the meaning of proportionality was highly desirable, but was not sure that it was possible. He awaited with interest the Special Rapporteur's clarification and development of the approach suggested in paragraphs 99 and 100 of the report.

25. Mr. EVENSEN said he agreed with Mr. Francis that an outline of the structure of draft articles would be a useful next step in the Special Rapporteur's work on part 2. Such an outline should not be too difficult to prepare, because it had already been sketched out in the report under consideration.

26. For example, he concurred with the view expressed in paragraph 6 that part 2 of the draft should in effect determine the consequences that an internationally wrongful act of a State might have under international law in different hypothetical cases. Moreover, it should cover not only reparation but also punitive measures, in connexion with which the Special Rapporteur had used the term "sanction". It might, however, be useful to use the term "sanction" exclusively for very special types of punitive measures, such as those referred to in Article 41 of the Charter of the United Nations. Various other terms might then be employed for other kinds of responses to breaches of international obligations.

27. It was certainly necessary to differentiate clearly between part 2 and part 3, for the latter would cover the implementation of international responsibility and the settlement of disputes. However, it might well prove difficult to draw a line of demarcation between the content, forms and degrees of international responsibility and its implementation, especially in the case of responses involving countermeasures, for the difference between the content and implementation of international responsibility was somewhat vague and elusive. It was his understanding that, in using the term

“implementation”, the Special Rapporteur was referring to the purely procedural aspects of international responsibility.

28. In connexion with the three parameters to be taken into account in drawing up a systematic catalogue of the new legal relationships created by a State's wrongful act, the Special Rapporteur examined in paragraphs 29 to 32 of his report three time elements involved in determining the content of such relationships. Those three elements all related to the problem of re-establishing the balance disturbed by the wrongful act. Reference was made in paragraph 31 to the view of the P.C.I.J. in the *Factory at Chorzów* case that the purpose of the principles of international responsibility for wrongful acts was “to wipe out all the consequences of the illegal act”. That view was, in principle, correct, but it gave an oversimplified picture of the problems to be dealt with in part 2. It should be remembered that the *Factory at Chorzów* case, in which economic issues had mainly been at stake, had been concerned with the protection of aliens and their property rights. In such instances, the damage could at least be assessed in terms of economic yardsticks. Nevertheless, he agreed that the three time elements involved in the *ex tunc*, *ex nunc* and *ex ante* approach might, to some extent, be taken into account in determining the size, value and contents of the reparation due as a result of a breach of an international obligation entailing international responsibility.

29. The distinctions drawn in paragraphs 32 to 36 between the various forms of *restitutio in integrum*, on the other hand would be much more valuable for the drafting of specific articles than the different time aspects of the content of the new legal relationships. The Special Rapporteur had introduced the concept of *restitutio in integrum* as a means of referring to the wiping out of all the consequences of the illegal act and to guarantees by the transgressor State that similar illegal acts would not occur in future. The question that arose in that regard was whether part 2 should include an enumeration of the various types of reparation which the transgressor State should be obliged to make.

30. The possible responses by injured States or others to a breach of an international obligation included countermeasures, responses under specific provisions of treaties, the responses of international organizations, and specific means available to the individual members of such organizations. In the traditional—or perhaps westernized—concept of international responsibility, there had been two main forms of responses. One was *restitutio in integrum* in the narrow sense of the term, namely, restitution in kind or restoration of the situation that had existed before the illegal act occurred. The other was payment of compensation for damages suffered, including payment of punitive damages.

31. The first form might be described in part 2 in the strict sense in order to indicate that what was required was the restoration of a particular situation. The second form of response, namely, payment of pecuniary compensation for damages suffered, related to the protection of aliens and the injuries suffered by a State as a result of violations of the rights of its nationals. In principle, he shared the view that the rights of aliens and the ensuing obligations of States should be spelled out in greater detail in part 2 than had been done in part 1. The questions of property rights and full and timely compensation for violations thereof were, however, two of the most controversial in modern State practice and in international law. He did not envy the Special Rapporteur, who would have to spell out the relevant principles in the form of draft articles, or the body which would have to hammer out hard and fast rules that would apply in that respect.

32. The report repeatedly referred to injured States and third States. It was his impression that the Special Rapporteur had perhaps drawn a line between the two without taking sufficient account of the fundamental developments that had taken place since the Second World War and had led to the emergence of a new notion of injury and interdependence. For a broad category of internationally wrongful acts, that notion no longer differentiated between injured States and third States. It would be preferable for the report to deal with the large number of parties that might have suffered injury as a result of an internationally wrongful act. Such parties might include individual States, group of States that were injured because of their interdependence, members of international organizations, international organizations themselves, and even the international community as a whole.

33. Lastly, in paragraph 41 of the report the Special Rapporteur pointed to the Judgments of the International Court of Justice in the *South West Africa* cases of *Ethiopia v. South Africa* and *Liberia v. South Africa* as a precedent indicating that those States had no special right to enforce the rules of international law against South Africa. In his opinion, a number of developments since 1970 had made those Judgments outdated. Hence, they did not offer good examples of a possible response to an internationally wrongful act.

34. Mr. BARBOZA said that the Special Rapporteur's topic should deal with the secondary rules and, in that regard, with the consequences of wrongful acts—in contrast to part 1 of the draft, entrusted to Mr. Ago, who had been concerned principally with wrongful acts. Those secondary rules could be expressed in the following way: a breach of a primary obligation (a wrongful act) must lead to a sanction (the term “sanction” being understood in its broadest sense). In other words, a wrongful act of a State must have clearly determined legal consequences. As Mr. Ago had dealt with the first limb of the rule, namely, the wrongful act, the circumstances in which it occurred and under which a given act would be

attributed to a State, the Commission would now have to deal only with the consequences of the wrongful act. The Commission's work on the topic should be set within those confines.

35. The Special Rapporteur had said it should be borne in mind, in considering part 2 of the draft, that the situation might differ, depending on whether the origins of the wrongful act lay in the breach of a conventional obligation or of a customary obligation. He had said that the breach of a conventional obligation gave rise to very different consequences with regard both to the position of the parties and to the measures available to those parties, because article 60 of the Vienna Convention, in dealing with a material breach of a multilateral treaty by one of the parties, treated the other parties differently according to whether they were especially affected by the breach, or the breach radically changed the situation with respect to the further performance of their obligations, or they were parties on which the breach had neither of those effects. The measures available to the parties as a consequence of the breach varied accordingly. Personally, he wondered whether the Vienna Convention was in fact relevant. It embodied a comprehensive set of rules that governed the responsibility incurred in the event of the breach of a treaty and determined the positions of the parties to the treaty and the corresponding legal consequences. All that was governed by the law of treaties, not by the draft now before the Commission. However, in the case of some further damage that gave rise to compensation over and above the sanction available under the treaty, namely, the termination or suspension of that treaty, the matter would indeed fall within the scope of part 2 of the draft and the distinctions that the treaty made between the parties would disappear.

36. Consequently, part 2 of the draft was concerned with the damage caused by the breach and with the application of the general principles of responsibility, rather than the treaty itself, which was to be regarded as one element in the case, and not as the source of responsibility. For example, in the *South West Africa* cases of *Ethiopia v. South Africa* and *Liberia v. South Africa* mentioned by the Special Rapporteur, the International Court of Justice had clearly based its reasoning on the interpretation of certain treaties; had the provisions of the Charter of the United Nations or of the Covenant of the League of Nations been different, or had the Court's interpretation of those provisions been otherwise, the result would not have been the same. Those cases were based, therefore, on treaty provisions and had no bearing on the draft. That did not mean that there was no link between the rules in part 2 and the primary rules, since the importance of the primary rules and the seriousness of their breach undoubtedly had an impact on the legal consequences attributed to the wrongful act of a State.

37. The Special Rapporteur, who was seeking the Commission's guidance on a number of points,

referred in paragraph 14 of his report to draft articles 27 and 28, which clearly came within the purview of part 2 of the draft. Presumably the Special Rapporteur had had in mind in both instances the concept of shared responsibility, which also arose in draft articles 29, 31 and 32.

38. It was difficult to comprehend the Special Rapporteur's concern with regard to draft article 30, relating to countermeasures. His own view was that the article referred to international law to determine in what conditions a countermeasure was legitimate; whether the breach of the obligation was such that a countermeasure should be applied or whether some measure that went beyond reparation was called for; the proportionality between the countermeasures and the seriousness of the breach; and whether or not force should be used in applying them. If the Special Rapporteur thought it advisable to include those conditions in his draft it would be necessary to modify article 30, which referred not to part 2 of the draft but to international law. Clarification on that point would be most helpful.

39. The title of part 2 was fairly explicit, but it was not easy to grasp the meaning of the expression "content" of State responsibility; perhaps it merely signified the consequences of wrongful acts by States. The "forms" of State responsibility related essentially to reparation and sanctions, although redress could also be secured through compensation, while the "degrees" of State responsibility seemed to refer to the rules of proportionality. He had certain doubts, however, regarding the form of sanctions. The Subcommittee on State Responsibility had considered various types of sanction in addition to *restitutio in integrum* and compensation, and had stressed the importance of sanctions for the maintenance of peace and international security. Also, as indicated in paragraph 1 of the report, it had referred to the need to examine the relationship between reparation and punitive action. In the circumstances, he wondered why the Special Rapporteur had not examined the whole question in a closer and more systematic manner. International law provided the machinery that was most accessible to States in the event of a breach of their rights. Unfortunately, that machinery was defective, because it was primitive and decentralized, but it was none the less important for the application of individual sanctions and countermeasures.

40. The rule of proportionality was the linchpin of part 2 of the draft, and it applied equally to reparation and to sanctions. The equality involved in reparation was, after all, a form of proportionality.

41. With regard to the method of work to be adopted, he agreed that it was not possible to itemize all possible breaches in the manner of a code of criminal law, matching each breach with an appropriate sanction. Rather, categories of breaches should be established, according to a given scale of values, and account should be taken of the rule of proportionality

for the relevant sanctions. It was also important to bear in mind positive law as developed by the courts.

42. Lastly, with regard to terminology he agreed that some more neutral term, such as "transgressor State", should be found to replace "guilty State". In addition, the word "response" should be avoided to denominate the reaction to a wrongful act, for in the context of part 2 of the project it was used in relation to the term "responsibility" and should be used in reference to that term alone.

43. Mr. RIPHAGEN (Special Rapporteur), summing up the discussion, said that the questions raised could be grouped in four broad categories: those relating to principle, those relating to terminology, those relating to the method of work, and miscellaneous questions.

44. The first point to bear in mind with regard to questions of principle was that, in using the term "parties", a distinction had to be drawn between the parties to the primary rule that laid down the particular obligation under international law, the parties to the breach of the obligation, and the parties to a dispute.

45. Most of the questions of principle raised by members concerned the relationship between parts 1 and 2 of the draft. In that connexion, Mr. Ushakov had contended (1599th meeting), first, that any questions left open in part 1 should be answered in part 1; secondly, that part 1 did not lay down primary rules and part 2 should therefore not do so either; and, thirdly, that the Vienna Convention had no bearing on the topic under consideration. So far as the distribution of the final articles was concerned, he, as Special Rapporteur, kept an open mind, although he would point out that the lines of demarcation between parts 1, 2 and 3 had already been approved by the Commission. However, a question of principle arose, because the Commission must decide what the draft should and should not cover. Part 1 covered the whole range of obligations under international law, irrespective of the origin, content and seriousness of the breach, and, while that did not necessarily mean that part 2 had to do likewise, it did require the Commission to give early consideration to articles that, like articles 73 and 75 of the Vienna Convention, would determine the matters that were to be omitted. Moreover, although the Vienna Convention did not deal with State responsibility, article 60 of the Convention did refer to new legal relationships that arose as a consequence of the breach of a treaty. Hence the Commission could not ignore that article, or such related articles as articles 34, 70 and 72.

46. Another question of principle was the relationship of part 2 of the draft to the so-called primary rules. Admittedly, part 1 did not lay down primary rules, just as the Vienna Convention did not stipulate the content of a treaty, but merely the obligations arising thereunder. Part 1 nevertheless recognized that there were different types of primary obligations, in the

same way as the Vienna Convention recognized that there were different types of treaty. Accordingly, part 2 should recognize different types of obligations, treaties, rules of general international law, and perhaps even rules of *jus cogens*. It was particularly important that it should do so since many Governments would not consider accepting part 1 as a whole (and particularly draft article 33)⁸ without clarification regarding the legal consequences of acts of the kind covered by chapter V of the draft. In drafting articles on any topic, the Commission could not altogether avoid the need to interpret the sources and rules of international law, since no one part of that law was entirely independent of the others; but with a little care it should be possible to avoid the pitfalls.

47. A further point of principle related to the rule of proportionality, which was a fundamental aspect of the question of responsibility. It was apparent, however, that further analysis was required in order to define its scope more precisely in part 2 of the draft. Mr. Šahović (1599th meeting) had not ruled out the need for part 2 to take due account of the different kinds of primary rules and had also referred to the boundary line between parts 2 and 3, a point that was touched upon in paragraphs 41, 42 and 101 of the report. The Commission might well wish to discuss it further within the context of specific draft articles.

48. In the matter of terminology, the most frequent query was the relevance of the distinction drawn in the report between the guilty, or transgressor, State, the injured State and the third State, and the definitions of those terms. He had drawn that distinction, first, because it had already been used in one of Mr. Ago's earlier reports and, secondly, because it had, in effect, also been drawn in article 60 of the Vienna Convention. Moreover, it did not prejudge the possibility that a third State might claim reparation or take other measures. The distinction had not yet been discussed in relation to part 3 of the draft, but that could be done later.

49. If he had laid what might seem to be undue emphasis on the position of third States, it was because of the structural changes in international society. The position of third States thus typified modern developments in international law and should give the Commission much food for thought in an area which had yet to be clearly defined.

50. Mr. Pinto had raised at the 1599th meeting a number of matters in which terminology and principle overlapped. On the whole, his analysis of the report was correct. It was true that the purpose of the new legal relationships created by international law as a consequence of an internationally wrongful act was to restore in some measure the equilibrium that had been disturbed by that act, but it followed that the parties to the new legal relationship were not necessarily the

⁸ See A/CN.4/318/Add.5, para. 81.

same as the parties to the primary rule breached. In that connexion, it should be noted that, in many cases, a universal rule of international law, or one laid down in a multilateral treaty, was a uniform rule only for the purpose of bilateral relationships. For instance, under the universal law of the sea, if a coastal State treated a flag State in a manner that was not in conformity with the universal rules, it was difficult to see *a priori* how another coastal or flag State would be affected by that situation. In other words, the parties to the new legal relationship arising out of the breach were not the same as the parties to the universal primary rule. Normally, the breach of an obligation laid down in a bilateral treaty simply created new legal relationships between the same parties—namely, the parties to the rule—and in that case the parties to the breach were generally the same.

51. With regard to the word “response”, he was not suggesting that it should appear in the draft; he had simply used it in the report in the sense of a reply under international law to the breach of a rule of international law. It could also be used, in the same sense, in relation to the duty of the transgressor State to make good any damage suffered as a consequence of the internationally wrongful act of that State, where such a duty was imposed by international law. There again, the rule of proportionality would apply, since there were several types of reparation and it was not certain that all of them, including punitive damages, would be resorted to under international law. “Response”, therefore, had been used to denote a reply to all the consequences of an illegal act, including the duty to make reparation.

52. As to method of work, an outline of part 2 would certainly be needed for the future. He had not submitted such an outline from the outset, since he had considered it premature to do so before the Commission decided which matters it wished to cover in the draft.

53. In the category of miscellaneous questions, Mr. Pinto’s point regarding a possible extension of the concept of new legal relationships to cover the case of several transgressor States was in fact discussed in paragraphs 14 and 26 of the report, but he agreed that it was necessary to consider the point further. Mr. Pinto had also queried the term “risk-allocation”, which appeared in paragraph 19 of the report. It was not a familiar term in international law and had been used, rather in the nature of an *à side*, to take account of cases in which the legal consequences arose as a result not of a wrongful act but of some extraneous force. On the other hand, it might be of some significance in the matter of the boundaries between his own and Mr. Quentin-Baxter’s topics. The expression “quantitative proportionality” had been used to indicate the seriousness of the situation created by a breach, and the expression “qualitative proportionality” denoted a difference in the quality of the rules.

54. Mr. Thiam had rightly observed (1600th meeting) that it would be difficult to draw up a tariff of penalties. For his own part, as Special Rapporteur he had no intention of laying down a penal code that would itemize all the different offences and determine the relevant penalties. It might, however, be possible to establish a *scala* of gravity, with a view to enunciating a general principle of proportionality and then providing some further indications for the application of the principle. Mr. Thiam had also referred to the important distinction between two kinds of responses, namely, reparation and sanctions. For all that, somewhere between the two lay certain countermeasures, and in the arbitral award cited in paragraph 94 of the report the countermeasures had been considered as measures to re-establish equality between the parties. Possibly, therefore, a third category of response should be established in order to cover countermeasures.

55. Mr. Francis (*ibid.*) had questioned whether the three exceptions to the third parameter of the new legal relationships, as listed in paragraph 62, were valid. The point he had sought to make as Special Rapporteur was that, if a wrongful act created a bilateral relationship between the transgressor State and the injured State, a special reason would be required for vesting in a third State another right, let alone a duty, to intervene in that bilateral relationship. Such a special reason might be, for example, that a State not directly affected by the breach was none the less a party to the rule breached, and thus entitled to intervene, or that the obligation breached was one which protected a fundamental interest of the international community as a whole. Members would recall that a recent judgment of the I.C.J. took the view that certain breaches of the law of diplomatic and consular relations affected the international community as a whole.

56. Mr. Calle y Calle had suggested at the previous meeting that, by definition, every internationally wrongful act caused injury—something which was in a sense true. However, it need not be inferred that a distinction could not be drawn between the various responses to such an act; even within the framework of reparation, the scope of the duty of the transgressor State would vary, depending on the nature and seriousness of the breach. In that connexion, members would note that paragraph 31 of the report mentioned the question of “punitive” damages and also of damages for *lucrum cessans*.

57. He fully agreed with Mr. Tabibi (1600th meeting) that the topic was a delicate one and had political overtones. He also agreed that it was not possible to dispense with part 2 of the draft, since it was necessary to define not only when State responsibility arose but also what it entailed. References to the teachings of publicists would certainly be included in his future reports and had been omitted in the present instance

merely because he had not thought them appropriate in the context of an initial analysis of the topic.

58. He endorsed Sir Francis Vallat's pertinent comments (*ibid.*) regarding terminology, and also the remark that the State's obligation subsisted after the breach. Yet the obligation could not necessarily be viewed in terms of the same situation. After all, a distinction had to be drawn between cases in which an injured State could claim specific performance of an obligation and those in which it could only claim damages. Such cases would have to be differentiated in part 2. It was true that responsibility related primarily to reparation by the transgressor State, but reparation could involve a number of measures. In that connexion, Sir Francis Vallat had alluded to certain measures which, to his own mind, were essentially punitive or *ex ante* legal consequences. Again, Sir Francis Vallat did not like the emphasis placed on countermeasures and self-help, but perhaps a re-reading of paragraphs 86-89 would give him satisfaction. Similarly he had expressed doubts regarding the approach outlined in paragraphs 99 and 100; possibly, he would be able at some later stage to indicate what other approach might be more appropriate.

59. Mr. Díaz González (*ibid.*) had, generally speaking, been in favour of the report. He had rightly pointed out that the Commission had already decided provisionally on the content of parts 2 and 3 of the draft and should proceed accordingly. His ideas would certainly be borne in mind in the further work on part 2 of the draft.

60. Mr. Jagota's views, expressed at the present meeting, differed from his own on one point: he could not altogether agree that the rule of proportionality was significant only in the case of the second parameter, relating to countermeasures, since there was also an element of proportionality in the duty to make reparation. Different types of reparation were relevant in the context of State responsibility, and a case could be made out for a corresponding degree of proportionality. It was, of course, far easier for a State to pay damages under its internal law than to restore the pre-existing situation, but the degree of gravity of the response also raised the problem of the degree of responsibility. Mr. Jagota had also correctly noted that the draft was concerned exclusively with State responsibility and not with the responsibility of international organizations. In his capacity as Special Rapporteur, he had none the less thought it appropriate to deal in the report with the influence of international organizations on countermeasures. Mr. Jagota had gone on to emphasize that the draft should deal solely with responsibility for wrongful acts. There was, however, one possible exception. Chapter V dealt in effect with circumstances which did not rule out the possibility of some kind of response, and part 2 should therefore deal with the consequences of acts whose wrongfulness was precluded in special circumstances. That was particularly important in the case of draft article

33, relating to state of necessity. In paragraphs 86 to 89 of the report, he had sought to bring out the relationship between countermeasures and the provisions of part 3 of the draft, to which Mr. Jagota had likewise referred, and hoped that they afforded an indication of what he thought might be relevant in the context.

61. Mr. Schwebel, who seemed to endorse the general approach taken in the report, had questioned whether the requirement of a collective decision (as proposed in paragraphs 71 and 72) was really valid. That was a matter which the Commission would have to consider, together with the question raised by Mr. Tsuruoka (1598th meeting), who had asked what constituted a collective decision. Many kinds of decisions, for instance, those taken under the Charter of the United Nations, were not strictly speaking decisions in the legal sense, but they could nevertheless be considered as such.

62. Mr. Evensen considered that the distinction between injured and third States was somewhat outmoded. Cases in which such a distinction did not create a difference were nevertheless becoming increasingly common in modern international law, and in that connexion, he would refer members to the comments set forth in paragraphs 62 and 96 of the report. Mr. Evensen had also taken the view that the 1962 Judgment of the International Court of Justice mentioned in paragraph 41 of the report might also be outdated. However, the Judgment in question had to some extent been reaffirmed in the advisory opinion delivered by the Court in 1971,⁹ stating that there was a need for a collective decision in certain instances.

63. He had been greatly assisted by Mr. Barboza's remarks and would simply confine himself to a few points. Mr. Barboza had asked whether it was really necessary to codify the rules of international law involved in draft article 30. That, of course, was a matter for the Commission to decide. His own view, once again, was that the rule of proportionality came into play, and that the relationship of that rule to article 30 should also be dealt with in part 2. He agreed with the observation that the rule of proportionality was of some significance, even within the framework of reparation, and trusted that his explanation of the use of the word "response" had dispelled some of Mr. Barboza's misgivings.

64. The CHAIRMAN thanked the Special Rapporteur for his report. The wealth of ideas it contained augured well for further work on the topic of State responsibility, and the discussion had served to clarify the Commission's thinking on a number of controversial issues.

The meeting rose at 6.15 p.m.

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. 16.*

1602nd MEETING

Tuesday, 3 June 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Bedjaoui, Mr. Boutros Ghali, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (A/CN.4/322 and Add.1 and 2,¹ A/CN.4/333)

[Item 1 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE B' (Transfer of a part of the territory of one State to another State)

1. The CHAIRMAN invited the Special Rapporteur to introduce his twelfth report on the succession of States in respect of matters other than treaties (A/CN.4/333), and more specifically the alternative version of draft article B' (*ibid.*, paras. 54 and 61), which read:

Article B'. Transfer of a part of the territory of one State to another State

Where a part of the territory of one State is transferred by that State to another State:

1. The passing of the State archives connected with the administration and history of the territory to which the succession of States relates shall be settled by agreement between the predecessor State and the successor State.

2. In the absence of agreement,

(a) the following archives pass to the successor State:

(i) archives of every kind belonging to the territory to which the succession of States relates,

(ii) the State archives that concern exclusively or principally the territory to which the succession of States relates, if they were constituted in the said territory;

(b) the following archives remain with the predecessor State: the State archives concerning exclusively or principally the territory to which the State succession relates, if they were constituted in the territory of the predecessor State.

3. The State to which these State archives pass or with which they remain shall, at the request and at the expense of the other State, make any appropriate reproduction of these State archives.

SIMPLIFIED VARIANT:

Article B'. Transfer of a part of the territory of one State to another State

Where a part of the territory of one State is transferred by that State to another State:

1. The passing of the State archives connected with the administration and history of the territory to which the succession

of States relates shall be settled by agreement between the predecessor State and the successor State.

2. In the absence of agreement, the State archives concerning exclusively or principally the territory to which the State succession relates pass to the successor State, if they were constituted in the territory of the predecessor State.

3. The State to which these State archives pass or with which they remain shall, at the request and at the expense of the other State, make any appropriate reproduction of these State archives for that other State.

2. Mr. BEDJAOUI (Special Rapporteur) said that the Commission had decided that the study of the topic of succession of States in respect of matters other than treaties would be limited exclusively to succession of State property and State debts and to a special category of State property—State archives. At its previous session, the Commission had adopted in first reading the text of draft articles 1 to 23 and A and B.² Article A defined the meaning of “State archives”, whereas article B dealt with the disposition of State archives in cases where the successor State was a newly independent State.

3. In its resolution 34/141 of 17 December 1979, the General Assembly had noted with appreciation that the Commission had completed the first reading of the draft articles and had recommended them to States for comment, and had recommended that the Commission should continue its work with a view to completing at its current session the study of the question of State archives. The Special Rapporteur's twelfth report (A/CN.4/333) had been prepared in the light of that resolution. It took into account the debates in the Commission, in UNESCO and in the General Assembly, in particular the Sixth Committee. So far as UNESCO was concerned, he had supplemented the information given in his eleventh report (A/CN.4/322 and Add.1 and 2), taking into account the first session (5–9 May 1980) of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation. State archives not only were used in the administration and management of a territory but were a precious part of a country's cultural and historic life. The United Nations had likewise dealt with the question of State archives in certain studies to which his twelfth report gave the prominence which they ought to have received in his earlier report.

4. At the thirty-fourth session of the General Assembly, in 1979, some members of the Sixth Committee had expressed certain views on the draft articles which the Commission would not be able to take into account until the second reading. It had been proposed, for example, that the title of the draft articles should be further amended so as to be more consistent with the content of the draft as a whole. Among the titles suggested were “Succession of States in respect of

¹ Reproduced in *Yearbook* . . . 1979, vol. II (Part One).

² See *Yearbook* . . . 1979, vol. II (Part Two), pp. 15 *et seq.*, document A/34/10, chap. II, sect. B.

State property, debts and archives” and “Succession of States in respect of certain matters other than treaties” (A/CN.4/333, paras. 25–27). Several members of the Sixth Committee had queried whether State archives were State property. In the course of the second reading the Commission would be able to consider the definition of the meaning of “State archives” and also the proposals for improving the text of draft article B (Newly independent State). For the time being, the Commission’s task was to supplement the draft articles already adopted on archives by provisions dealing with each of the other types of succession of States.

5. Referring to the two versions of draft article B’ (Transfer of a part of the territory of one State to another State) that were proposed in his twelfth report, he said that, as he had indicated in his eleventh report (A/CN.4/322 and Add.1 and 2, paras. 92 *et seq.*), the practice of States in the event of succession in consequence of the transfer of part of a State’s territory to another State was somewhat suspect, inasmuch as it relied on peace treaties that were generally concerned with providing political solutions that reflected relationships of strength between victors and vanquished rather than equitable solutions. It had long been the traditional custom that the victors took the archives of the territories conquered by them and sometimes even removed the archives of the predecessor State.

6. The value of the archives as evidence of ownership had been recognized in very early times. In France, King Philippe Auguste had in 1194 founded his *Trésor des Chartes*, in which he assembled documents relating to his kingdom, and as new provinces were added to the Crown, their archives were added to the treasury. Not infrequently, the victors had removed archives by force. For example, in 1415 the Swiss Confederates had removed the archives of the earlier possessions of the Hapsburgs that had been preserved in the Castle of Baden. As those archives concerned not only the territories of the Confederates but also a large area of south-western Germany, the Austrian Hapsburgs had been able to recover in 1474 documents not relating to those territories. In effect, therefore, it was the law of the jungle that had prevailed, even though there had been some intention to respect the law, since archives had been regarded as evidentiary title to ownership.

7. In the course of time, archives had also been considered as an instrument of administration. It had then become apparent that in the event of a transfer of territory the successor State would have to be left with a territory that would be as viable as possible in order to avoid the dislocation of management and administration. Two situations were possible, depending on whether one or more successor States were involved. Where there was only one successor State—the case discussed in paragraphs 96 to 98 of the eleventh report—the administrative archives relating to the territory affected by the succession of States passed to the successor State. Where there was more

than one successor State—the case discussed in paragraphs 99 to 101—it was customary to respect the unity of the stock of archives by maintaining it intact in the territory where the archives were physically present, though the successor State controlling that territory had a duty to make copies for the other successor States. There was, however, a distinction between administrative archives and historic or cultural archives, and that distinction would hamper the operation of the principle.

8. Normally, only the administrative archives should pass in their entirety to the successor State. By virtue of the principle of the integrity of the stock of archives, the others should remain in the possession of the predecessor State, unless they had been constituted in that part of the territory that was affected by the succession. There was, however, an abundant State practice in conflict with that rule. In that connexion, he stressed that in modern times the situation contemplated in article B’ should concern only a small part of territory. It followed that the problem of the transfer of the archives should arise only in respect of administrative archives, even though in such a situation there might be historical or cultural, notably ecclesiastical, archives. If the administrative archives had been removed, they had to be restored; he referred to the examples cited in his eleventh report (paragraphs 112 to 118).

9. It could happen that some archives had been constituted outside the territory affected by the succession, a case that generally occurred where the predecessor State was a highly centralized State. In such a case, he considered that it would be wrong to truncate the stock of archives that might be physically located in the capital of the predecessor State. Adjustments were always possible where the archives were of the administrative kind; besides, in many cases there were copies of the archives in the ceded territory. He referred to paragraphs 119 to 121 of his eleventh report, where various examples were given of archives established outside the territory.

10. In general, the practice of States had taken into account the connexion between archives and the territory affected by the succession. For the purpose of determining what was the nature of that connexion, States had relied on the notions of territorial origin or territorial or fundamental connexion; such concepts were not always easy to translate into practice.

11. In some circumstances, the passing of State archives to the successor State involved certain obligations on the part of that State, inasmuch as territorial changes often led to shifts of population. It could happen, for example, that the inhabitants of the territory affected by the succession settled in the territory of the predecessor State. It was in the light of such considerations that he had provided that the successor State had a duty to deliver to the predecessor State copies of the administrative archives which the latter might need.

12. The relatively rare case of State libraries was illustrated by the example cited in his eleventh report (paragraph 132) of treaty provisions whereby libraries were restored at the same time as archives.

13. Thus, in earlier times, the practice of States regarding succession to State archives had followed the rule "might is right". In modern times, it was inconceivable that a transfer should take place except by agreements between the predecessor State and the successor State and with the approval of the population of the territory transferred. Similarly, in preference to the cession of a large tract of land, the modern approach was rather to envisage frontier adjustments. State practice showed, however, that peace treaties were nearly always an opportunity for the victor to impose his choice on the vanquished, and the past practice of States not only did not reflect any concern with equity but also was somewhat rigid.

14. For the purpose of deriving from that practice a rule concerning succession to State archives, the material provision concerning succession in respect of State property was that in article 10.³ It was possible to lay down a number of general principles. In the first place, State archives situated in the transferred territory passed to the successor State. Secondly, it was sound practice that the passing of those archives should be settled by agreement between the predecessor and successor States. Thirdly, it should be admitted that, in the absence of agreement, at least the archives connected with the predecessor State's activities in the territory would pass to the successor State, in so far as the archives had been constituted in the territory. Fourthly, the situation to be dealt with was the modern one where the territory to be transferred was comparatively small. Accordingly, the archives in question were archives formed in the territory by the predecessor State and passed to the successor State, subject to the proviso that the successor State had a duty to make copies for the purpose of the administration of that part of the population that left the territory. The archives that were not physically present in the territory and that had a direct connexion with the administration of the territory should remain in the possession of the predecessor State out of respect for the principle of the integrity of the stock of archives, though the predecessor State would have a duty to provide copies of the archives to the successor State. Historic or cultural archives, if present in the transferred territory, were presumably a self-contained stock and passed to the successor State. Conversely, historic or cultural archives relating to the territory that were physically located in the predecessor State, in particular in that State's capital, would presumably form part of a stock it would be wrong to truncate for the purpose of their passing to the successor State. Those were the reflections that had guided him in the drafting of article B'.

15. As State archives were movable State property, it would be necessary to compare the terms of the proposed article with those of draft article 10. In each of those provisions, priority was given to the agreement between the parties. Article 10 provided that, where there was no agreement, the decisive criterion would be the connexion between the movable property in question and the predecessor State's activity in respect of the territory; similarly, draft article B' provided that in such a case the decisive criterion would be the more or less identical one of the association of the archives with the territory. The documents in question were those produced, created or "hidden" in or by the territory. He had had to adjust the criterion applied in article 10 to the special nature of archives. In draft article B', the coverage of the criterion had been enlarged in so far as it concerned all the archives situated in the territory and not only those relating to the predecessor State's activity with respect to the territory. At the same time, the criterion was limited, in the sense that archives connected with the predecessor State's activity in the territory would not pass if they had been constituted not in the territory in question but, for example, in the predecessor State's capital. The explanation was that many countries managed or administered a territory from their capital and kept in the capital administrative archives relating to the territory. Where such a territory was affected by succession, the archives in question could hardly be transferred to the successor State without damage to the archival stock. As there were bound to be local copies of those archives, the criterion of article 10 had been adapted accordingly. That was also the solution suggested by practice, though on occasion the rule had been seriously infringed.

16. If the members of the Commission considered his draft article B' too long, it might be simplified in the manner suggested in the proposed variant. According to subparagraph 2 (a) (i) of draft article B', in the absence of agreement, archives of every kind belonging to the territory to which the succession of States related would pass to the successor State. He considered that, since it was so obvious that such archives—more often local than State archives—should pass to the successor State, the provision in question might well be omitted. Subparagraph 2 (a) (ii) provided that, in the absence of agreement, State archives concerning exclusively or principally the territory affected by the succession of States would, if constituted in that territory, pass to the successor State. That was an essential rule and would, of course, have to be retained. Subparagraph 2 (b) might perhaps be omitted, since all it did was to lay down the converse rule, which was that archives remained with the predecessor State if constituted in that State's territory. Paragraph 3, on the other hand, was indispensable, for it dealt with certain practical difficulties arising notably in the case of population transfers.

³ *Ibid.*

17. The CHAIRMAN thanked the Special Rapporteur for his oral introduction of the twelfth report. He invited members' comments on the report, and specifically on the two versions of draft article B'.
18. Mr. FRANCIS said that the preoccupation of UNESCO and the General Assembly with State archives that was disclosed by the twelfth report was an indication that the Commission was not working in a vacuum. The Sixth Committee of the General Assembly had stressed two points in particular, first, that the definition of "State archives" could be clarified and, secondly, that the Commission should endeavour to complete its work on the issue at the current session. He therefore agreed entirely with the Special Rapporteur that the Commission should concentrate on settling the provisions concerning the disposition of State archives in the various situations of succession of States other than that of a newly independent State, which was covered in draft article B. The general context of the draft articles on State archives should be decided at the second reading.
19. Referring to the two versions of draft article B' proposed by the Special Rapporteur, he said that he preferred the first, primarily because he was strongly in favour of the terms of subparagraph 2 (a) (i). He would merely propose that the words "subject to the provisions of subparagraph 2 (a) (ii)" should be added at the beginning of subparagraph 2 (a) (i), to dispel any possible confusion and provide the necessary link between the two subparagraphs.
20. Mr. EVENSEN said that he, too, preferred the first version of draft article B'. So far as matters of substance were concerned he agreed entirely with the Special Rapporteur, but he did have a few points of drafting to raise.
21. In the first place, he wondered why the words "administration and history" had been included in paragraph 1 of the draft article, since they seemed to imply a restriction which was not in keeping with the definition of State archives laid down in article A. Those words seemed neither necessary nor useful in the context of a reference to an agreement between the parties. Moreover, although the words were not used in subsequent paragraphs of the draft article, he wondered whether they were incorporated by implication.
22. Secondly, he shared some of Mr. Francis's misgivings regarding paragraph 2 of the draft article. Specifically, he considered that, if subparagraph 2 (a) (i) was meant to be a general provision, it would make subparagraph 2 (a) (ii) somewhat superfluous, which was perhaps not the intent. He proposed therefore that the order of those two subparagraphs should be reversed.
23. Thirdly, the Special Rapporteur had mentioned that, in many instances, the archives with which draft article B' was concerned would be local archives rather than State archives; possibly that point should be covered in the draft article.
24. Lastly, he had some doubts about the use of the word "constituted" in subparagraph 2 (a) (ii), although he understood the intent, namely, that the reference was to archives physically present in the territory.
25. Mr. QUENTIN-BAXTER pointed out that, in the simplified version of article B', the wording of the last line of the English text of paragraph 2 should be brought into line with the wording of the French text of that paragraph, which referred to "the territory to which the succession of States relates", not to "the territory of the predecessor State".
26. As the Special Rapporteur had pointed out, the draft article relating to the transfer of part of a territory were designed to deal only with the smallest of boundary adjustments. The Commission's philosophy on that subject had, moreover, always been that the question of the movement of a sector of population from one State to another was not simply a matter for agreement between the two States concerned, because it involved the important principle of the right to self-determination. Indeed, the Commission had always taken the view that a substantial transfer of territory affecting a local population was governed by draft article E (A/CN.4/322 and Add.1 and 2; para. 204) paragraph 5 of which related to the case in which part of the territory of a State separated from that State and united with another State. In such a case, account had to be taken both of the interests of the transferred population and the interests of the States concerned.
27. Thus, draft article B' related to little more than the question of boundary adjustments, while cases involving units of population were covered by draft article E, which fully respected the principle of the right of the transferred population to self-determination, referring as it did to the separation of a territory and its uniting with another State. The comments made by Mr. Francis and Mr. Evensen seemed to relate more to draft article E than to draft article B', and the Commission should therefore be able to deal fairly rapidly with article B', which covered the case in which two States negotiated on equal terms to reach agreement on a change in the international boundary which they shared. Such agreement would probably take the form of a bilateral treaty.
28. In that connexion, he said that even though the residual case in draft article B' was less important than any of the other specific cases which the Commission would have to consider, provision must be made for it. He was nevertheless not sure that reference had to be made in draft article B' to documents constituted in the territory to which the succession related. Reference would, however, have to be made to documents having a bearing on the international boundary because, as was well-known from case law, the title which a State obtained was no better than the title which the other State was able to convey. Paragraph 1 should therefore refer not to documents which were primarily administrative or historical in nature but rather to

documents which had some bearing on the actual boundary between the two States concerned.

29. Mr. ŠAHOVIĆ said he could endorse the Special Rapporteur's recommendations regarding the answers to be given to the general questions arising out of the discussions at the General Assembly's thirty-fourth session.

30. In general, he could accept the rules proposed by the Special Rapporteur in draft article B', though he considered that the article might need some redrafting.

31. He thought that, before the provision was referred to the Drafting Committee, attention should be drawn to the need to harmonize the language of article B' with that of the provisions approved by the Commission, at its previous session, for dealing with the problems of principle arising in connexion with article A (definition of State archives). In addition, he considered that, for the sake of the uniformity of the terminology, the Commission should have a general conspectus of the draft articles as a whole.

32. The terms of draft article B' and of the simplified version of that article gave rise to some difficulties which might perhaps necessitate the redrafting of the provision in the light of the discussions in the Commission and its Drafting Committee. For example, the expression "State archives" should be used in a stricter sense. Paragraph 1 spoke of "State archives connected with the administration and history of the territory to which the succession of States relates", whereas subparagraph 2 (a) (i) referred to "archives of every kind belonging to the territory"—a much broader concept. Perhaps the provision would be clearer if express reference was made to the definition of State archives given in draft article A.

33. The proposals made in paragraph 59 of the Special Rapporteur's twelfth report (A/CN.4/333) seemed at first sight both sound and logical. At the same time he considered, however, that the question should be reviewed in the light of the fundamental principles, of the content of the rule and of the remainder of the article in its simplified version. In the passage in paragraph 3 that referred to the "State to which these State archives pass or with which they remain", the use of the verb "remain" might strike the reader as surprising if the provisions of subparagraph 2 (b) were dropped.

34. In his opinion, draft article B' might be referred to the Drafting Committee forthwith.

35. Mr. THIAM said that the Special Rapporteur's concern had been to maintain a balance between the rights of the predecessor State and those of the successor State. In so far as draft article B' clearly described the position of each State, he (Mr. Thiam) considered the draft article sufficiently explicit and balanced.

36. He had some hesitation, however, with regard to the use of the word "belonging" in subparagraph 2 (a)

(i), for draft article B' dealt with the succession to State archives, not with succession to the local archives of a territory, which, as such, were bound to share the fate of that territory in the event of transfer. It would accordingly be more methodical and preferable to omit that subparagraph and to refer to the disposition of that kind of archive in the commentary rather than in the body of the provision itself.

37. Sir Francis VALLAT said that, although he generally agreed with the approach adopted in draft article B', he thought that further consideration would have to be given to the use in article A of the words "belonged to the predecessor State" because it was not at all clear whether the word "belonged" was used in that draft article in the same sense as in draft article B, paragraph 2 (a) (i), which referred to archives of every kind "belonging" to the territory to which the succession of States related. It was his guess that the meaning of that word, which would have to be defined by the Drafting Committee, was intended to be different in the two draft articles, especially since it did not seem to denote either ownership or possession.

38. Referring specifically to draft article B', he said that he understood the point made by Mr. Quentin-Baxter concerning the distinction which the Commission had maintained between boundary adjustments and the transfer of part of the territory of a State and agreed with Mr. Quentin-Baxter that draft article E, paragraph 5, extended the provisions of the foregoing paragraphs 1 to 4 to the case where part of the territory of a State separated from that State and united with another State. He noted, however, that the distinction between a small boundary adjustment and a large one was not based on any conceptual foundation and must therefore be difficult to apply in practice, whereas there was a conceptual difference between draft articles B' and E, in the sense that there was a difference between a transfer of territory and the separation of part of a territory. In one case, the initiative was taken by the State concerned, whereas in the other the initiative was taken by the people of the territory concerned. That was where the principle of the right to self-determination came into play. Moreover, since draft article B' probably related to something more than minor boundary adjustments, it would have to refer to archives constituted in the territory to which the succession of States related.

39. He had doubts similar to those expressed by Mr. Francis and Mr. Evensen concerning the use in draft article B', paragraph 1, of the words "State archives connected with the administration and history of the territory ...", the use in paragraph 2 (a) (i), of the word "archives" and the use in paragraph 2 (a) (ii) of the words "State archives". From the drafting point of view, it would, in his opinion, be better to adhere to the term "State archives" defined in article A. Indeed, since that article referred only to State archives, the following articles could not properly deal with other types of archives, such as papers which might have

been collected locally and which belonged to a municipal authority.

40. Lastly, he said that, in his view, draft article B' could be referred to the Drafting Committee.

41. Mr. USHAKOV said that most of the difficulties arising in connexion with the succession to State archives were due to the indivisible nature of certain archival stocks, which were, as a consequence, distinguishable from the other movable State property; in most cases, movable State property was divisible and capable of being evaluated for the purposes of compensation, where applicable.

42. The Special Rapporteur's commentary on draft article B' explained that, in the context of that article, the transfer of part of a State's territory to another State corresponded essentially to a frontier adjustment carried out by agreement between the States concerned. That explanation should be taken into account when the Commission came to draft the article. It was hardly necessary, for example, that paragraph 1 should refer specifically to "State archives connected with the administration and history of the territory", since the transfers in question were the subject of an agreement between the States which settled the question what archives would pass to the successor State. The provisions of paragraph 3 of article B might be a useful guide in that connexion, in order that provision should be made also for archives connected with the history or culture of the transferred part of a territory.

43. He suggested that draft article B' might be referred to the Drafting Committee, which would surely be able to work out the appropriate language.

The meeting rose at 1 p.m.

1603rd MEETING

Tuesday, 3 June 1980, at 3.45 p.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/322 and Add.1 and 2,¹ A/CN.4/333)

[Item 1 of the agenda]

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

ARTICLE B' (Transfer of a part of the territory of one State to another State)² (*concluded*)

1. Mr. BARBOZA said that the reason why, at its thirty-first session, the Commission had not included among the draft articles submitted to the General Assembly³ the article concerning succession to State archives in the case of the transfer of a part of the territory of one State to another State had not only been lack of time but also that some of its members had felt that the article was superfluous. However, he considered that the draft as it stood was somewhat incomplete and, as he had said in the Sixth Committee,⁴ the criteria for the transfer of movable State property would require some adaptation before they could be applied to State archives. Draft article B' was proof that adaptation was necessary. Like the Special Rapporteur, he thought that the title of the draft article should be reconsidered at the second reading, as should the definition of State archives, since any defects in the articles dealing with the subject would only become apparent during the discussion.

2. A comparison of article B' and article 10⁵ showed the difference in the criteria for the transfer of property and for the transfer of archives. Article 10, paragraph 2 (b) provided merely for the passing of "movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory ...". The Special Rapporteur had, in his introduction, clearly shown that the criteria in article B', subparagraph 2 (a) (ii), were broader since it provided that all the archives concerning exclusively or principally the territory would pass to the successor State, but that provision was also narrower in that it stipulated that archives passed to the successor State only if they were constituted in the territory.

3. The Special Rapporteur had proposed a simplified version of article B', but he (Mr. Barboza) preferred the first version of article B'—although he realized that it posed a delicate legal problem—because the reference to archives of every kind belonging to the territory created an interesting concept of cultural heritage in the context of State archives, which could be used for interpretation of the other articles.

4. Mr. Thiam and Sir Francis Vallat had at the preceding meeting drawn attention to the fact that, strictly speaking, only State archives should be considered. The documents which formed part of the cultural heritage of a State or territory were not State

² For text, see 1602nd meeting, para. 1.

³ See 1602nd meeting, foot-note 2.

⁴ See *Official Records of the General Assembly, Thirty-fourth session, Sixth Committee, 46th meeting, paras. 40–46; and ibid., Sessional fascicle, corrigendum.*

⁵ See 1602nd meeting, foot-note 2.

¹ Reproduced in *Yearbook . . . 1979*, vol. II (Part One).

archives within the meaning of the definition contained in Article A, possibly because the definition was defective. If the Commission wished to maintain the concept of “belonging” and the reference to a cultural heritage, the definition might perhaps be broadened to cover certain types of archives that were not directly owned by the State but were a part of its “eminent domain”, which would prevent them from being removed from the national territory. He felt that the concept should be further explored in the Drafting Committee. Article B’ concerned archives which belonged to a territory—but a territory was not a legal entity in international law, and it might be preferable therefore to make a reference to the State and to its “eminent domain”.

5. Sir Francis Vallat and Mr. Evensen had pointed out at the 1602nd meeting the difference in scope between paragraphs 1 and 2 of article B’, since paragraph 1 referred more particularly to archives connected with the administration and history of the territory. The point should be considered by the Drafting Committee.

6. Mr. CALLE Y CALLE thanked the Special Rapporteur for having referred to the latest developments on the subject in the General Assembly and UNESCO.

7. The Special Rapporteur had said that the relationship between archives and a territory was based on two principles, namely the territorial origin of the archives and their functional connexion with the territory. The territorial origin of the archives depended on whether they belonged to the part of the territory being transferred and, if so, the type of archives concerned would be primarily local, municipal or regional registers relating or belonging to the territory. The functional connexion depended on whether the archives were linked to the territory, and a parallel concept appeared in article 10, on property.

8. In his view, the references to a “part of a territory” should be understood to mean a sizeable piece of land with a sizeable population, since the transfer of small pieces of land would be dealt with in frontier agreements rather than in the context of a succession of States. It was implied that the main interest would be in administrative archives rather than in archives of a historical or cultural nature. However, the populations of the territories transferred to another State had their own history, and often the reason for the transfer was ethnic, cultural or historical.

9. He pointed out that no distinction had been made between what could be called living archives, namely titles to land and birth and marriage registers, and archives of a historical nature, which were no longer in use.

10. He would have no objection to accepting either version of article B’, although he preferred the simplified version, because the longer version contained a contradiction as to the basis for the rule,

which was to ensure that the successor State was not deprived of the documents connected with the territory. The ownership and functional connexion of the archives were recognized, and their location was taken into account. If the archives were physically present in the territory and had been constituted there, there was no doubt that they should remain there; but if they were not located in the territory, the predecessor State was entitled to keep them, though it must supply copies of them. Paragraph 2 of the simplified version of article B’ set out the rule, and obviously implied that if the archives had not been constituted in the territory they could remain in the possession of the predecessor State.

11. Paragraph 3 referred to the obligation to provide reproductions of archives. He felt that the obligation might be extended to cover the possibility of transferring specific originals, since archives were not an absolutely indivisible entity. Sometimes ownership of the original document was essential, for example, in the case of title deeds, where a copy was not a sufficient guarantee since the original could disappear. A Royal Decree of 1802 had re-integrated the entire Amazon region, taken a few decades previously to form the Vice-royalty of Nueva Granada, in the Vice-royalty of Peru, and that document was essential to Peru. Throughout America, the principle of *uti possidetis* had been applied when countries had gained their independence: thus each State had had to be able to show its title deeds, which were State documents issued by the Spanish Crown. In some cases, therefore, it was appropriate to deliver the original document to the new sovereign of a territory. Some representatives in the Sixth Committee had stated that it was essential to ensure that certain documents were preserved and transmitted to the successor State, by virtue of a basic right inherent in national or territorial sovereignty.

12. He agreed with Mr. Barboza that there were archives which were not really State archives: they were privately owned and had frequently been taken from State institutions during wars, and kept as a private heritage. Since the State had the power to expropriate private property in the general interest, it also had a duty to expropriate documentary archives and works of art which were privately held and return them to their legitimate owners, namely, the territory to which they belonged.

13. Mr. VEROSTA (Chairman of the Drafting Committee) said he would be grateful for the Commission’s guidance with regard to the two versions of article B’. His personal preference was for the simplified version, principally because, unlike the other version, it referred, not to “archives of every kind belonging to the territory to which the succession of States relates” but only to “State archives”.

14. Mr. RIPHAGEN said that he would confine his remarks to the phrase “belonging to the territory”, which recurred in various forms in several parts of the text. Thus, subparagraph 1 (a) of article B which the

Commission had adopted⁶ contained the words “having belonged to the territory ...”, which in that context had an entirely different meaning from the phrase “documents of all kinds which ... belonged to the predecessor State ...” to which the definition of State archives in article A referred. In article B, which dealt specifically with newly independent States, the use of the past tense in the phrase “having belonged to” was intended, as it were, to give retroactive effect to State succession; it meant that, when the right of self-determination was exercised, archives that had belonged to the territory prior to colonization should be restored to it. The principle was a very just one, but it applied only to newly independent States.

15. He tended to agree with the point made by Mr. Quentin-Baxter at the previous meeting that, except in the cases covered by articles B and E (A/CN.4/322 and Add.1 and 2, para. 204), there seemed to be no particular reason for elaborating the question of succession to State archives in great detail. It was the right to self-determination which gave the problem its particular meaning and colour; in cases where the question of self-determination did not arise, the matter might as well be left to the States concerned. He added that he had already made a similar comment in the Sixth Committee.⁷ The fact that certain archives were the property of a territory in the sense that they actually related to that territory and thus belonged to its administration was adequately taken into account in paragraph 1 of article B.

16. The CHAIRMAN, speaking as a member of the Commission, said he would refer only to the point raised by Sir Francis Vallat (1602nd meeting) and by Mr. Riphagen concerning the phrases used in various parts of the text to describe the relationship between State property—in the particular case, archives—and the territory affected by the succession of States. The relationship might be described by the phrase “belonging to” used in subparagraph 2 (a) (i) of article B', or in the terms of the definition of State property given in article 5. In paragraph 56 of his latest report (A/CN.4/333), the Special Rapporteur defined State archives as “a class of movable State property”. In article A, State archives were defined as “the collection of documents of all kinds which ... belonged to the predecessor State according to its internal law ...”. Elsewhere in the draft, the relationship was indicated by the words “situated in” (article 10), “connected with the activity of the predecessor State in respect of the territory” (articles 10 and 11), and, in paragraph (1) of article B', “... connected with the administration and history of the territory”. In his view, the phrases used did not convey the same meaning in each context, the words “belonging to”, in particular, being of uncertain legal content.

⁶ *Ibid.*

⁷ See *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 39th meeting, para. 5; and *ibid.*, *Sessional fascicle*, corrigendum.

17. He hoped that the Special Rapporteur would review the different phrases in order to preserve the essential clarity of the draft.

18. Mr. BEDJAOUI (Special Rapporteur) said that the comments made in the course of discussion on article B' could be arranged under three major headings.

19. First, what kind of territory and what kind of succession were involved? Did the succession relate to large tracts of the territory of a predecessor State, or was the article concerned only with minor frontier adjustments affecting tiny parcels of the predecessor State's territory? That was the issue underlying the entire debate, and he gathered that what was in the Commission's mind was the kind of succession that followed from the transfer of a part of one State's territory to another State, not in consequence of territorial conquest or annexation by force but in consequence, essentially, of boundary adjustments which, even though they might be minor, could nevertheless affect the persons and localities concerned.

20. Apparently Mr. Ushakov and Mr. Quentin-Baxter (1602nd meeting) thought that article E was the relevant provision. Sir Francis Vallat (*ibid.*) had said, however, very rightly, that article E related to the separation of part or parts of a State's territory that was followed by the formation of another State. He (Mr. Bedjaoui) would point out that under paragraph 2 of article 13 (concerning property) and paragraph 2 of article 22 (concerning debts) the transfer of part of a State's territory to another State was equated with the separation of part or parts of a State's territory. Accordingly, the Commission might perhaps refer to article E even if, as Sir Francis had noted, that article contemplated implicitly the population's exercise of its right to self-determination, whereas minor frontier adjustments were operated by governments. Admittedly the difference was an important one, even though in the case of frontier adjustments it had happened that the local population had been consulted by plebiscite, for example after the First World War (case of Eupen and Malmedy) and after the Second World War (case of Tenda and Briga).

21. The real problem was what kind of situation and what kind of territorial adjustment should be governed by article B' and what other kind of situation or territorial adjustment should preferably be governed by article E. That was the heart of the difficulty since, as Sir Francis had pointed out, there were no legal criteria for differentiating between a minor and a major boundary or territorial adjustment.

22. The second question was what kind of archives were to be the subject of article B'. Opinions in the Commission were apparently divided on the meaning to be attached to the expression “archives of every kind belonging to the territory to which the succession of States relates” (subparagraph 2 (a) (i)); Sir Francis

Vallat had gone so far as to suggest that subparagraph (i) should be omitted altogether. That was feasible, since, after all, the archives involved were generally local archives; the point would be considered in the Drafting Committee. However, article B' referred also to other kinds of archives: "archives connected with the administration and history of the territory", archives necessary for the administration of the territory transferred and also historic or cultural archives, which might be of definite importance, for even in the case of minor frontier adjustments there might be some frontier town that had been the capital of a former empire or the centre of great cultural activity where valuable archives might have been kept. He had endeavoured in his draft to stress the link of the archives to the territory in question, but if the matter should give rise to difficulties, he would be prepared to redraft the provisions.

23. Alternatively, as Mr. Quentin-Baxter and Mr. Ushakov had said, the archives might not have been constituted in the territory affected but might be of interest to the successor State in regard to its new frontiers. Hence, it would be desirable to provide that the successor State should possess reliable evidentiary title or proof of its claim to the territory, and consequently a useful guide might be the relevant provisions in article B (Newly independent State). He would press for the acceptance of that idea in the Drafting Committee; the idea was not totally lacking in draft article B' as drafted, e.g. subparagraphs 2 (a) (i) and 2 (b), and also paragraph 3. It might, however, be sound practice to state the idea expressly.

24. He wished to explain at that stage that he had not meant to differentiate among categories of archives; indeed, the whole of the article related exclusively to State archives. The reason why he had introduced the concept of "State archives connected with the administration and history of the territory"—a concept that was admittedly remote from the definition of archives and that he was quite prepared to drop—was that he had been thinking of the case where at some point in its history a central State might have held certain property, cultural archives or manuscripts in a frontier province that had subsequently been transferred to another State, in which case the archives had to be restored to the predecessor State because they had no connexion with the administration or history of the transferred territory. The "archives of every kind belonging to the territory to which the succession of States relates" were archives specific to the transferred territory and, in any case, passed to the successor State. In his simplified version of article B' that class of archives was not referred to; it might be sufficient to mention that class in the commentary, or in the article itself, in more appropriate language to be drafted with the help of the Drafting Committee.

25. Thirdly, which of the draft provisions should serve as a model for the terminology? That was an important point as Mr. Šahović had said (1602nd

meeting); it would be the Drafting Committee's task to ensure the general consistency of the draft as a whole.

26. In reply to Mr. Evensen (*ibid.*), he explained that the meaning of the expression "archives ... constituted" in the territory affected by the succession of States was intended to mean archives in fact constituted in that territory, but possibly removed from that territory just before the succession of States occurred; in reply to Sir Francis Vallat, who had noted the ambiguity in the expression "archives ... constituted in the territory of the predecessor State", he explained that the expression was obviously intended to mean archives constituted in that part of the territory which remained with the predecessor State. Lastly, in reply to Mr. Calle y Calle he explained that article B' was intended to provide for the transfer of the original documents and not for the delivery of mere copies.

27. The CHAIRMAN, noting that no objection of principle had been raised to article B' in either of its versions, suggested that the article should be referred to the Drafting Committee.

*It was so decided.*⁸

ARTICLE D (Uniting of States)

28. The CHAIRMAN invited the Special Rapporteur to introduce draft article D (A/CN.4/333, para. 65), which read:

Article D. Uniting of States

1. Where two or more States unite and thus form a successor State, the State archives of the predecessor States shall pass to the successor State.

2. Without prejudice to the provision in paragraph 1, the allocation of the State archives of the predecessor States as belonging to the successor State or, as the case may be, to its component parts, shall be governed by the internal law of the successor State.

29. Mr. BEDJAOUI (Special Rapporteur) said that the succession to State archives was clearer and simpler in the case of a uniting of States, where the agreement of the parties was paramount. Indeed, in no other case was that agreement more decisive, for what was involved was a consensual act *par excellence*, an act of the free will of two or more States. The agreement was intended to settle all the problems of succession. In so far as any points were not settled or if any uncertainty remained regarding the disposition of the archives, it must be assumed that it was the common will of the States to rely on the future provisions of the internal law of the successor State, which would prevail.

⁸ For consideration of the text proposed by the Drafting Committee, see 1627th meeting, paras. 26 *et seq.*

30. The passing of the archives depended, however, on the form which the uniting of States took and on the kind of archives involved. Where States united to form a federation or confederation, there was no reason why the archives of the predecessor States should pass to the successor State: each predecessor State would retain its own archives. Where States united in order to form a unitary State, the archives might perhaps be rearranged—but that was a question for the successor State.

31. So far as the kinds of archives were concerned, he said that historical archives, for example, manifestly were of interest primarily to the predecessor State. Hence it would not be desirable to make provision for the transfer of those archives, unless by virtue of internal law it was decided to assemble all the archives in the capital of the successor State. Similarly, a union of States might have less need of the administrative archives of the various component States than did those States themselves; in such a case, therefore, those archives did not necessarily pass. At the time of the unification of Spain in the fifteenth and sixteenth centuries, for example, each kingdom had received its autonomy, exemplified by the establishment of the office of Viceroy and separate councils. Accordingly, the archives had not been centralized in the capital of Spain; some had to be consulted in Seville, others in Cadiz, none of them in Madrid.

32. Nevertheless, even if under the public internal law the predecessor States retained the legal ownership of their archives, in public international law—which took cognizance only of the new State—the archives would pass to the successor State, even in cases where all the problems, including the disposition of the archives, were settled by the internal law of the successor State, as happened where the predecessor States forming the union were determined to fulfil all the conditions to make the union viable.

33. He explained that the terms of article D were modelled on those of article 12, concerning the succession of State property in the case of a uniting of States. During its first reading of article 12 the Commission had decided to omit the words “subject to paragraph 2” from the end of paragraph 1 and to add at the beginning of paragraph 2 the words “without prejudice to the provision of paragraph 1”.⁹ For the sake of consistency he had made an analogous change in his draft article D.

The meeting rose at 5.15 p.m.

⁹ See *Yearbook . . . 1979*, vol. I, p. 179, 1568th meeting, para. 16.

1604th MEETING

Wednesday, 4 June 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Bedjaoui, Mr. Boutros Ghali, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Organization of work (*continued*)*

1. The CHAIRMAN said that, at its meeting held on 3 June 1980, the Enlarged Bureau had decided that the topic of jurisdictional immunities of States and their property, for which Mr. Sucharitkul was the Special Rapporteur, would be discussed by the Commission on 3, 4, 7 and 8 July.

2. The Enlarged Bureau had further decided to set up a Planning Group of the Enlarged Bureau and to appoint Mr. Thiam as Chairman of the Group. Mr. Thiam had suggested that the Planning Group should be composed of the following members: Mr. Calle y Calle, Mr. Díaz González, Mr. Njenga, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov and Sir Francis Vallat. The meetings of the Planning Group would, of course, be open to all members of the Commission.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/322 and Add.1 and 2,¹ A/CN.4/333)

[Item 1 of the agenda]

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

ARTICLE D (Uniting of States)² (*concluded*)

3. Mr. TABIBI said that the question of succession to State archives, which was dealt with in the Special Rapporteur's twelfth report (A/CN.4/333) and related to the administrative, cultural and historical heritage of peoples and States, had received close attention at the General Assembly's twenty-eighth, thirtieth and thirty-fourth sessions in the course of discussions on the subject of the restitution of works of art to countries victims of expropriation; the Assembly had invited³ all Member States to ratify the Convention on the Means

* Resumed from the 1591st meeting.

¹ Reproduced in *Yearbook . . . 1979*, vol. II (Part One).

² For text, see 1603rd meeting, para. 28.

³ Resolutions 3187 (XXVIII), 3391 (XXX) and 34/64 of the General Assembly.

of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted by the UNESCO General Conference in 1970.⁴ The question had also been carefully considered by the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, which had ended its first session on 9 May 1980.

4. In view of the importance of the topic, he agreed with the Special Rapporteur that the draft articles relating to State archives might be included in the part of the draft articles on succession in respect of State property. He felt, however, that since their cultural and historical value was difficult to assess, State archives should be considered as a special kind of State property.

5. He agreed with the view expressed by the Special Rapporteur in paragraph 28 of his twelfth report, that the Commission should not take any decision for the time being to change the title of the topic because that question had no bearing on the decision whether the Commission should append the study on State archives to the original draft articles. He had no doubt about the need to include in the draft articles provisions on succession to State archives, but, if such provisions referred to an inventory of *objets d'art*, it would be necessary to supplement draft articles A and B.⁵

6. He also supported the views stated by the Special Rapporteur in paragraphs 48 and 49 of his twelfth report, that the question of the definition of State archives should be left untouched for the time being and that articles A and B should be enlarged to take account of types of succession other than decolonization.

7. He supported draft article B'⁶ because it was in keeping with the principle embodied in draft article 10, paragraph 2 (b) and gave preference to agreement between the successor State and the predecessor State.

8. With regard to draft article D, he said that he agreed with the reasoning set out by the Special Rapporteur in paragraphs 63 and 64 of the report, and could therefore support that draft article.

9. Mr. BARBOZA, referring to draft article D, said that he doubted the need not only for draft article D but also for draft article 12 (on succession to State property in the case of a uniting of States) on which article D was based.

10. State property passed at the time when the succession occurred. Thus, from the legal point of

view, there was a moment in time when the sovereignty of the successor State replaced that of the predecessor State in the territory to which the succession related. It was also at that time that the passing of State property or archives occurred, and it occurred by operation of international law.

11. In the case of a uniting of States, there was also a time when the transfer of sovereignty occurred. At that time, however, there was only one State, the successor State, and it was therefore the internal law of that State, not international law, which governed that transfer. Draft article D, paragraph 2, recognized that the only applicable law was the internal law of the successor State. The point might have some bearing on the question of claims on the property of the successor State made by third States, which could, of course, not contest the succession. This might be the only justification for the article.

12. For that reason, he could understand why the Special Rapporteur had said that draft article D might not be necessary if the draft articles on State archives were included in those on State property. He proposed that, if such were the case, draft article D should be dropped. As of now, he agreed that it should be referred to the Drafting Committee.

13. Mr. SCHWEBEL said he agreed with the views expressed by other members of the Commission concerning draft article D, which was entirely acceptable and should be referred to the Drafting Committee.

14. Mr. USHAKOV said he could accept the Special Rapporteur's draft article D.

15. With regard to paragraph 2 he pointed out, however, that it had never been the Commission's intention to limit the successor State's power to deal as it saw fit with the State archives or, for that matter, with all the State property passing to it, for that State was sovereign and free to determine for what purpose that property was to be used. The point would have to be reconsidered during the second reading of the draft.

16. Mr. VEROSTA said that article D was strictly necessary, and that he likewise could accept the Special Rapporteur's draft of the article. He suggested that the article should be referred to the Drafting Committee.

17. Mr. DÍAZ GONZÁLEZ said that the debates in the General Assembly and in UNESCO on matters relating to cultural property were directly relevant to the study of the question of State archives, both in cases of the dissolution or uniting of States and in cases of decolonization. In that connexion, he noted that, as pointed out by the Special Rapporteur in his eleventh report (A/CN.4/322 and Add.1 and 2), treaties concluded in the nineteenth and early twentieth centuries, particularly in Europe, had nearly always referred to the passing of State archives, whereas in cases of decolonization no provision had ever been made for the passing of those archives, which were of

⁴ UNESCO, *Records of the General Conference, Sixteenth Session, Resolutions* (Paris 1971), p. 135.

⁵ See 1602nd meeting, foot-note 2.

⁶ For text, see 1602nd meeting, para. 1.

the greatest importance at a time when the process of decolonization was practically completed and newly independent States required assistance in maintaining their cultural and historical memory and taking possession of what the Special Rapporteur had called in paragraph 73 of his twelfth report "one of the keys to power".

18. He thus supported the draft article D proposed by the Special Rapporteur, because it met the requirement of protecting developing countries that wished to belong, not to the "third world", but to the world *tout court*, and were now entitled to the rights so long denied to them by their colonizers.

19. Mr. SUCHARITKUL said that he fully approved of the Special Rapporteur's draft article D.

20. He added that the case of the Socialist Republic of Viet Nam offered a concrete and recent example of a uniting of States, even though it might be debatable whether Viet Nam had been a divided State before. In the light of that example the provision proposed by the Special Rapporteur, particularly paragraph 2, seemed perfectly justified.

21. Mr. BEDJAOUI (Special Rapporteur) noted that the Commission seemed to be agreed that draft article D should be referred to the Drafting Committee.

22. He said that Mr. Barboza had subtly analysed the situation to be covered by the provision, for he had spoken of the specific moment at which the succession occurred and at which there was only the successor State, inasmuch as the predecessor States had ceased to exist in the eyes of international law. It was precisely for that reason that under paragraph 1 of the draft article the responsibility for the archives was attributed to the successor State to which they passed; that did not mean that the archives belonged to that State or ought to be transferred to the new capital—it meant only that as from that moment the successor State alone was responsible for those articles vis-à-vis the international community. Paragraph 2 then went on to provide that the ownership of the archives would be governed by internal law.

23. Any other larger problems that the draft article might raise might be considered by the Commission in the course of the second reading, a possibility mentioned by Mr. Ushakov in his comments on paragraph 2. In the circumstances contemplated by that provision, there was no doubt that the internal law of the successor State was applicable, and there was no suggestion of limiting that State's freedom.

24. He suggested, lastly, that draft article D should be referred to the Drafting Committee.

25. The CHAIRMAN said that, in the absence of objections, he would take it that the Commission decided to refer draft article D to the Drafting Committee.

*It was so decided.*⁷

ARTICLE E (Separation of part or parts of the territory of a State) *and*

ARTICLE F (Dissolution of a State)

26. The CHAIRMAN invited the Special Rapporteur to introduce draft articles E and F (A/CN.4/322 and Add.1 and 2, paras. 204 and 206), which read:

Article E. Separation of part or parts of the territory of a State

1. Where a part or parts of the territory of a State separate from that State and form a State, the transfer of the State archives of the predecessor State to the successor State shall be settled by agreement between the predecessor State and the successor State.

2. In the absence of an agreement:

(a) the State archives of the predecessor State connected with the activity of the predecessor State in respect to the territory to which the succession of States relates pass to the successor State;

(b) the State archives of the predecessor State, other than those referred to in paragraph 2 (a) above, pass to the successor State in an equitable proportion.

3. Each of the two States shall, for the use of the other State and at its request, make an appropriate reproduction of the State archives which it has retained, or which have passed to it, as the case may be.

4. The provisions of paragraphs 2 and 3 above are without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

5. The provisions of paragraphs 1 to 4 above apply where a part of the territory of a State separates from that State and unites with another State.

Article F. Dissolution of a State

1. If a predecessor State dissolves and disappears and the parts of its territory form two or more States, the transfer of the State archives to the different successor States shall be settled by agreement between them.

2. In the absence of an agreement:

(a) the State archives of all kinds of the predecessor State, wheresoever they may be, pass to the successor State if they relate exclusively or principally to the territory of that successor State, which shall be responsible for making an appropriate reproduction thereof for the use of the other successor States, and at their request and expense;

(b) State archives which are indivisible or which relate equally to the territories of two or more successor States pass to the successor State in whose territory they are situated, the other successor States concerned being equitably compensated, and the successor State to which they pass shall be responsible for making an appropriate reproduction thereof for the use of the other successor States concerned and at their request;

(c) State archives of the type referred to in paragraph (b) above which are kept outside the territory of the dissolved predecessor State pass to one of the successor States concerned according to the conditions laid down in paragraph (b).

27. Mr. BEDJAOUI (Special Rapporteur) said that the terms of paragraph 3 of article E should be amended to read:

⁷For consideration of the text proposed by the Drafting Committee, see 1627th meeting, paras. 26 *et seq.*

Each of the two States shall, for the use of the other State and at the request and expense of that other State, make an appropriate reproduction of the State archives which it has retained or which have passed to it, as the case may be.

28. When the Commission had considered the question of State property and State debts it had chosen to prepare two separate articles, one for the case of the separation of part of a State's territory and the other covering the case of the dissolution of a State, but to provide only a single commentary covering both provisions. The explanation was that both separation and dissolution involved the removal of a part of a State, with the consequential formation of a new State. The only difference between the two situations was that in the case of a separation of States the predecessor State survived, whereas in the case of dissolution it disappeared.

29. Both situations could be illustrated by numerous examples taken from history of the kind he had mentioned in his eleventh report.

30. For example, in 1905, at the time of the termination of the union of Sweden and Norway under which two separate States had been linked solely by the person of a single sovereign ruling in both, the archives specific to each State that had not been merged had been easily divided. The only cases remaining to be settled were that of the central archives and that of the common archives held abroad by diplomatic missions. The case of the central archives was settled almost half a century later, by a protocol dated 25 April 1952 whereby Norway had obtained from Sweden the transfer of certain archives of special interest to Norway. The common archives held abroad formed the subject of an agreement concluded, with less delay, in the form of a convention dated 27 April 1906 whereby documents "relating exclusively to Norwegian affairs" had been handed over to the Norwegian diplomatic agent accredited to the country concerned; similarly, collections of Norwegian laws and other Norwegian publications had been dealt with in like manner in pursuance of the principle of functional connexion (A/CN.4/322 and Add.1 and 2, para. 191).

31. The termination of the union between Denmark and Iceland in 1944 illustrated the combined application of the principles of functional connexion and territorial origin. The case was especially interesting in that archives that had not formed part of the State archives, but belonged to a private person, had been transferred to the successor State—a situation comparable to that referred to by Mr. Calle y Calle in his remarks on the subject of expropriation at the previous meeting. Even before the termination of the union, a general arbitration convention, concluded on 15 October 1927, had settled the reciprocal delivery of archives on the basis of the two principles of origin and connexion. Iceland had, however, also claimed some historic archives of great cultural value belonging to a private person who had constituted them outside

Iceland, at Copenhagen, and who had even bequeathed the ownership thereof to a Danish university institution. Those documents were not State archives, but a collection of parchments and manuscripts. When the Danish Government had decided to restore them to Iceland, the legatee foundation had contested the decision in the Court of Copenhagen; in 1966, the Court ruled in favour of their restoration to Iceland. In 1971, the Supreme Court of Denmark had given a ruling to the same effect, and on that legal basis the two Governments had agreed on the restitution of the originals to Iceland, which added them to the collection of the Institute of Icelandic Manuscripts at Reykjavik and which entered into certain commitments as regards loans, reproductions and facilities for the consultation of the documents (*ibid.*, paras. 192–193).

32. Those examples showed that, in the case of a dissolution each of the successor States received the archives relating to its territory; the central archives were apportioned if they were apportionable or, if not, were entrusted to the successor State with which they had the closest connexion, subject to the right of the other State or States to obtain copies thereof.

33. The dissolution or disintegration of the Austro-Hungarian Empire had likewise given rise to a series of extremely complex disputes regarding archives which were still continuing 60 years later. The basis for the apportionment of the archives of the Austro-Hungarian Empire were the provisions set out in great detail in the Treaty of St. Germain-en-Laye of 10 September 1919 and in the Treaty of Sèvres of 10 August 1920. However, owing to the diversity of the situations it was impossible to determine clearly what was the exact legal nature of the disappearance of that Empire, for it was not always easy to identify the various kinds of State succession to which its dissolution had given rise. In his eleventh report he had described the long series of treaties, agreements and conventions concluded among the large number of States concerned for the purpose of settling the transfer of the multifarious archives involved—political, administrative, military, historic, cultural—in keeping with the principles of connexion and origin (*ibid.*, paras. 195 *et seq.*).

34. The break-up of the Ottoman Empire after the First World War was another example that made it reasonable to treat the two articles together and to draft a single commentary, for it had been argued on the one hand that what had happened was the separation of various parts of a State, whereas during the negotiation of the treaty signed at Lausanne in 1923 the Turkish Government had argued to the contrary that the case was one of dissolution, since Turkey too was one of the successor States to the Ottoman Empire (*ibid.*, para. 201).

35. The last example that might be cited was that of the dissolution of the German Third Reich, which had led to the establishment of the two Germanies; that

example likewise was mentioned in his eleventh report (*ibid.*, para. 202).

36. The large number of historic precedents he had mentioned indicated clearly what line the Commission should follow in settling the question of the succession to State archives in the case of the separation of part or parts of a State's territory and in the case of the dissolution of a State. Draft articles E and F were modelled on articles 13 and 14,⁸ which were applicable in analogous circumstances to State property.

37. Mr. YANKOV said that archives, although a species of movable property, presented special features, one of the most important of which was their integrity and indivisibility; and whereas, in the case of most movable property, compensation provided an equitable solution in the event of a dispute, that did not apply in the case of State archives which, by virtue of their very nature and purpose, could not generally be split up. Moreover, even if a selection were made of those archives which related to a part of the territory of a State or to a newly emergent State, the value of the archives as a whole could be destroyed. As he understood subparagraph 2 (a) of draft article E, it imported a presumption that State archives could in fact be divided or that a selection among them could be made. He noted that subparagraph 2 (b) borrowed from draft article 13 the expression "in an equitable proportion", which posed the question of who would decide, in the case of archives that were not divisible, what constituted an equitable proportion.

38. He therefore considered that the whole question of indivisibility merited special attention within the context of the Commission's consideration of the separation of part or parts of the territory of a State or of the dissolution of a State. Specifically, he would recommend that the Commission should endeavour to adopt a more pragmatic and flexible approach in paragraph 2 of draft article E, with a view to providing Governments with a viable solution in the event of a dispute. Possibly, a reference could be made to the question of indivisibility, in which connexion subparagraphs 2 (a) and (b) of article F might provide a guideline. Alternatively, more emphasis should be given to the idea of appropriate reproduction of State archives as embodied in paragraph 3 of draft article E.

39. His comments were not to be construed as a criticism of the wording of draft article E, since he appreciated the difficulties attaching to the very complex issue of archives, but he did feel that there was a problem the Commission was required to solve.

40. On a point of drafting, he would suggest that, for the sake of uniformity, the wording of the opening clause of paragraph 1 of draft article 13 should serve as a model for paragraph 1 of draft articles E and F.

41. Mr. EVENSEN said that in his view Mr. Yankov had laid undue stress on the indivisibility of archives.

As was demonstrated by State practice, archives not only could be divided, but should be divided in certain cases, and the Special Rapporteur had cited a number of relevant criteria in support of such division. It was only right and just that the original archives should be transferred to the territory to which they belonged, although modern reproduction methods could, of course, be used as an aid in that connexion. For the purpose of assuring an equitable distribution of archives, as envisaged in subparagraph 2 (b) of draft article E, there were a number of relevant factors that could be taken into account, for instance, the manner in which and the place where the archives had been acquired, the ownership of the archives before they had entered the predecessor State's archives, the artistic, folkloric and historical value of the archives, and the type of separation of the territory of a State involved. For example, the developments of the preceding twenty years, during which colonial empires had been split up into national States, called for a more modern approach to the division of archives.

42. In general, he agreed with draft articles E and F. He noted, however, that in certain respects draft article E was similar to draft article B'⁹; possibly, therefore, the language of the two articles could be aligned. He would prefer the wording of paragraph 1 of draft article E to that of the opening clause of draft article B'. On the other hand, he preferred the phrase "that concern exclusively or principally the territory" (subparagraph 2 (a) (ii) of draft article B' to the phrase "connected with the activity ... in respect of the territory" (subparagraph 2 (a) of draft article E). In that connexion, he noted that a phrase similar to the one used in draft article B' appeared in paragraph 2 (a) of draft article F. Lastly, it might be useful to compare draft articles B'¹⁰ and F, since the wording of the latter seemed preferable in certain respects.

43. Mr. TSURUOKA said that he had not commented on the draft articles considered by the Commission at the preceding meetings because, as to substance, he was in agreement with their provisions. At most, he would offer in the Drafting Committee some minor comments on the concordance of some provisions and on some terminological questions. Though minor, the comments would nevertheless be of great importance to the Drafting Committee, particularly with regard to a topic where treaty provisions, if not buttressed by the goodwill and understanding of the parties, would not be sufficient *per se* to settle problems that might arise.

44. To illustrate the drafting questions he had in mind, he stressed that a better concordance should exist between articles 13, 14, E and F. Whereas articles 13, 14 and E each contained a special provision concerning the question of equitable compensation, no such provision appeared in article F. The passing reference in subparagraph 2 (b) of article F to

⁸ See 1602nd meeting, foot-note 2.

⁹ For text, see 1602nd meeting, para. 1.

¹⁰ See 1602nd meeting, foot-note 2.

equitable compensation was not sufficient to establish a concordance with the provision in each of the other three articles, and it was a potential source of error.

45. Nor was he entirely satisfied with the expression "equitable proportion". The expression conveyed an idea of which he approved, but he thought that the language used might give rise to difficulties of interpretation. Not having any specific suggestions to make, he considered that it was the task of the Drafting Committee to devise better language.

46. Mr. QUENTIN-BAXTER said that, unlike many of the members of the Commission who came from countries with a long tradition of direct interest in the matter of archives, he came from a country which had never had any particular problem on that score. Consequently, he approached the matter with the detached attitude of a lawyer seeking to do what was right and proper in the circumstances.

47. One problem to which reference had been made concerned the transfer of folkloric and like materials to Europe and elsewhere; but that problem, and the concern to which it gave rise, had nothing to do with archives as defined in the draft unless, of course, the predecessor State took a very exotic view of what constituted its State archives.

48. He had been persuaded by the Commission's series of discussions that the value of a collection of archives should not be wantonly destroyed by dealing them out like a pack of cards. That consideration must, however, be balanced by the recognition that what properly belonged to the new entity should not be withheld from it.

49. Equitable compensation rules clearly occupied an important place in the case of immovable property and of movable property connected with the activities of the new State that had been entirely paid for by somebody else. In the case of archives, however, compensation was a very secondary matter, unless it was understood in a different sense from the monetary sense in which it was used in the articles relating to property.

50. The Special Rapporteur had been completely loyal to the formulations which the Commission had approved in other articles, and possibly the members felt that there should be a limit to that loyalty in view of the special quality of archives. His own view was that the extreme differences in drafting between articles E and F could not be defended, even though those differences had been dictated by the terms in which the articles on State property had been drawn up. Draft article F perhaps provided the better starting point, since in subparagraph 2 (b) a certain emphasis was given to the question of indivisibility. Also, since the Drafting Committee had spent much time and effort on article B (Newly independent State), the Commission should not hesitate to draw on that article for inspiration when dealing with some of the more difficult points in draft articles E and F.

51. He was grateful to the Special Rapporteur for his response at the previous meeting to the comments that he had made on draft article B' (1602nd meeting) and agreed entirely that cases involving the movement of populations should be taken into account. Yet the reader should not be led to believe that the article on the transfer of part of the territory of a State was the dominant article; without the benefit of the commentary, it would take keen perception to deduce that a subparagraph in draft article E was in fact more important. For that reason, he would suggest that at the second reading the classification adopted at the outset of the Commission's work should be slightly adjusted.

52. Mr. SUCHARITKUL said that a clear distinction should be drawn between the case of the separation of one or more parts of a State's territory—a situation dealt with in article E—and the case of the transfer of part of a State's territory to another State—the situation dealt with in article B'. In connexion with article B' it had been said that there must have been at least two pre-existing States, and special reference had been made both to the right of self-determination and to the initiative of the territory that was separating.

53. In the case of Bangladesh, in the absence of agreement between the predecessor State and the successor State concerning the archives held in the territory of East Pakistan, the relevant provision would be paragraph 2 of article E; in other words, the archives would pass to the successor State, or rather would stay in that State. In the case of Singapore, what had been paramount was the right of self-determination, a subjective element that was at the basis of every case of separation of a part of a State's territory. In that case, the initiative had come not from Singapore but from the Parliament of Malaysia, and the State of Singapore had come into existence by virtue of parliamentary action by the predecessor State. It was arguable that the apportionment of the State archives had formed the subject of an agreement, inasmuch as consultations had preceded the separation.

54. As a further illustration of the case contemplated in paragraph 5 of article E, that of separation of part of a State's territory and union with another State, he cited the case of Timor and West Irian, which had separated and united with the Republic of Indonesia.

55. Cases of the dissolution of a State, the subject of article F, could occur after a uniting of States. For example, the case of the Socialist Republic of Viet Nam, which had come into existence through the union of two pre-existing States, also illustrated the situation of dissolution. Similarly, the Federation of Malaya had been dissolved on being succeeded by Malaysia.

The meeting rose at 1 p.m.

1605th MEETING

Thursday, 5 June 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Bedjaoui, Mr. Boutros Ghali, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/322 and Add.1 and 2,¹ A/CN.4/333)

[Item 1 of the agenda]

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

ARTICLE E (Separation of part or parts of the territory of a State) *and*

ARTICLE F (Dissolution of a State)² (*concluded*)

1. Mr. BARBOZA said that he endorsed the general approach adopted in draft articles E and F and agreed that those articles should be referred to the Drafting Committee.

2. Like Mr. Evensen (1604th meeting), he noted, however, that the wording of subparagraph 2 (a) of draft article E differed somewhat from that of subparagraph 2 (a) (ii) of draft article B'³ since, whereas the former referred to State archives "connected with the activity of the predecessor State in respect of the territory", the latter referred to State archives "that concern exclusively or principally the territory". It was more than a matter of drafting. There could be cases of sizeable private collections of documents that were expropriated by a State prior to a succession or were donated to the predecessor State: those collections would not be connected in any way with the activity of the State in respect of the territory, but would exclusively or principally concern the territory. The Special Rapporteur had given a very clear example of such a case when he had referred at the previous meeting, to the case of manuscripts and parchments relating to Iceland which had been collected in Denmark by an Icelander and had been returned in 1971 to the Government of Iceland, which had been claiming them ever since the termination of the Union of Denmark and Iceland. To make provision

for such cases, he preferred the language used in draft article B'.

3. The remarks which he had made at the 1603rd meeting on "eminent domain", during the discussion on draft article B', were likewise relevant in the present context. He had been thinking then of the magnificent private collection of gold objects, dating from the time of the Inca and pre-Inca civilizations, which belonged to a private citizen of Peru and were housed in the Museo del Oro in Lima. Under which rules of international law would the successor State be able to claim such objects in the event of the dissolution of the predecessor State? On reflection, it seemed to him that the answer lay in the draft articles themselves, and specifically in the definition of State property in draft article 5,⁴ under which a predecessor State would have a right or interest in archives that were not necessarily State archives. That right was reflected in the internal law of many States which, for instance, limited the freedom to export or to dispose of private collections of archives, and he considered that the right would also pass from the predecessor State to the successor State. He would therefore suggest that, if archives were considered to fall within the terms of the articles relating to State property, a reference to such a right in the commentary on articles E and F would suffice; if they were not considered to fall within those terms, however, an article along the lines of article 5 should be incorporated in the articles concerning archives.

4. Lastly, he noted that the Spanish text of draft article B' used the words "*se refieren*" whereas, in the same context, paragraph 2 (a) (ii) of draft article F used the word "*concernen*". If the intent were the same, those two provisions should perhaps be aligned.

5. Sir Francis VALLAT, expressing his agreement with the general thrust of draft articles E and F, said that he was pleased to note the place accorded to two principles, namely, the principle of agreement, which was fundamental to the draft, and a new principle relating to the provision of copies, which would be a valuable aid in solving the problem of State archives in cases of State succession.

6. There was, however, another principle, which some had termed the indivisibility of archives but which he preferred to call the unity of archives. Draft articles E and F seemed to take full account of the need to preserve the unity of archives in the event of the separation of part or parts of the territory of a State or of the dissolution of a State. No doubt the Special Rapporteur would also underline the importance of that principle in the commentary. He (Sir Francis) did not, however, think that the concept of division in an equitable proportion, as embodied in paragraph 2 (b) of draft article E, could be applied to archives. A point both of drafting and of substance was involved, and he trusted that it would be considered further by the Drafting Committee.

¹ Reproduced in *Yearbook* . . . 1979, vol. II (Part One).

² For texts, see 1604th meeting, para. 26.

³ For text, see 1602nd meeting, para. 1.

⁴ See 1602nd meeting, foot-note 2.

7. For the sake of uniformity, the wording of draft articles E and F should be aligned. He did not, however, believe that it necessarily had to be aligned with the articles dealing with other kinds of property since, given the special nature of archives, there might be good reason for some difference in wording and possibly also in presentation.

8. Mr. JAGOTA said that the subject of State archives was of special interest to his country, where a wide body of State practice had been developed in the matter, both under earlier treaties which provided for the transfer from France to India (1951, 1954, 1956) of certain territories and also under the more recent Treaty of Lisbon (31 December 1974), which provided, *inter alia*, for the transfer from Portugal to India of Goa.

9. The Special Rapporteur had asked whether State archives could be assimilated to movable property since, if they could be, there would presumably be no need for separate provisions; if they could not, however, it would not only be necessary to have separate provisions but those provisions should differ somewhat from the other provisions on movable property.

10. His own view was that State archives indeed differed from movable property by virtue of their special link with a territory and with the cultural and historical unity of its people. Archives, which had been aptly termed cultural property, had a certain sentimental value and, unlike other movable property, could not therefore be compensated for by money alone. That being so, it seemed to him that, in cases of succession which resulted in the constitution of a State, the principle was that documents relating to the cultural history of a territory would run with the land. At the same time, however, as a result of developments in modern reproduction techniques, the question of the indivisibility (or unity) of archives arose. The problem which faced a number of countries, including his own, therefore, was how to reconcile the need to preserve the organic unity of archives, in the interests of scientific and historical research, with the special sentimental value of certain archives which ran with the land.

11. It was with a view to resolving that problem that Article 5 of the Treaty of Lisbon had been modified in March 1975, in an exchange of notes between Portugal and India.⁵ In the course of that exchange, it had been recognized that the origin, or provenance, of the archives was the decisive element. Thus, the obligation to return archives had been confined to those archives which had been removed from the territory concerned to the metropolitan capital, no division of such archives being permitted. In all other cases, both parties were allowed to retain the archives which had

originated in their respective territories, even if those archives related to the other territory. It had also been agreed that each party would have a right of access to the archives retained by the other party. No provision had been made for the payment of compensation to either party. He did not know whether that solution would work elsewhere, but in that particular case no problem had arisen as yet.

12. Turning to draft articles E and F, he said that he agreed with their broad approach and, in particular, with the basic principle that any problems of succession to archives should be settled by agreement between the parties. As those articles were drafted, however, the rules prescribed were residual; in other words, they would only apply in the absence of such agreement, whereas in his view they should have the status of normative rules since they would be embodied, even if only in a modified form, in any agreement between the parties.

13. One question to be considered concerned the relationship between, on the one hand, draft article E and, on the other, draft articles F, B⁶ and, to some extent, B'. The relationship between draft articles E and F was clear: if the predecessor State had disappeared, article F applied; if not, article E applied. So far as the relationship between draft articles E and B was concerned, the point to be decided by the Commission—if possible before the second reading of the draft articles—was whether there were any similarities in the way in which a newly independent State was formed in either of the two situations covered by those articles, and, if so, whether some cross-reference was needed. It had been said during the discussion on draft article B' and in connexion with article E, that the separation of a part or parts of a territory—as distinct from its transfer—might involve an element of self-determination, for example, through the consultation of the people by plebiscite or referendum. Once draft article E was understood to import such an element of self-determination, it necessarily had similarities with article B. That was why the Commission, in the draft articles on succession of States in respect of treaties, had included a provision linking certain cases of separation of parts of a State with the formation of a newly independent State, although that provision had in the end not been retained.⁷

14. His proposition was, therefore, that in the event of the separation of part or parts of the territory of a State and the constitution of such part or parts as a separate State, the latter was entitled to the archives which ran with its territory. If the Commission accepted that proposition, the wording of paragraph 2

⁶ See 1602nd meeting, foot-note 2.

⁷ See *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III, *Documents of the Conference* (United Nations publication, Sales No. E.79.V.10), pp. 160 and 161, document A/CONF.80/30, para. 87, art. 33, para. 3, and paras. 93 and 96.

⁵ See A/CN.4/322 and Add.1 and 2, chap. I, sect. D, treaty No. 175.

(a) of article E would have to be broadened, preferably along the lines of paragraph 2 (a) of draft article F or, alternatively, of the relevant part of article B. The reference, in paragraph 2 (a) of article E, to State archives connected with the "activity" of the predecessor State was unduly restrictive, since it would confine the terms of that paragraph to State archives connected with administrative matters only and hence would not cover the cultural and historical documents that might set forth the very reasons for which the separation had taken place, nor would it provide for a right to have such documents returned.

15. The use of the term "equitable proportion" in paragraph 2 (b) of draft article E raised the question whether archives could be equated with movable property and whether that term was in fact broad enough to cover documents which ran with the land. His own view was that the word "proportion" was likely to be construed in a very restrictive manner, and that some other word should be found.

16. Lastly, with regard to paragraph 3 of draft article E, he said that the Commission should consider two related questions: first, whether to include a provision indicating which party should bear the costs of reproduction or (as under the treaty of Lisbon) to leave the matter to the agreement of the parties; and, secondly, whether to include a provision concerning the payment of compensation. In that connexion, the Commission might wish to bear in mind the points raised by the Special Rapporteur in his eleventh report (A/CN.4/322 and Add.1 and 2, paras. 82-83). Since the relationship between reproduction and compensation was more clearly brought out in paragraph 2 (b) of draft article F, a similar provision might perhaps be included in draft article E.

17. Mr. RIPHAGEN said that at the previous session the Drafting Committee had prepared draft articles A and B on the assumption that those two articles might be the only ones dealing with State archives. Paragraphs 4 and 5 had thus been included in draft article B to make it clear, in cases relating to the right to self-determination, that, although State archives were, legally speaking, movable property, they could also be considered as immovable or cultural property.

18. Now that new articles on State archives had been proposed, the Drafting Committee should ensure that the cross-references they contained were as accurate as possible. For example, article B, paragraph 5, seemed to be relevant to the case covered by article B' or to that covered by article E, paragraph 5. Similarly, article B, paragraph 4, was closely linked to articles D,⁸ E, paragraph 5, and F.

19. Mr. SCHWEBEL said that, in his opinion, draft articles E and F could be referred to the Drafting Committee.

20. Mr. USHAKOV said that he would submit to the Drafting Committee a number of proposals for bringing the terms of draft articles E and F into line with those of article B.

21. Mr. VEROSTA said that the meaning of the expression "equitable compensation", which appears in article E, paragraph 4, should be spelt out in the commentary.

22. He added that the three subparagraphs of paragraph 2 of article F, which were to be applicable "in the absence of an agreement", were so complex that the eventual settlement would still have to take the form of an agreement. That being so, were those subparagraphs to be regarded as residual rules?

23. Mr. BEDJAOUI (Special Rapporteur), reviewing the comments made in the course of the debate on articles E and F, said that his first remark would be that he endorsed Mr. Jagota's observations on the special nature of archives in the sense that archives were connected with their home ground and that they were of inestimable value for a nation's cultural heritage. The point had been stressed more than once in his eleventh report on the subject; besides, historic and cultural archives were not the only ones to which a people might attach special value and which deserved special treatment. Other movable property of potentially great historic importance for a nation might include, for example, such objects as the obelisk removed from Ethiopia and set up in Rome at the time of the Fascist regime; under the Treaty of Peace of 1947,⁹ the obelisk had had to be restored to Ethiopia and the transport costs had been chargeable to the Italian Government.

24. In general, the members of the Commission had stressed that articles E and F should be brought into line with the other draft articles in order to avoid any contradiction, though opinions had varied as to the method to be employed for the purpose. Some members had suggested that there should be a greater parallel between articles E and F, or between article E and article 13 on the one hand and between article F and article 14 on the other. Others had suggested that article E should be brought more closely into line with article B; and Mr. Barboza had by implication requested that article E should take into account the terms of article B', on the ground that the criterion of the exclusive or principal connexion of the State archives with the transferred territory and the criterion of the connexion of the archives with the predecessor State's activity in the territory that was separating should be unified. Each of those suggestions deserved to be taken into account; yet it would be wrong to copy indiscriminately the terms of one article from another, for that might risk overlooking the peculiar features of each type of succession, with the eventual

⁸ For text, see 1603rd meeting, para. 28.

⁹ See United Nations, *Treaty Series*, vol. 49, p. 142, Treaty of Peace with Italy, art. 37.

result that the articles might all resemble each other or that there might be just one single article.

25. In Mr. Jagota's opinion, article E should be aligned with article 13, and he had inquired whether article E referred to a category distinct from those covered by articles F, B' and B. He had said that article E (Separation of part or parts of a State's territory) had a connexion with article B (Newly independent State), and had pointed out that the Commission had earlier discerned resemblances between the case of a newly independent State and that of a State that came into being in consequence of a separation. In reply, he (Mr. Bedjaoui) would point out that those resemblances had not been taken into account by the United Nations Conference on Succession of States in Respect of Treaties.

26. In his opinion, articles E and F ought definitely to be interrelated, although the relationship would be subject to certain limitations. In that connexion, Mr. Jagota had pointed out that in the case contemplated by article F the predecessor State disappeared, with the consequence that the totality of its archives would have to be disposed of; the archives would thereupon pass to the successor States, for otherwise they would become *bona vacantia*. In the case contemplated by article E, on the other hand, the predecessor State remained in existence. Consequently it was impossible to establish a complete parallel between article E and article F.

27. He thought that the Drafting Committee would likewise have to take into account the suggestion that article E, concerning the separation of a part or parts of a State's territory, should correspond more closely with article B', concerning the transfer of part of the territory of one State to another State.

28. The debate had been dominated by an essential but very delicate problem: the indivisibility of archival collections. Indivisibility was certainly one of the special features of archives. Admittedly, modern processes of reproduction had made the problem less acute, but it was still a fact that, so far as cultural and historic documents were concerned, no copy, even if indistinguishable from the original, could replace the original. Still, the principle of the indivisibility of archives should not imply that archives could not be attributed to a State. For example, in the case dealt with by article F the archives could surely not be left ownerless. The problem of indivisibility might likewise crop up in the case covered by article E. In that connexion, Mr. Yankov had inquired at the previous meeting whether, under article E, paragraph 2, it was possible that indivisible archives could pass to the successor State. In reply, he (Mr. Bedjaoui) pointed out that the rule stated in that paragraph was qualified in two ways. First, the archives in question were those connected with the activity of the predecessor State in respect of the territory; in such a case, the archives in question would probably consist of documents relating to a specific and identifiable activity of the predecessor

State in the territory that was separating. Secondly, subparagraph 2 (b) imported the notion of equity by virtue of which it should be possible to work out, as regards the remainder of the indivisible archives, solutions that would not jeopardize the unity of the archival collections. Sir Francis Vallat had expressed the view that it would be undesirable to refer to the concept of equity.

29. Several members of the Commission had commented at some length on the expression "equitable proportion" in subparagraph 2 (b) of article E. Mr. Tsuruoka in particular had pointed out (at the 1604th meeting) that the term might not be easy to apply. Actually, the same expression had been used in other articles, including those relating to State property, and as the Commission was in favour of a standardization of the articles he (Mr. Bedjaoui) could hardly be criticized for having used the term in article E. Besides, the expression was probably the best one, in the light of the various criteria governing the application of the concept of equity. Mr. Evensen had mentioned (*ibid.*) as some of the criteria, the historic value, the nature, origin and present ownership of the archives.

30. In the opinion of Mr. Jagota, it would be wrong to speak of an equitable "proportion" in connexion with archives closely linked to their home ground and incapable of being apportioned in any manner whatsoever. So far as that point was concerned, he (Mr. Bedjaoui) agreed that better wording should be devised.

31. Both Mr. Tsuruoka and Mr. Jagota had suggested that article F should refer to equitable compensation in the same terms as those used in articles 13, 14 and E. There was indeed a reference to compensation in article F.

32. In that connexion, he would add that the compensation envisaged would not necessarily be of a monetary kind. If the archives were historic, for example, the compensation might take the form of a transfer of other historic archives or of other movable property. As Mr. Jagota had emphasized and as was also indicated in paragraphs 82 and 83 of the eleventh report on the subject, there was a right to claim reparation in the form of the delivery of documents of equivalent importance.

33. With regard to the question of which State would be liable for the expenses of reproducing certain archives, he explained that, in the case covered by subparagraph 2 (b) of article F, it would be the successor State to which the archives passed that would be answerable for those expenses, for the archives were indivisible ones relating equally to the territories of the various successor States, and it was purely by reason of the fortuitous accident of their physical location that they passed to one of them. Hence it was normal that the expenses of reproduction should be chargeable to that State, which would, but for that fortuitous circumstance, have no right to those

archives. In the course of some more general remarks on the question of the expenses of reproduction, he said that if a State—whether predecessor or successor State—was entitled to archives but it was impossible to transfer them to that State, for example, owing to the operation of the principle of the indivisibility of the archives, it was normal that the State to which the archives passed should be responsible for the expense of reproduction. By contrast, if a State was not entitled to archives but asked for a reproduction of the archives from the State to which they passed, then, logically the expenses of reproduction should be chargeable to the requesting State. He suggested that the Drafting Committee might consider how the principle could be formulated.

34. Mr. Barboza had very pertinently compared the criteria of the connexion of archives that were referred to in article E and in article B' respectively, and had made an incidental reference to situations in which private property might be expropriated. He (Mr. Bedjaoui) pointed out, however, that the criterion of the connexion with the predecessor State's activity in the territory, referred to in article E, subparagraph 2 (a), should be seen in the light of the notion of equity, which, under subparagraph 2 (b), governed State archives other than those referred to in subparagraph 2 (a). In his comments concerning archives belonging to the territory Mr. Barboza had referred to article 5, which defined the meaning of the expression "State property" in terms covering not only property but also rights and interests. Allowance might perhaps be made for the concern of a State to ensure that certain archives should not leave the territory affected by the succession.

35. He thought that the Drafting Committee might try to bring article E into line with article 13, as had been suggested by Mr. Yankov at the 1604th meeting, but the Committee would have to make sure that in article E the importance and necessity of an agreement were not minimized. As several members of the Commission had said, in the final analysis agreement was always necessary in cases where part of a State's territory separated from that State and formed another State.

36. The rules in articles E and F that would be applicable "in the absence of an agreement" were not of course residual rules. Those rules offered guidelines, without prejudice to the sovereignty of States, in all cases where an agreement was concluded.

37. Unlike Mr. Jagota, who took the view that article E related exclusively to administrative archives, he considered that the article might apply to any archives, including historic ones, for the archives connected with the State's activity might be the archives of an ancient State and hence of historic value. Similarly, the archives referred to in subparagraph 2 (b) of article E might be historic archives.

38. It had been pointed out by Mr. Riphagen that at its previous session the Commission had agreed that

only two articles would be drafted concerning State archives, and that those articles would form a self-contained whole. Since the Commission had been invited to supplement articles A and B, it might perhaps need to review the terms of those articles, and in particular those of paragraph 5 of article B. In his (Mr. Bedjaoui's) opinion, the point was one to be considered by the Drafting Committee, not by him as Special Rapporteur.

39. A point which would probably be taken up by the Commission in the course of the second reading was that mentioned by Mr. Quentin-Baxter at the 1604th meeting: in preparing the draft articles the Commission had followed the typology employed in the case of the succession of States in respect of treaties, but was now in some respects a prisoner of that typology. For example, article B', which dealt only with territorial adjustments, possibly of a minor character, seemed to prevail over article E, which dealt with true cases of secession. The order of those articles might be changed accordingly.

40. In conclusion he wished to thank Mr. Jagota for the information he had provided at the present meeting about India's experience, and Mr. Sucharitkul for the interesting examples he had cited at the 1604th meeting concerning events in the Asian region.

41. The CHAIRMAN suggested that draft articles E and F should be referred to the Drafting Committee.

*It was so decided.*¹⁰

The meeting rose at 11.55 a.m.

¹⁰ For consideration of the texts proposed by the Drafting Committee, see 1627th meeting, paras. 26 *et seq.*

1606th MEETING

Friday, 6 June 1980, at 11.20 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Co-operation with other bodies

[Item 10 of the agenda]

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

1. The CHAIRMAN said that it was his privilege, on

behalf of all the members of the Commission, to extend a very warm welcome to Mr. Sen, Secretary-General of the Asian-African Legal Consultative Committee, and to invite him to address the meeting.

2. Mr. SEN (Observer for the Asian-African Legal Consultative Committee) said the fact that almost all of the Commission's members from Asia and Africa had played and continued to play leading and effective roles in the work of the Asian-African Legal Consultative Committee and the Committee's warm association with many members from other regions indicated how closely linked the two bodies had become in the twenty years since the establishment of official relations between them. Such close ties were only natural, since the Commission and the Committee were pursuing the common goal of bringing about a system of law which would command universal respect in the relations between nations.

3. It was particularly gratifying that Mr. Šahović, the Chairman of the Commission's thirty-first session, had been able to attend the Committee's twenty-first session, which had been held at Djakarta as part of the silver jubilee commemoration of the historic Asian-African Conference held at Bandung in 1955—a conference to which the Committee owed its existence—and had brought into focus the political impact achieved by the Committee in promoting Asian-African co-operation on a number of matters of common concern, in the context of wider co-operation among nations at a global level. The Committee had thus been happy to welcome Mr. Šahović not only because the Commission had given it great encouragement during its formative years, but also because Mr. Šahović was from a country that had very close links with the developing countries of Asia and Africa and had been at the forefront of the non-aligned movement, which was itself an important outgrowth of the Bandung Conference. In that connexion, he wished to express the Committee's deep sorrow at the death of President Tito, who had made an enormous and lasting contribution to international peace and security.

4. Although its competence lay primarily in the field of international law, the Committee had had to expand its activities in the past ten years to meet the practical needs of its members and to carry out the task entrusted to it by the Bandung Conference of promoting Asian-African co-operation. It had therefore concentrated its attention on the law of the sea. The needs and interests of developing countries in Africa, Asia and Latin America had to be reflected in a convention to regulate activities carried out in an area embracing nearly three-quarters of the world's surface, and those countries therefore had to take concerted action. In the early stages, the Committee's work had been directed towards the compilation and preparation of voluminous preparatory material, but with the passage of time its activities had focused on the promotion of consultations among Asian and African

States and on the organization of discussions among developed and developing countries as a means of assisting in the negotiations for the conclusion of a convention that would be acceptable to all nations. The law of the sea had been a priority item on the agenda of the twenty-first session, at which the Committee had taken advantage of the presence of observer delegations from all over the world to assess the progress made at the Third United Nations Conference on the Law of the Sea, and had discussed some of the crucial issues that would have to be resolved at the ninth session of the Conference, to be resumed in July 1980.

5. The Committee was also engaged in work on a closely allied topic, namely, the optimum utilization of fishery resources in the exclusive economic zone. Although the Conference on the Law of the Sea had not yet concluded a convention, broad areas of agreement had none the less emerged regarding the rights and jurisdiction of coastal States over their exclusive economic zones up to a limit of 200 nautical miles. Nearly every coastal State in the world had therefore taken legislative or administrative steps to claim such extended jurisdiction over the areas in question. The worldwide establishment of 200-mile economic zones would bring within national jurisdictions nearly one-third of the world's oceans and 90 per cent of the resources now under commercial exploitation in marine areas. The two resources most likely to be exploited in the immediate future on a global scale were the fishery resources of the exclusive economic zone and the petroleum and gas resources of the continental shelf.

6. In accordance with its policy of providing practical assistance to member Governments, the Committee had decided at its twentieth session (Seoul, February 1979) that its secretariat should undertake a programme of work designed to optimize the benefits accruing from the exploitation of the fisheries resources of the exclusive economic zones of the countries of the Asian-African region. Since the achievement of that objective would require developing coastal States to take appropriate legislative and administrative measures to regulate fishing activities, in particular, those carried out by foreign fishermen, and to strengthen their fisheries' potential, the Committee had decided to provide member Governments with drafts of model legislation. In addition, it had prepared a model bilateral umbrella agreement allowing foreign fishing on certain terms and conditions, with provision for assistance to be rendered by the home States of foreign fishermen in building up the fishing industries of coastal States. The drafts had been presented at Djakarta at the twenty-first session and were to be considered in detail by expert groups later in the year. The Committee hoped to work in close co-operation with FAO in that regard.

7. Another field of activity engaging the attention of the Committee was protection of the environment. In December 1978, an expert group had identified areas

which called for the urgent establishment of environmental protection mechanisms and had recommended the legislative and administrative action to be taken by member Governments. The Committee had decided to carry on its work in that field in stages, on the basis of a five-year programme. Priority was given to the question of marine pollution and, at the Djakarta session, a draft scheme had been submitted on subregional co-operation to combat pollution resulting from accidents to oil tankers or blow-outs in off-shore installations. The scheme was being studied in consultation with IMCO.

8. The most important activity in which the Committee was likely to be involved in the 1980s was that of regional economic co-operation, including industrialization. Its work in that area would demand the preparation of complex legal instruments to establish a balance between the interests of developing States and industrialized nations and the consideration and formulation of new rules and patterns of investment protection.

9. The Committee had, of course, been working on various aspects of economic co-operation for the past twenty years. For example, it had decided at its third session (Colombo, 1960) to consider issues relating to commodities and the international sale of goods and, at its fourth session (Tokyo, 1961) it had approved a plan of work designed to assist member Governments in the enactment of legislation on trade, investment, Customs regulations and foreign exchange control. Its continuing involvement in the economic field had led to the establishment of official relations with UNCTAD in 1969 and with UNCITRAL in 1971. At its seventeenth session (Kuala Lumpur, 1976), the Committee had recommended the adoption of two standard contracts for transactions involving sales of agricultural produce and minerals exported by the countries of the region, with a view to replacing the standard terms and conditions of sale drawn up by trading institutions that were oriented to the needs of colonial economies. Those standard contracts had been published by the United Nations as documents of the Economic and Social Council. Another standard contract, relating to light machinery and durable consumer goods, had been adopted at the Djakarta session.

10. The Committee's most spectacular achievement in the economic field had perhaps been the adoption of its integrated scheme for the settlement of disputes relating to economic and commercial matters, which was designed to create stability and confidence in economic transactions in the Asian-African region. Two regional centres had been established, one at Kuala Lumpur and one at Cairo, and a third was being set up at Lagos. The World Bank's International Centre for Settlement of Investment Disputes (ICSID) had concluded formal agreements with the Committee on co-operation with, and assistance to, those regional centres. The Japan Shipping Exchange, one of the

world's major specialized shipping institutions, had agreed in principle to make its services available to the countries of the region under additional facility rules within the framework of the Committee's disputes settlement scheme. The Committee's initiatives in connexion with standard contracts and the settlement of disputes could be regarded as important contributions to the establishment of the new international economic order.

11. Industrialization was yet another area in which the Committee could make a positive contribution to the economic growth of the developing countries of the region by generating new ideas and policy approaches. A paper submitted at the twenty-first session contained a number of suggestions for a possible pattern of regional co-operation in the industrial field and a new approach to the question of investment protection.

12. In the past few years, the Committee had been mainly sought to provide member Governments with practical assistance, but it was not unmindful of the value of the codification and progressive development of international law, which would have a lasting effect on relations between nations. That aspect of its activities had been specifically assigned to a section of the Committee's secretariat which regularly followed the work of the Commission. At its nineteenth session (Doha, 1978), the Committee had made certain recommendations on the topic of succession of States in respect of treaties, but in the past two years had not made many suggestions on matters under consideration by the Commission because a larger number of leading jurists from the Asian-African region were included among the members. The Committee nevertheless remained deeply interested in the Commission's work, particularly since most of the items on the Commission's agenda were of vital importance to its member Governments. It looked forward to continued and closer co-operation with the Commission in those areas in the years to come.

13. Mr. ŠAHOVIĆ thanked Mr. Sen for his tribute to the memory of President Tito and to Yugoslavia's role in the non-aligned movement.

14. When he had attended the twenty-first session of the Asian-African Legal Consultative Committee, he had seen for himself that the countries of Asia and Africa, although confronted with serious political and economic difficulties, nevertheless actively pursued their endeavours to promote the observance and codification of international law. The Committee followed very closely the work of the Commission and other United Nations legal bodies and its contribution to the shaping of the law of the sea and to the establishment of a new international economic order certainly deserved to be reflected in universal conventions. The policy outlined 25 years earlier at the Bandung Conference, which had led to the establishment of the Committee, was more valid than ever in the world of today.

15. The Commission should strengthen its links with the Committee, a very active body and one that, judging more particularly from the high quality of the documents discussed at its twenty-first session, which indeed deserved to be circulated throughout the world, could not fail to have an ever-greater impact on international law.

16. Lastly, he wished to emphasize the part played by Mr. Sen in arranging the Committee's Djakarta session, which could be viewed as a major international event that had been more than regional in its importance.

17. Mr. TSURUOKA, also speaking on behalf of Mr. SUCHARITKUL and Mr. TABIBI, said that the Asian-African Legal Consultative Committee had greatly expanded in the course of twenty years, since it now had some forty members and as many associate members. The fact that it represented so many countries gave it a place in international legal circles that was made even more important by the remarkable quality of its work and he welcomed the increasingly close ties between the Commission and the Committee.

18. Mr. EVENSEN expressed his appreciation of the Asian-African Legal Consultative Committee's highly effective contribution to international law and to the economic development of its members and to the activities of the United Nations as a whole. Its work in connexion with the Conference on the Law of the Sea, which had done much to solve the complex questions involved in deep-sea mining, deserved special mention. Among the many other positive aspects of its activities was the establishment of fruitful relations between representatives from all nations.

19. Mr. CALLE Y CALLE, speaking on behalf of the Latin American members of the Commission, thanked Mr. Sen for his report on the Committee's work. It was particularly gratifying to note that the Djakarta session had been concerned with the establishment of justice in international society on the basis of the principles formulated at Bandung, and that the Committee did not simply engage in an academic exercise but also provided Governments with practical advice in a number of important areas.

20. Mr. THIAM, also speaking on behalf of Mr. BEDJAOU, joined in the admiration expressed for the work of the Asian-African Legal Consultative Committee, which had succeeded in incorporating age-long values into modern international law and, in the light of the concerns of the third world, was now embarking on further endeavours to promote the establishment of a new international economic order.

21. Mr. QUENTIN-BAXTER, congratulating Mr. Sen on the success of the Djakarta session of the Asian-African Legal Consultative Committee, said that his own attendance at a meeting held at the Committee's headquarters had enabled him to see for himself the breadth of interests generated by the

Committee. Its activities were not confined to questions of codification, but extended to practical co-operation in a number of fields ranging from the law of the environment to the preparation of standard contracts relating to the sale of goods. The great interest taken by the Committee, as by other regional organizations, in the work of the Commission, and in other international legal developments, improved the quality of discussion of legal matters and enhanced the possibilities of international agreement. He trusted that the Committee, despite its many other commitments, would continue to follow the work done by the Commission.

22. The CHAIRMAN, thanking Mr. Sen for his report on the activities of the Asian-African Legal Consultative Committee, said that Mr. Sen's visit marked the continuation of a close and cordial association between the Commission and the Committee that had developed over many years. The Committee could claim to be one of the most influential organizations of its kind, and the quality of its research, as well as the scope of its substantial yet discreet assistance to Governments, had won the universal respect and confidence of its members.

23. Of particular interest to the Commission was the Committee's policy of carrying out, for the benefit of its members, a parallel and complementary study of the topics before the Commission and the United Nations. In that way it was able to offer guidance to its members and to promote consultation among them on issues before the international community. The success with which the Committee had carried out its functions under the dynamic leadership of its Secretary General was exemplified by the consultative process which had preceded the United Nations Conference on the Law of Treaties and the series of meetings which it was currently arranging in connexion with the Conference on the Law of the Sea.

24. He wished the Committee every success and expressed the hope that the co-operation between the Commission and the Committee would be strengthened still more in the future.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/322 and Add.1 and 2,¹ A/CN.4/333)

[Item 1 of the agenda]

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

25. The CHAIRMAN said that, in a characteristically valuable report, the Special Rapporteur had provided new insights into the subject of succession in respect of State archives and had placed before the Commission a set of draft articles that would form a valuable supplement to the main body of his work.

¹ Reproduced in *Yearbook . . . 1979*, vol. II (Part One).

26. On the basis of a detailed analysis of the material he had compiled, the Special Rapporteur had developed a number of principles governing that particular class of State property: the indivisibility, or unity, of State archives; the connexion with, or essential relationship to, the place of their origin or constitution; the rights arising on succession that might require the division of archives; the reproduction of State archives or the payment of compensation on the basis of equitable principles; and the underlying but dominant theme, which was of overwhelming significance in the ordering of modern international relations, namely, the need for agreement, co-operation and consultation.

27. The Special Rapporteur's oral introduction to the draft articles relating to archives had attested to his encyclopaedic knowledge and mastery of the subject. The contributions by members had been equally valuable, and the Commission could be confident that the draft articles would emerge, after consideration by the Drafting Committee, to adorn in a fitting manner the great work of which a first reading had been completed in 1979.

28. In his latest work, the Special Rapporteur had once again displayed his outstanding qualities: a scholar's passionate desire to protect and ensure the proper use of archival material, which might be of the highest evidentiary value; an acute sensitivity to the cultural significance and value of archives and to the incalculable sense of deprivation that could be caused by their loss; and an honest mind, dedicated to developing rules and principles that would ensure that those with the greatest moral right should have the use or enjoyment of that kind of State property.

29. He congratulated the Special Rapporteur on the completion of the first reading of the supplementary articles on State archives and thanked him for the work he had done on behalf of the Commission and of the United Nations as a whole.

The meeting rose at 12.20 p.m.

1607th MEETING

Monday, 9 June 1980, at 3.10 p.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Casteñada, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

The law of the non-navigational uses of international watercourses (A/CN.4/332 and Add.1)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his second report on the law of the non-navigational uses of international watercourses (A/CN.4/332 and Add.1) and, in particular, draft articles 1 to 7 (*ibid.*, paras. 52, 59, 64, 69, 105, 130 and 142), which read:

Article 1. Scope of the present articles

1. The present articles apply to the uses of the water of international watercourse systems and to problems associated with international watercourse systems, such as flood control, erosion, sedimentation and salt water intrusion.

2. The use of water of international watercourses for navigation is within the scope of these articles in so far as provisions of the articles respecting other uses of water affect navigation or are affected by navigation.

Article 2. System States

For the purposes of these articles, a State through whose territory water of an international watercourse system flows is a system State.

Article 3. Meaning of terms

[To be supplied subsequently.]

[This article does not attempt to set forth any definitions of terms used in the draft articles because of a decision to leave open, temporarily, the question of the scope of articles. There are differences whether an international watercourse system should be considered as comprising:

(a) only boundary waters and the main streams of watercourses crossing boundaries; or

(b) river basins, including tributaries, whether or not solely within a system State; or

(c) drainage basins including all water whether surface or underground within the geographic limits of a watershed, moving toward a common terminus; or

(d) some combination of the above.

Pending a decision on the foregoing issue only terms not affected by the absence of a decision will be defined.]

Article 4. System agreements

1. These articles shall be supplemented, as the needs of an international watercourse system may require, by one or more system agreements.

2. A system agreement may be entered into with respect to an entire international watercourse system, or with respect to any part thereof provided that the interests of all system States are respected therein.

Article 5. Parties to the negotiation and conclusion of system agreements

1. All system States are entitled to participate in the negotiation and conclusion of any system agreement that applies to the international watercourse system as a whole.

2. Each system State whose use or enjoyment of the water of an international watercourse system may be affected to an

appreciable extent by the provisions of a system agreement that applies only to a part of the system is entitled to participate in the negotiation and conclusion of that agreement.

Article 6. Collection and exchange of information

System States shall undertake or make arrangements to accomplish, in light of the economic development of and the resources available to the individual system States, the systematic collection and exchange, on a regular basis, of hydrographic and other information and data pertinent to existing and planned uses of the system water.

Article 7. A shared natural resource

System States shall treat the water of an international watercourse system as a shared natural resource.

2. Mr. SCHWEBEL (Special Rapporteur) said that the topical summary prepared by the Secretariat (A/CN.4/L.311) of the Sixth Committee's discussion on the report of the Commission to the General Assembly at its thirty-fourth session had proved most helpful to him. He trusted that the preparation of such a resumé would be a regular feature of the Secretariat's assistance to the Commission.

3. During that discussion, the Sixth Committee had reached broad agreement on three points. First, the Commission should prepare draft articles that, when completed, would constitute an umbrella agreement setting out general principles of the law of the non-navigational uses of international watercourses. Secondly, the umbrella agreement should be formulated in such a way that it could be coupled with user or system agreements concluded between riparians of given watercourses, which would lay down obligations calibrated to the watercourse concerned. Thirdly, one of the general principles of the umbrella agreement should be that the waters of an international watercourse should be regarded as a natural resource to be shared among the riparians of that watercourse, however it was defined; that, pursuant to a second such principle, such water should be equitably utilized by the riparians; and that, pursuant to a third, no riparian should so use its share of the waters as to inflict injury upon other users. There had also been some, albeit less, emphasis on the responsibility of riparians to conclude among themselves agreements embodying both substantive and procedural principles and providing mechanisms for the governance of the watercourse, and to collect and share data on water.

4. Although, as was clear from the topical summary, a minority in the Sixth Committee had differed on some, or most, of those points, his report had been drafted in the light of the discussions held in the Sixth Committee and at the thirty-first session of the Commission. He trusted that, on that basis, the Commission would be able to make further progress at its current session. He had not, however, submitted a final text on the controversial issue of whether the international watercourse was a river which formed or traversed an international boundary or whether it

comprised the drainage basin of a particular watercourse; in view of the divergence of views on the matter, he had preferred to submit a general article on the scope of the draft, which, in effect, left the matter open.

5. Turning to the proposed draft articles, he said that draft article 1 (Scope of the present articles) was similar to the article 1 proposed in his first report,¹ which had attracted considerable support both in the Commission and in the Sixth Committee. The articles were stated to apply "to the uses of the water of international watercourse systems". Although a question had been raised regarding the need to refer to the water, rather than simply to the uses, of the international watercourse, that question had seemed material to only a very few members, and he trusted that the answer given in the report would suffice. With the virtually unanimous support of States, draft article 1 referred in paragraph 1 to such associated problems as flood control, erosion, sedimentation and salt water intrusion, and maintained paragraph 2, the substance of the earlier proposals regarding navigational uses, which had likewise received virtually unanimous support.

6. The only innovation was the expression "international watercourse systems", which seemed appropriate both as to what it did and what it did not signify. It did not define clearly the extent of the international watercourse, nor did it decide between the definition of a river as a watercourse which formed or traversed international boundaries or as a watercourse which formed an international drainage basin. It did, however, give an indication that, when dealing with the international watercourse, consideration should not be confined to the main stem of a river, thus excluding even lakes and canals. The expression was, moreover, widely accepted not only in the language of treaties but also in scientific and legal literature, and, even if it did not denote that an international watercourse was "a pipe carrying water" (A/CN.4/332 and Add.1, para. 52), it did not convey more than was generally accepted by international consensus. The adoption of that expression by the Commission would be a major step towards the fulfilment of its mandate.

7. Draft article 2 (System States) sought to take account of the criticisms of the corresponding article he had submitted in his first report,² particularly in regard to the dual requirement of contribution to and use of water. Under the new article, a user State, to be termed a "system State", would be a "State through whose territory water of an international watercourse system flows". That requirement, which was simpler both to express and to apply than the dual requirement under the former article, was based on the determination of physical facts, and the main one—

¹ Reproduced in *Yearbook ... 1979*, vol. II (Part One), document A/CN.4/320, para 2.

² *Ibid.*

whether the water of an international watercourse system flowed through the territory of a State—could in most cases be determined by mere observation. Although the article might seem to incline the draft against the drainage basin concept (since ground water could rightly be said to seep under, rather than to flow through, the territory of a State), that was no more the intent of the article than it was the intent of draft article 1 to prejudice the draft in favour of the drainage basin.

8. His point was brought out still more clearly by draft article 3 (Meaning of terms), which was still incomplete. Although in accordance with the Commission's practice a decision on definitions could be deferred, he would suggest that, in view of the need to make it clear that the definition of the extent of the international watercourse was being left open, a draft text along the lines of that proposed should be adopted.

9. Draft article 4 dealt with system agreements, and in paragraph 1 laid down a general principle that the framework treaty was to be supplemented by one or more system agreements. That principle was qualified by the phrase "as the needs of an international watercourse system may require". Thus, if there was little likelihood of a given watercourse system being developed, there would be no need to seek to conclude a system agreement for its development. There was, however, a large body of State practice and associated jurisprudence from which it could be inferred that there was, in general, an obligation under customary international law to seek to conclude such agreements.

10. In that connexion, the second report referred, in paragraphs 74 *et seq.*, to the *North Sea Continental Shelf* cases, in which the International Court of Justice had held that there was an obligation under international law to negotiate continental shelf boundaries taking the unity of resource deposits into account. It was therefore submitted that there was an equal obligation under international law to negotiate with respect to the utilization of the uses of the waters of an international watercourse.

11. Even more in point were the *Fisheries Jurisdiction* cases (A/CN.4/332 and Add.1, paras. 82 *et seq.*), in which the Court had been concerned with what could be regarded as a species of shared natural resource, namely, oceanic fish stocks. If there was an obligation to negotiate such fishing rights, it could hardly be maintained that there was no obligation to negotiate the rights of States in the uses of the waters of an international watercourse system; the movement of water through more than one State was a unique phenomenon that could be dealt with only by agreement between the States concerned.

12. Whereas the analogy with those cases was arguable, the *Lac Lanoux* case (*ibid.*, paras. 86 *et seq.*) was "on all fours" with that before the Commission. In that case, the obligation of the riparians to negotiate with a view to seeking agreement on the construction of works that would divert waters had been affirmed

by both parties; it had been acknowledged by France, the party which had built the works in question, not only on the basis of a treaty in force between the two States, but also as a principle to be derived from the authorities. In its award, the tribunal had stressed that the only way to achieve such adjustments of interest was by concluding agreements on an increasingly comprehensive basis, and had noted that international practice reflected the conviction that States should seek to conclude such agreements. The tribunal's view was, moreover, reflected in the "Draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States" prepared by an intergovernmental working group of experts under the auspices of the United Nations Environment Programme (*ibid.*, para. 90).

13. As pointed out in the commentary (*ibid.*, para. 71), however, the principle enunciated in paragraph 1 of draft article 4 did not impose an obligation on States to conclude system agreements before they could use the waters of an international watercourse, but only required them to seek to do so. Possibly, therefore, that point would be brought out more clearly if paragraph 1 were redrafted to read:

"System States shall enter into negotiations for the purpose of supplementing these articles, as the needs of an international watercourse system may require, by one or more system agreements."

14. Paragraph 2 of draft article 4 dealt with system agreements as they applied either to the whole of a system or to part of a system, since, as noted in paragraph 102 of the report, such agreements might be either system-wide or localized, and either general or confined to a specific problem. Possibly, therefore, paragraph 2 would be clearer if it were reworded to read:

"A system agreement may be entered into with respect to an entire international watercourse system, or with respect to any part thereof or particular project, programme or use, provided that the interests of all system States are respected therein."

He made that suggestion because certain system agreements might cover one or more uses only, without any territorial delimitation, e.g. agreements on data collection and sharing, pollution abatement, a single hydraulic undertaking, or fishing.

15. Draft article 5 dealt with the parties to the negotiation and conclusion of system agreements. Paragraph 1 had been drafted with regard to the fact that, while a system State was entitled to participate in the negotiation and conclusion of any system agreement that applied to the international watercourse system as a whole, it was not required to do so. Paragraph 2 then provided that a State whose use or enjoyment of the water of a system might be affected to an appreciable extent by an agreement which applied to only a part of the system would be entitled

to participate in the negotiation of that agreement and to become a party to it. To exclude such a State could result in a denial of its fundamental equality of right. The word “appreciable” had been chosen for the reasons stated in the report. In determining whether a State’s interests might be affected “to an appreciable extent”, presumably not only its current but also its potential uses of the water of a given watercourse must be considered. An informed judgement would, however, call for specialized knowledge, and a body of experts should therefore be set up to give advice on such matters. The conference of the international river commissions to be convened by the United Nations in 1981 might provide an occasion for the provision of such advice, though not on a continuing basis.

16. In preparing draft article 6, he had tried to take account of the main views expressed on the question of the collection and exchange of information. The considerations supporting that draft article were straightforward; they were set out in paragraphs 130 to 139 of his report. The collection and exchange of data were crucial to any rational determination of the development potential of rivers. At the same time, however, it was clear that the resources of different riparian States varied. The reference in draft article 6 to the economic development of and the resources available to the individual system States was designed to lay the foundations for assistance by developed countries and international organizations to developing countries, with a view to strengthening their capabilities for data collection and exchange. In that connexion, he drew the Commission’s attention to paragraphs 375 to 387 of the very useful United Nations study on the Management of International Water Resources: Institutional and Legal Aspects.³

17. Although the general principle embodied in draft article 7 might seem unduly basic or novel, he thought it was indubitably sound, and hoped the Commission would accept it as self-evident, thus paving the way for the formulation of more refined general principles, which, if the Commission so agreed, he would submit at the next session. Two of the principles he had in mind were: that system States should share equitably in the uses of the water of international watercourse systems, and that system States should ensure that conduct subject to their jurisdiction did not change appreciably the volume, flow or levels of any system waters so as adversely to affect another system State in its use of its equitable share of those waters. Other procedural principles might relate to prior notification of intent to effect changes in a watercourse, to the establishment and maintenance of river commissions, and modes for the settlement of disputes. Substantive principles might deal with matters such as pollution and State responsibility.

³ *Management of international water resources: institutional and legal aspects—Report of the Panel of Experts on the legal and institutional aspects of international water resources development*, Natural Resources/Water Series, No. 1 (United Nations publication, Sales No. E.75.II.A.2).

18. At present, however, he was merely suggesting that the Commission should take the preliminary step of adopting a draft article affirming that the water of an international watercourse should be treated as a shared natural resource. As stated in the commentary to draft article 7, the concept of shared natural resources must embrace the waters of international watercourses (A/CN.4/322 and Add.1, para. 140). That concept had considerable support in the United Nations. In that connexion, he noted that many members of the Commission seemed to attach considerable importance to the Charter of Economic Rights and Duties of States,⁴ and he hoped that they would continue to do so in discussing draft article 7. He also hoped that they would give appropriate weight to the conclusions of the United Nations Water Conference and the draft principles on shared natural resources prepared by UNEP (A/CN.4/322 and Add.1, paras. 149 and 90).

19. It was, moreover, clear from State practice and jurisprudence that States had, for many years, treated the waters of international watercourses as a shared natural resource. The Judgment of the Permanent Court of International Justice in the *Territorial Jurisdiction of the International Commission of the River Oder* case (*ibid.*, paras. 187 *et seq.*), in stating that the waters of navigable international rivers were waters in which and to which both upper and lower riparians had a “community of interest” and a “common legal right”, had assumed and implied that the waters of an international watercourse constituted a shared natural resource. Similarly, it was suggestive of the assumptions and outlook of States that treaty after treaty relating to navigation treated the waters of international watercourses as a shared natural resource. Treaties relating to boundary rivers also demonstrated that States regarded the waters of international watercourses in that way. It therefore seemed quite natural to him that the Commission should accept the principle that system States should treat the water of an international watercourse system as a shared natural resource.

20. He noted that when treaties were relied upon in the Commission to demonstrate the existence of a rule of customary international law there was always room for the contrary conclusion, namely, that such treaties were not written in consonance with and in construction of international law, but rather in specialized derogation from it. It was not argued that the many treaties between States providing for extradition gave rise to a customary law of extradition. Rather, such treaties were cited to show that, in their absence, there was no applicable international law. Why then should the case be different in respect of watercourse treaties, if indeed it was different?

21. He believed that the case was different for two reasons. The first was that international tribunals and

⁴ General Assembly resolution 3281 (XXIX).

States had found in watercourse treaties what the Permanent Court of International Justice had referred to as "international fluvial law", as was strikingly illustrated by the *River Oder* case and the following quotation from an official document of the Government of the United States of America:

It is accepted legal doctrine that the existence of customary rules of international law, i.e., of practices accepted as law, may be inferred from similar provisions in a number of treaties.

Well over 100 treaties which have governed or today govern systems of international waters have been entered into all over the world. These treaties indicate that there are principles limiting the power of states to use systems of international waters without regard to injurious effects on neighbouring states. These treaties restrict the freedom of action of at least one, and usually of both or all, of the signatories with regard to waters within their respective jurisdictions. The number of states parties to these treaties, their spread over time and geography, and the fact that in these treaties similar problems are resolved in similar ways, make of these treaties persuasive evidence of law-creating international customs.⁵

22. The second reason why treaties on international watercourses could reasonably be read as giving rise to rules of customary international law was the function such treaties served. In his lectures to the Hague Academy of International Law, then Professor R. R. Baxter, had put that point in the following way:

Often the function of the bilateral treaty is to spell out the details of a general principle, to provide for its application in a particular case, or to give content to an imperfect rule of international law. If, for example, there is a rule of international law requiring the apportionment of the use of the waters of an international river according to the principle of "equitable utilization", it is still necessary for the parties to specify such details as how many acre-feet each riparian is to have for irrigation purposes, at what time the water is to be delivered, and how the delivery of the right quantity of water is to be verified.

...

... a certain amount of guidance about the state of general international law may be derived from an examination of bilateral treaties in their context in international law. In some cases, it may then be possible to rely directly on the bilateral agreements as evidence of the state of the law.

A bilateral treaty can be understood to be in derogation of the law if the state of customary international law is such that the activity dealt with lies within the sovereign domain of State A and that State B has no legal claim to participate in that activity or to benefit from it. A State has no obligation to establish postal, telephone, radio or television relations with another State ... There is no general duty to extradite

... The multiplicity of treaties of extradition or of air transport agreements does nothing to prove a rule of customary international law.

On the other hand, there are areas of inter-State activity in which international law is silent, ambiguous or lacking in a clear rule—or at least does not recognize that matters lie within the sovereign power and discretion of States. When the law is in this state, it may be necessary to look to the whole range of instances of international dealings on the particular matter. It may then be

discovered that controversies arising out of a certain area of activity are usually or always solved by a sharing of the activity or of the benefits of the activity ...

Examples drawn from several areas of international law may clarify this role of bilateral agreements as evidence of the law.

It is generally recognized that the riparians of an international river have a right to navigate the full course of the river. As put in the *Case relating to the Territorial Jurisdiction of the International Commission of the River Oder*, the essential features of this rule are "the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others". The Permanent Court relied on the Final Act of the Congress of Vienna, provisions relating to other rivers in the Treaty of Versailles, and what it referred to as the "treaty law which applied and developed the principles" of the Final Act of the Congress of Vienna. It is important that no conflicting international agreements or norm of international law operative in the absence of treaty points in the opposite direction. It would seem that there had been an examination of the antecedent treaties and an assumption that the same principle was being applied in the Treaty of Versailles as in the prior instances, in the absence of any indication of change. The right recognized by the Court extended only to the riparians, and international law generally demands that there must be a dedication to free use by the ships of all nations before ships of non-riparians may use an international river. The latter rule seems firmly understood, and a treaty granting a right of free passage to the ships of non-riparians must therefore be understood as a departure from the general rule of international law.

A second example may also be drawn from the law of international rivers. Here there is growing support for the view that the requirement of international law is that there be an equitable apportionment of the uses of waters of an international river. The detailed content of this very general principle is far from clear. Virtually all authorities seem today to deny the Harmon Doctrine, according to which the upper riparian has complete sovereignty over the waters of such a river and may control them or cut them off as it sees fit. The firm rejection of this outmoded view disposes of the possibility that a treaty that does provide for the apportionment of the waters of an international river constitutes a contractual renunciation of the sovereign rights of the upper riparians. There is not full agreement on the law-making force of those treaties that do provide for a sharing of the uses of international rivers ... But the firm fact remains that all who write on this subject feel impelled to take account of the treaties as a source of law on the uses of waters of international rivers.

Fear of this very phenomenon of the influence of the treaty on customary international law possibly lay behind the provision of the Indus Waters Treaty, which stipulated that "Nothing in this Treaty shall be construed by the Parties as in any way establishing any general principle of law or any precedent".⁶ The precaution was a natural one to take, but the quoted provision certainly does not limit the ability of others to rely on the law of the treaty.⁷

23. Mr. REUTER congratulated the Special Rapporteur on his presentation of an important and difficult topic. One of the principal ideas he had put forward was that the difficulties raised by the topic related to the problem of shared natural resources. It would be better to refer to them as common natural resources,

⁵ Memorandum of the State Department, "Legal aspects of the use of systems of international waters", 85th Congress, 2nd Session, document No. 118 (Washington, D.C., U.S. Government Printing Office, 1958), p. 63.

⁶ United Nations, *Treaty Series*, vol. 419, p. 154.

⁷ R. R. Baxter, "Treaties and custom", *Recueil des cours de l'Académie de droit international de la Haye, 1970-1* (Leyden, Sijthoff, 1971), vol. 129, pp. 82-87.

since one of their special characteristics was, precisely, that they were not shared, but should be shared. As the Special Rapporteur had shown, the work done by the United Nations on shared natural resources, as embodied in resolutions, was encouraging. In relating the topic to shared natural resources, the Special Rapporteur was adopting an approach which had already yielded concrete results.

24. The question of the method to be followed in dealing with the topic had already arisen at the previous session. The Commission had reached a turning point in its history. So far, it had considered reports and prepared draft articles relating to traditional topics. It now found itself faced with a topic the legal regulation of which called for a new approach, new methods and new concepts. While the Special Rapporteur had shown himself capable of innovation, the same might not be true of all members of the Commission. Personally, he still felt somewhat intimidated by certain technical aspects of the problem.

25. With regard to method, the Special Rapporteur proposed to adopt the broadest possible approach, beginning with general principles and then proceeding from the general to the particular. In view of the mass of work done by the Special Rapporteur, he himself was prepared to trust his judgement and accept the method he proposed, albeit as an act of faith, until it could be seen where that method was leading.

26. Although he had no objection to the use of the word "systems" in article 1, he would like to know exactly what the Special Rapporteur intended. Such a term could, of course, be adopted and used without any immediate attempt being made to define its content; while aware that that was open to discussion, it was possible to go straight to the heart of the subject and not take a position until later. It was also possible to proceed from the assumption that the three concepts of river, river basin and drainage basin were sufficiently familiar, and to refrain from making any choice for the time being. Hence the term used was "international watercourse system", which could be regarded as covering those three concepts. That seemed to be the attitude adopted by the Special Rapporteur.

27. The reason why some members of the Commission wished to adhere to the conventional definition of an international watercourse, which excluded drainage basins, was perhaps that they had a specific problem in mind and did not wish the regime of international watercourses to be applied merely because part of the waters feeding a river situated entirely within the territory of one State—in other words the waters of a drainage basin—came from outside that State. Whether that point of view was accepted or rejected, the concept of the drainage basin must nevertheless be accepted for certain specific problems, even though it were rejected for others.

28. The Commission had decided initially to deal with all the questions raised, and perhaps subsequently

to eliminate some of them. Thus it included pollution in its study. One example would be the case of a State whose chemical wastes seeped into ground water and poisoned a river which did not flow on the surface in its territory. It was obvious that such a State could not disclaim responsibility for such pollution. Consequently, the concept of the drainage basin could not be excluded from a legal text regulating the whole of the subject under consideration. When looked at in that light, the concept of international watercourse systems could have a variable content, depending on the circumstances. In his view, it would be preferable to ascribe a variable content to that concept, rather than regard it as a vague concept which was taken to be constant. Otherwise, the Commission would be compelled, on taking up the first articles of the draft, to stipulate the content it intended to ascribe to that concept in each individual case.

29. In his report, the Special Rapporteur had introduced a number of familiar but difficult concepts, such as the obligation to negotiate. In addition, he had revived a concept which had previously provoked lively debate in the Commission: that of the right to participate in negotiations. General multilateral treaties were treaties in the negotiation of which all States had the right to participate. In article 5, however, the Special Rapporteur had gone so far as to provide—a very serious step—that system States were not entitled to conclude a system agreement among themselves without opening its negotiation to participation by the other system States. While not excluding the possibility of a provision of that kind, he was afraid it might raise very difficult problems. Admittedly, in terms of international responsibility, if two system States negotiated a system agreement at the expense of a third system State, their responsibility would be engaged. It remained to be seen whether the Commission wished to go so far as to institute a procedure whereby, by such means as notification, such machinery could be set in motion.

30. In conclusion, he stressed that the topic under consideration was an example of the new topics to which the Commission would have to turn its attention once it had exhausted the traditional topics.

31. Mr. ŠAHOVIĆ said that the report before the Commission showed that considerable progress had been made since the previous report, which had only been of an exploratory nature. He welcomed the fact that the Special Rapporteur had taken due account of the observations made by members of the Sixth Committee; they considered the question of the use of international watercourses to be of major importance, and their observations on the work of the Special Rapporteur and the Commission were most encouraging.

32. Like Mr. Reuter, he regarded the subject under study as both important and difficult. It was important to adopt an approach that would enable the Commis-

sion to achieve concrete results; it should no longer confine itself to general discussions.

33. As to the method to be adopted, he was not entirely convinced by the approach, or by some of the solutions, proposed by the Special Rapporteur, who was inclined to stress the technical aspects of the subject. The reason why so many terminological problems arose was that the Special Rapporteur started out from certain technical aspects, which led him to legal solutions not entirely suited either to the needs and interests of the international community, or to the stage of development of applicable international law. The topic was not new. Positive international law provided many examples of bilateral and multilateral conventions embodying legal solutions from which it was possible to derive general principles that took account, first and foremost, of the interests of States.

34. From the purely legal point of view, the ultimate aim was the codification and progressive development of international law on the topic, in other words, to regulate the relations between the rights and duties of riparian States that used the waters of an international watercourse as they could be used with existing technical possibilities. It was necessary, therefore, to reconcile respect for the rights of States with the requirements of legal regulation of international co-operation, and in particular the respect for the principle of good neighbourliness, which had underlain all solutions of such problems adopted for decades. The Commission should therefore take positive law as the starting point, and, as the Special Rapporteur proposed, seek solutions by which the principles derived from positive law could be adapted to modern situations.

35. In conclusion, he said he was prepared to consider the Special Rapporteur's draft articles individually in succession, but from a standpoint other than that of the application of a clearly defined conception of solutions linked to the technical aspects of the topic.

36. Mr. EVENSEN, referring to draft article 1, paragraph 1, said that he welcomed the introduction by the Special Rapporteur of the term "international watercourse systems": it was quite flexible and could be properly defined at a later stage in a draft article on the meaning of terms. He nevertheless suggested that the word "non-navigational" might be added before the word "uses" in the first line of that paragraph. The Special Rapporteur might also consider including a reference to pollution in the second part of the paragraph, because pollution was one of the most important issues now under discussion by the Third United Nations Conference on the Law of the Sea and in connexion with matters relating to international watercourses.

37. With regard to draft article 2, he had some doubts about the term "system State" and hoped that the Special Rapporteur would give it closer consideration.

38. Lastly, he suggested that, in draft article 3, reference might be made to "canals or channels" forming part of international watercourse systems. Those two terms would, of course, have to be clearly defined.

39. Mr. USHAKOV said that the Commission was only at the preliminary stage of its work on the topic, and the problems to be dealt with were of a general nature.

40. For example, while it seemed legitimate, in draft article 7, to describe international watercourses as shared natural resources, since that was obviously what they were, the use of such a concept was admissible only if its legal consequences for the use of the resource were specified, so that the scope of the provision was clearly defined.

41. In the case of draft article 6, difficulties of translation were added to the legal difficulties, and in his view the French text was not sufficiently clear. He also noted that the provision had no direct consequences for the use of an international watercourse.

42. Draft articles 4 and 5 regulated relations between the future draft articles and possible agreements between riparian or system States. It might seem premature to take up questions of that kind, when the Commission did not yet have a complete text and could not know whether its draft articles would become a draft convention.

43. Like the Special Rapporteur, he believed that the Commission should first establish the basic principles applicable to all international watercourses, and then supplement them by a set of rules on the specific uses of such watercourses.

44. He was not opposed to the use of the "systems" concept which appeared in article 1, provided that the meaning of the term was clearly defined. As he had already had occasion to point out at previous sessions, the Commission should confine its work to international rivers and possibly to lakes through which they flowed, and should exclude lakes as such. The French equivalent of the English term "watercourse" would seem to be "*cours d'eau*", as the concept of a "*voie d'eau*" could include lakes, or even sounds. It also seemed necessary to specify that the Commission was considering international watercourses, that was to say, rivers which traversed or separated States. If it decided to include lakes within the scope of the draft, it would have to define the lakes involved, since it was possible to imagine the case of a lake forming the boundary between two States, although no river flowed through it.

45. As before, he wished to emphasize the difference between the use of water and the use of a river. The inhabitants of a region who obtained water for their consumption used the water, not the river. Conversely, a hydroelectric power station used the energy acquired by the water in descending; that was to say, it used the river and not the water, just as the watercourse rather

than the water was used for floating timber. He saw no reason why the Commission should not regulate both the use of a watercourse and the use of its water, provided that it clearly established the necessary physical and legal distinction. In that connexion, he stressed that a lake was not a watercourse, since its water did not flow.

46. With regard to the wording of draft article 1, he did not think that flood control was a problem related to the use of a watercourse or its water. The problem of floods was independent of the use of a river as such. The same was true of erosion, sedimentation and salt water intrusion, which was a more general case of pollution. In principle, those problems did not derive from the use of the water or the watercourse as such.

47. In addition to the system concept, consideration should be given to the concept of an international river basin, which might give rise to considerable difficulties if it was broadly defined and included groundwater and perhaps even the glaciers feeding a river. Under such a definition an entirely national river, flowing in the territory of a single State, might become an international river. In reality, the concept of an international watercourse presupposed that its water flowed through the territory of a number of States. It was essential that the Commission should define the concept of an international watercourse as the basis for its work.

The meeting rose at 5.55 p.m.

1608th MEETING

Tuesday, 10 June 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Castañeda, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

The law of the non-navigational uses of international watercourses (continued) (A/CN.4/332 and Add.1)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPporteur¹ (continued)

1. Mr. SUCHARITKUL said that he was cautiously optimistic about the law of the non-navigational uses

¹ For the text of articles 1 to 7 submitted by the Special Rapporteur, see 1607th meeting, para. 1.

of international watercourses, because constant progress was being made on its codification and progressive development. In pursuing that objective, the Commission would have to take account of a number of important scientific, technical and geographical factors and of the need for a workable definition of the scope of the topic. The Special Rapporteur could take heart from the fact that work on the progressive development of the law of the sea was also proceeding quite slowly.

2. In attempting to delimit the scope of the topic, the Commission would have to come to grips with the difficulty of choosing between broad and narrow definitions of basic concepts, such as water itself (which could be taken as a single unit or seen in terms of its many characteristics) and international watercourses (which could be seen either as pipelines or in terms of their content). It would also be necessary to take account of other, intermediate concepts, such as that of drainage basins (which included all surface and underground water within the geographical limits of a watershed and involved problems of pollution control and environmental protection) and of valleys (like the Tennessee Valley). Attention should also be given to the concept of river systems—which had been introduced in draft article 1 and would provide a good starting point for the Commission's discussions—and further thought would have to be given to the use of the word "réseau" in the French text, because its meaning was broader than that of the word "system"; it might be rendered in English by the word "network".

3. He agreed with Mr. Evensen (1607th meeting) that paragraph 1 of draft article 1 should be expanded to include references to irrigation, energy, fisheries, pollution, conservation, agriculture and industry. Further historical and geographical details might also be included in the commentary to explain more clearly some of the problems associated with international watercourse systems, in particular, erosion and salt water intrusion.

4. Although he had no objection to draft article 2, he thought it might take some time to become accustomed to the term "system State", which he hoped the Special Rapporteur would define more clearly.

5. In draft article 4, paragraph 1, the Special Rapporteur had provided that the future articles could be supplemented by system agreements designed to fill gaps in the main framework agreement. Paragraph 2 provided that such system agreements could be entered into either with respect to an entire international watercourse system or with respect to any part thereof. In his opinion, that paragraph should also take account of the needs of countries such as those in the region of the Mekong Basin. In 1957, four lower riparian countries of that region, namely, Thailand, the Lao People's Democratic Republic, Democratic Kampuchea and the Socialist Republic of Viet Nam, had established the Committee for co-ordination of investi-

gations of the Lower Mekong basin,² which should, if it was to cover the entire Mekong watercourse system, also include as members Burma, China, India and Nepal. Under draft article 4, lower riparian States should be allowed to enter into agreements for the co-ordination of their research and projects. Moreover, the fact that upper riparian countries did not take part in such agreements should not prevent lower riparian countries from functioning as an economic unit, as the members of the Mekong Committee had continued to do in the 1960s despite diplomatic difficulties between Thailand and what was then known as Cambodia.

6. Draft article 5 provided for an entitlement to participate in negotiations, similar to that embodied in draft article 4. The question that had arisen during the Commission's discussion of draft article 5 at its thirty-first session³ was whether an obligation to negotiate existed as a corollary to the obligation of States to settle their disputes by peaceful means. Although he thought that, for practical reasons, the obligation to negotiate should exist, he was not sure that negotiations would lead to any positive results. If such an obligation did exist, it should, moreover, apply to all system States, if only because they all had an interest in the international watercourse concerned and had to bear in mind the principle that its water was a resource they all shared.

7. He had supported the draft articles on data collection and exchange at the previous session⁴ and would also support draft article 6.

8. Draft article 7 embodied the principle that water was a shared natural resource. That principle, which might seem relatively new, had in fact been affirmed, *inter alia*, by the Charter of Economic Rights and Duties of States,⁵ in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,⁶ at the Asian-African Conference held at Bandung in 1955, and in the practice of States. In that connexion, he agreed with the Special Rapporteur that treaties between States should be taken as definite evidence of the existence of customs and practices which might pave the way for more constructive participation by countries in the just and equitable sharing of the world's natural resources. Such sharing was what the Commission should be

aiming to promote as it formulated new legal rules on the non-navigational uses of international watercourses. Given time and patience, he was sure that the concept of shared natural resources would inevitably be accepted.

9. Mr. CALLE Y CALLE said that the Special Rapporteur was to be commended for the efforts he had made to formulate rules of international fluvial law in the light of the contemporary practice of States and the action taken by the international community in other forums dealing with problems relating to water, which was the main subject of the current study, and the features of which should be clearly defined for the benefit of all States. In his opinion, the Commission was being too cautious in its approach to the law of international watercourses, the study of which had been requested by the General Assembly twenty years previously and which was now ripe for codification. The Commission should therefore complete its general discussion of the topic and go straight on to consider the draft articles submitted by the Special Rapporteur.

10. The wording of draft article 1, paragraph 1, was a distinct improvement on that of the corresponding provision submitted at the thirty-first session.⁷ With the reference it now made to the "uses of the water of international watercourse systems", it would enable the Commission to keep up with all the developments taking place in work on water uses, pollution and ecology. The same paragraph also referred to "problems associated with international watercourse systems". Some of those problems resulted from the use of the waters of such systems, while others resulted from their misuse. The solution of those problems would obviously require the co-operation of States. Paragraph 2 referred to the interaction between the traditional use of international watercourses for navigation and other uses affecting or affected by navigation. He believed that the future draft articles should take account of that interaction and therefore supported paragraph 2, the wording of which might nevertheless be given further consideration by the Drafting Committee.

11. He agreed with Mr. Reuter (1607th meeting) that draft article 2 contained a key term, namely, "system State", that would enable the Commission easily to formulate other rules relating to the law of international watercourses.

12. Although it had been placed in square brackets, draft article 3 was an important provision, because it would define the terms used in the draft as a whole, thus determining what was meant by an "international watercourse system" and whether such a system comprised boundary waters, river basins, drainage basins, including surface and ground water, or some combination of those categories of water.

² *Legislative texts and treaty provisions concerning the utilization of international rivers for other purposes than navigation* (United Nations publication, Sales No. 63.V.4), p. 267.

³ Reproduced in *Yearbook ... 1979*, vol. II (Part One), document A/CN.4/320, para. 2.

⁴ See *Yearbook ... 1979*, vol. I, p. 111, 1554th meeting, para. 50.

⁵ General Assembly resolution 3281 (XXIX).

⁶ General Assembly resolution 2625 (XXV), Annex.

⁷ Reproduced in *Yearbook ... 1979*, vol. II (Part One), document A/CN.4/320, para. 2.

13. Draft article 4, paragraph 1, provided that the general principles enunciated in the draft as a whole could be supplemented by one or more system agreements relating to an international watercourse system. If the needs of the system so required, States could thus adopt provisions that did not necessarily correspond to the general principles of international law embodied in the draft articles. The point being made in that paragraph would, however, be clearer if it was amended to read: "These articles shall be supplemented . . . by one or more agreements between system States".

14. Paragraph 2 of article 4 was a logical extension of paragraph 1. The words "are respected therein" should, however, be replaced by the words "are not affected thereby", since, although the States parties to a system agreement were equal, the extent of their participation in the system might not be the same. The participation of some States might, for example, be quite insignificant. It would then be only fair that they should be allowed only a very small share of the water resources. In that connexion, he drew attention to the Treaty for Amazonian Co-operation of 1978 (see A/CN.4/322 and Add.1, para. 206), the parties to which were not only the States through whose territories the waters of the Amazon flowed, but also States like Suriname, through whose territory the Amazon did not flow, but which had features similar to those of the main system States, and Guyana, one of whose borders with Brazil was formed by a tributary of the Amazon. It was, in his opinion, quite inconceivable that the use of the waters of the Amazon by a country such as Peru, in whose territory the Amazon rose, should depend on equal participation in a system agreement by countries such as Suriname or Guyana. Peru did, of course, have the obligation not to cause permanent damage to the waters of the Amazon that might affect the use of such waters by other parties to the treaty.

15. Draft article 5 met an obvious need, since each major river system comprised a number of smaller systems, and regions covered by the same system could present a variety of different features. Paragraph 2, however, called for some clarification, for, as drafted, it seemed to provide for the negotiation and conclusion of an agreement that was already in being.

16. With regard to the use of the term "to an appreciable extent" in paragraph 2, he thought the main point was to bear in mind that a right of redress existed only where substantial damage, as opposed to minor inconvenience, had been suffered as a consequence of the use of the waters of an international watercourse by another State. Since the early times of Roman law, it had always been recognized that, where the needs of the other State were overriding, certain damage could not be prohibited. Thus, only when the damage was substantial would the rules governing agreement, consultation, reparation and compensation come into play.

17. He would speak on draft article 6 later in the discussion.

18. Draft article 7 provided that the water of an international watercourse system should be treated as a shared natural resource. In other words, such water was to be enjoyed and used jointly by the States concerned as partners in a sort of common heritage. While he endorsed the underlying idea of the draft article, he considered that the statement to the effect that the principle of permanent sovereignty over natural resources did not apply to shared natural resources (*ibid.*, para. 148) was somewhat categorical. If a State had sovereignty over a resource, the fact that that resource was shared did not deprive the State of its sovereignty or transmute its permanent sovereignty into some kind of transitory sovereignty. So long as States existed as a social phenomenon, water could not alter the character of a State through which it flowed. In his view, therefore, it was necessary to specify whether the "system" was regarded as a material concept or as a means of organizing the watercourse.

19. Mr. VEROSTA noted that, according to the Special Rapporteur, in paragraph 26 of his report, the Sixth Committee of the General Assembly had indicated that "the Commission should begin its work by seeking to produce a set of legal principles which would be generally applicable to the use of the water of international watercourses for purposes other than navigation". The Sixth Committee had not, however, indicated the methods to be adopted by the Commission for identifying those legal principles, which were necessarily very abstract. In his view, therefore, the Commission and the Special Rapporteur were free to choose their own methods, but if they were not to remain in the vague area of general legal principles they should seek to establish the existing rules of international customary law on the various non-navigational uses of international watercourses. The Sixth Committee had not ruled out such an approach since, in its view—again, according to the Special Rapporteur—the Commission should also consider whether there were "substantial grounds supporting work upon specific uses rather than upon the uses of water in general".

20. He fully endorsed the statement in the first sentence of paragraph 30 of the report regarding the method to be adopted in drafting general principles, and could not agree that it had any serious drawbacks. Indeed, it was the involvement in disputes over detail, referred to in the third sentence of the paragraph, that would enable the Commission to arrive at general rules on the basis of State practice and would perhaps point the way to a more substantive text.

21. He would therefore reiterate the request he had made at the Commission's thirty-first session, namely, that the Special Rapporteur should analyse at least one of the non-navigational uses of international watercourses. For example, hydroelectric power plants had long been a feature of international watercourses, and

States had not waited for any umbrella agreement before constructing them. A comparison of the relevant international treaties might reveal an international standard already applied in State practice, on the basis of which the Special Rapporteur and the Commission could determine the existing rules of international customary law on the matter. That study would, in turn, provide certain indications as to the manner in which the necessary legal principles should be formulated, thereby enabling the Commission to contribute to the progressive development of international law and to comply with the wishes of the Sixth Committee.

22. Mr. QUENTIN-BAXTER said that, in preparing the draft articles, the Special Rapporteur had examined elements of international jurisprudence and had rightly called in aid general principles of law, while leaving many of the specific matters to be dealt with under subordinate agreements. One of the difficulties with which the Special Rapporteur was faced stemmed from the fact that, in the area with which the Commission was concerned, the interests were polarized between the upstream and downstream States, whereas in most subjects affecting the use of the physical environment, and in transfrontier problems, there was a certain balance: States knew that in some cases they might be disadvantageously affected because they had to take account of another State's interest, but that in other cases the position would be reversed. That balance of advantage could even be seen in the use of international rivers for navigational purposes, since the countries bordering on the river system granted each other mutual easements or rights over the use of their respective territories.

23. In that connexion, reference had already been made to a gathering of non-governmental experts at which a certain relationship had been noted between the view that the experts took of the equities and their actual position, depending on whether their countries were upstream or downstream users. That kind of problem was, however, almost inevitable and despite all the emphasis placed on good neighbourliness and interdependence by such international instruments as the Final Communiqué of the Asian-African Conference (Bandung),⁸ the Charter on the Economic Rights and Duties of States and the Declaration of the United Nations Conference on the Human Environment,⁹ there was an obvious gap in thinking on the degree of consultation required and the point at which the freedom of a sovereign State ended and its duty to consider its neighbours began.

24. In the absence of a fuller treatment of those questions, the Special Rapporteur had looked to the

⁸ See Indonesia, Ministry of Foreign Affairs, *Asian-African Conference Bulletin*, No. 9 (Djakarta, 1955), p. 2.

⁹ *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I.

way in which States had actually behaved and, in his study, had accorded the first place to the physical situation as it related to water and its uses. His enquiry had therefore necessarily focused on the ways in which States had resolved the related and analogous problems, and the wealth of State practice which had thus evolved would have to be systematized to bring it to bear directly on the way in which the Commission carried out its task. In the past, it had sometimes been the political pressures that arose out of given situations that had led to solutions. It would, for example, have been quite unacceptable for a State which commanded an international strait providing the only ingress to or egress from a closed sea to take the position that, because the area in question fell within its territorial sovereignty, the other States directly affected had no legal interest. Although throughout history such situations had been dealt with in a variety of ways, much had depended on the relative power and influence of the parties. That perhaps was an indication of the need for draft articles that did not deal in general terms with the nature of rights and obligations, but specialized in a particular area. However, it was not possible to deal in detail with all the situations that arose, and States would therefore have to be encouraged—if not required—to seek in good faith to resolve their differences at the specific level.

25. It seemed to him that, as the notion of law in the world community developed, the mere advantages and inequalities of political situations should not dictate the answers. In drafting the articles, therefore, the aim should be to give careful consideration to the particular situations of sovereign States, while at the same time providing them with some valid precepts that would set the scene for more detailed negotiations and leave no room for a return to the outmoded Harmon doctrine. The Special Rapporteur, having dramatically evoked the world's total dependence on the finite supply of water and its total vulnerability to misuse of that resource, and having also appealed to such jurisprudence and perceptions of general principles of law as existed to justify the notion of international co-operation, should now concentrate on the development of viable principles which took account of the actual needs.

26. With regard to the definition of an international watercourse, he thought the Commission's inability to accept Mr. Kearney's larger view of the matter had perhaps been due to its perception of the inchoate state of practice and of international thinking. Now, however, it had a slightly clearer idea of what was involved. It was a question not of stipulating that anything excluded from the definition was outside the law, but simply of determining the practical ways of solving an infinite variety of problems.

27. Mr. Ushakov, commenting at the previous meeting on draft article 1, had questioned the advisability of placing all the emphasis on the use of water rather than on the use of the watercourse, which

underlined the fact that there were different layers of interest. Perhaps the Commission should be talking in terms not of the use of water, but of the various aspects of the use of water. In a sense, Mr. Ushakov had been saying that certain uses of water were consumptive, whereas others left the quantity of water unchanged. Water used for the purpose of power development could still be delivered in the same quantity to the downstream State, and if a particular use had no effect on the downstream State, there was not the slightest reason to impair the freedom of the upstream State to do as it wished. Again, in the case of river basins which, though located within the territory of one State, drew supplies through underground flow or seepage from another State, the actual uses of the river might have no interest for that other State, since it was merely contributing something efferent to the river.

28. When drafting a definition, it was essential to ensure that those directly interested in a given problem dictated the solution to that problem. To that end, the Commission should seek to identify the areas in which there might be different groupings of interest. There were perhaps three such areas, relating respectively to consumptive uses of water, non-consumptive uses which affected the quality of the water delivered, and various circumstances having an important environmental effect, such as some phenomena which predisposed the whole region to flooding or drought.

29. The draft should also be flexible enough not to oblige a group of States in whose territory a river basin was situated to maintain that any measure taken in regard to the watercourse in question had to be decided by a majority vote of those States. Very often, it would be advisable for the States primarily concerned first to consider what would be in their interests, and then negotiate with those States which were only secondarily affected. The Commission should therefore be careful to avoid any provision under which only the States directly affected would be entitled to take part in negotiations. Such States should rather be encouraged to refer to certain general criteria that would enable them to solve their problems in some order of priority.

30. He agreed entirely that the Commission should not cast doubt on the validity of the general principles which limited the right of a sovereign State so to use its own resources as to do substantial harm to other States. In that connexion, the head of the Hungarian delegation to the High-Level Meeting within the Framework of the ECE on the Protection of the Environment (Geneva, November 1979) had stated that 95 per cent of the surface water in his country had its origin outside Hungarian borders. A statistic of that kind was so startling that it set at rest any question deriving from the Harmon doctrine. The problem facing the Commission, however, lay within a more contained area and related as much to diplomacy as to law. Specifically, it concerned the way in which the articles should be drafted in order to ensure that negotiations were not disturbed by the presence of

those who had no real interest in a given matter, while not excluding from consideration a State which might be able to show that it did have such an interest. In providing for those two elements, the practice developed by States themselves would be of considerable assistance.

31. The Special Rapporteur had rendered a great service and would certainly continue to do so. He should be left in no doubt about the Commission's confidence in the value of his task and its recognition of the need for a positive solution.

32. Mr. BARBOZA said that, despite the wide measure of support in the Sixth Committee for the Commission's work on the topic, a minority of States had adopted a negative attitude. The Commission, however, had a mandate to fulfil and should now proceed to do so in the hope that some common ground of agreement with those States would be found.

33. Several criticisms had been voiced as to the method to be adopted by the Commission. It had been said that the Commission was exploring new ground, that only a few of the draft articles had been submitted and that it was therefore difficult to judge the full scope of the work, and that the subject had not even been properly defined as relating either to rivers or to the river basin or, again to the drainage basin. He would deal in turn with those points in an effort to dispel what seemed to him to be a negative approach.

34. In the first place, the subject itself was not new, but it had acquired a new dimension since, under traditional international law, the uses of water had been limited and watercourses had therefore been of lesser interest than was the case today. The final Act of the Congress of Vienna (1815), for example, dealt mainly with navigation, which was the main use of rivers at the time, since the other domestic uses did not present any particular problem for States. All that had changed. The world population had increased dramatically and continued to do so, particularly in the developing countries. Industrial development had expanded, with a corresponding increase in the industrial uses of water, and pollution, unknown in earlier times, had also increased. There had been a proliferation of non-navigational uses, and as the availability of combustible fossils had declined, the needs in terms of power had risen and, consequently, so had the demand for watercourses to produce it. Above all, more water was needed for irrigation in order to meet the world's food requirements. There had, however, been no increase in water resources, and in some instances they were even being depleted by pollution and misuse of water. The world had become aware that the supply of natural resources was not unlimited, and conscious of the idea that shared natural resources should be shared fairly. The Commission therefore had a duty to provide adequate international legislation with a view to solving those problems; in so doing, it should not overlook the progressive development of international law.

35. There had been warnings against undue reliance on technical data, but such data were a feature of the times. In that connexion, it seemed to him that the principles set forth by the United Nations Conference on the Law of the Sea held at Geneva in 1958 had not foreseen the rapidity of technological progress. For example, the extension of the continental shelf had been defined by reference to the possibilities of exploration and exploitation, but that definition had become obsolete and without meaning now that the sea-bed could be exploited at any depth. On the other hand, at the time nobody had even considered having an exclusive economic zone, and when the Latin American countries, among others, had broached the idea at the Conference they had not been taken seriously; yet that idea was now fully accepted because of the increasing dependency of riparian populations on the resources of the sea. What had happened at the 1958 Conference on the Law of the Sea might well happen again if the Commission did not adopt a bold approach along the lines proposed by the Special Rapporteur.

The meeting rose at 1.05 p.m.

1609th MEETING

Wednesday, 11 June 1980, at 10.15 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Castañeda, Mr. Diaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

The law of the non-navigational uses of international watercourses (continued) (A/CN.4/332 and Add.1)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPporteur¹ (continued)

1. Mr. BARBOZA, continuing the statement he had begun at the previous meeting, said that the second point on which the Special Rapporteur's method had been criticized was that the scope of the rules to be drafted had not been determined. His own view was that that criticism was not justified.

2. At the present stage, the Commission was dealing with general principles, and it should not overlook all

that had been accomplished within the framework of the United Nations in respect of shared natural resources. For instance, the Charter of Economic Rights and Duties of States² was relevant to the topic, and it had also been considered at the United Nations Conference on Water. General Assembly resolution 3129 (XXVIII) dealt with co-operation in the field of the environment concerning natural resources shared by two or more States. A set of related principles had been drawn up by an intergovernmental working group of experts, and various non-governmental organizations and private bodies of high standing had also made contributions. All those instruments and bodies had recognized that water must be used equitably and in a reasonable manner; that co-operation must be established between the States belonging to a given watercourse system; that such States must not cause substantial damage to the other States of the system; and that machinery must be provided for the settlement of disputes. Thus the Commission was not working in a vacuum, since the waters of watercourses were considered to be a shared natural resource, and it could not be said that it was impossible to foresee the consequences of the rules it adopted. But if it was felt that in certain circumstances the consequences might be too far-reaching, then exceptions or restrictions should be provided for.

3. A point had been raised regarding the sovereignty of States over their natural resources. It was clear from the relevant General Assembly and Economic and Social Council resolutions that two kinds of relationships had to be considered: the relationship between a given natural resource and third States, and the relationship between the States which shared in that natural resource. In the latter case, it was not so much a question of sovereignty that was involved; what was needed was first to define the rights of the parties, since if one of them exceeded its rights on the pretext of sovereignty, the result could be a depletion of the resource to the detriment of the others—which could likewise invoke their sovereignty. On the other hand, the interests of States which shared in the natural resource should be protected in relation to third States.

4. The third point of criticism was that the object and purpose of the draft articles had not been defined. It was not the first time the Commission had deferred a definition until it had completed consideration of a set of draft articles, but in any event his view was that the definition should be drafted subsequently, in light of the principles to be adopted by the Commission and of the concept of shared natural resources. As he had already pointed out, it was important to bear in mind the need to provide for exceptions. In that connexion, reference had been made to the case of a watercourse which was located entirely within the territory of one State, but was fed by the underground waters of another State. Since, with advancing technology, it might soon be possible to deflect such waters or to use

¹ For the text of articles 1 to 7 submitted by the Special Rapporteur, see 1607th meeting, para. 1.

² General Assembly resolution 3281 (XXIX).

them to the detriment of ground water, that case should be brought within the scope of the draft articles, to ensure that a State which caused any damage in that way incurred responsibility under fluvial law.

5. The conclusion to be drawn from those general remarks was that the Commission should continue along the same lines with a view to submitting specific articles to the thirty-sixth session of the General Assembly.

6. With regard to the draft articles proposed by the Special Rapporteur, it had been suggested that in draft article 1 the phrase “the uses of international watercourse systems” would be preferable to “the uses of the water of international watercourse systems”. That was a point of terminology to which he did not attach great importance, but on balance, he preferred the wording proposed by the Special Rapporteur, since any use of a watercourse inevitably implied the use of water. He had no difficulty with the word “system”, but if there was any strong objection he would suggest that it be placed in square brackets. He had no objection to the reference to “flood control, erosion, sedimentation and salt water intrusion”, all of which related to the watercourse system and could affect its uses.

7. Article 4, which provided that the draft articles should be supplemented by system agreements, was particularly important. He agreed with the Special Rapporteur that there was an obligation to negotiate; it was imposed not only by Article 33 of the Charter of the United Nations, but also by customary law. In that connexion, the Special Rapporteur had drawn analogies with the *North Sea Continental Shelf* cases, the *Fisheries Jurisdiction* cases and the *Lac Lanoux* case³ that were perfectly acceptable to him. He considered, however, that the obligation to negotiate was incurred only when a difficulty arose and not before.

8. He approved of the terms of draft article 5, which provided the counterpart to the obligation to negotiate.

9. Draft article 7 was the most innovative feature of the Special Rapporteur’s report, and he agreed entirely that the concept of a “shared natural resource” (of which the implications had been frequently discussed at the United Nations) should be incorporated in the draft. In that connexion, the recommendations made by the United Nations Water Conference (see A/CN.4/332 and Add.1, para. 149) were particularly relevant, since they could, perhaps, indicate the course the Commission should follow. Those recommendations treated water as a shared natural resource and emphasized the need, on the one hand, for general and regional co-operation and, on the other, for relevant programmes and machinery, and for exchange of information and data. The Conference had also recommended that the codification and progressive

development of international law on the subject should be given a higher priority.

10. Mr. RIPHAGEN said that draft articles 1 and 7, which formed the cornerstone of the draft, dealt with the twin concepts of the international watercourse and of water as a shared natural resource; both of those concepts had institutional and substantive consequences. So far as their institutional consequences were concerned, the Special Rapporteur had imposed on States, under draft article 4, a duty to negotiate and had conferred on them, under draft article 5, a right to participate in system agreements. Where such agreements applied only to a part of the system, the right to participate was limited to States whose use or enjoyment of the water might be affected “to an appreciable extent”. In other words, the draft provided for a natural transition from the unilateral duty to negotiate to the multilateral duties and rights which arose as a result of the actual or foreseeable uses which were in actual or potential dispute. As States were not particularly anxious to enter into the kind of commitment which arose under system agreements, the right to participate in such agreements would perhaps not be invoked unless an actual or potential conflict of uses was involved. In his view, therefore, there was no reason to be unduly wary of the institutional consequences of the two concepts.

11. In that connexion, he referred the Commission to paragraph 218 of the Secretariat’s summary of the discussion held by the Sixth Committee of the General Assembly (A/CN.4/L.311), where it was suggested that a user or system agreement would itself determine which waters were covered by that agreement. The same idea was reflected in Principle 2 of the draft principles of conduct concerning shared natural resources prepared by an intergovernmental working group of experts set up by UNEP (A/CN.4/332 and Add.1, para. 90), so that possibly some wording along the lines of that text could be adopted.

12. He wondered whether the draft should not also take account of the second half of the hydrologic cycle, when the water was returned through the air. As technology advanced, there might well be some interference with that return flow, caused by what was sometimes known as artificial or atmospheric water. That point could perhaps be examined within the context of draft article 3.

13. He considered that the expression “system State” was preferable to “user State”: first, because the latter implied that a State could not only use, but also contribute to the waters of an international watercourse, and he doubted whether a State could so contribute; and secondly, because the water might ultimately be used by a State which was outside the system.

14. The substantive consequences of the twin concepts of the international watercourse and of water as a shared natural resource had yet to be determined,

³ See 1607th meeting, paras. 10–12.

since the Special Rapporteur had not proposed a draft article on that matter. In his view, however, the implications of the term "shared natural resources" need not cause concern. A comparison of the UNEP draft principles of conduct with a set of rules prepared by the OECD⁴ showed that, whereas the former were based on the shared resources approach, the latter were based on the classic approach to trans-frontier pollution, that was to say, to an act by a State which caused damage to another State giving rise to the responsibility or liability of the former State. The same classic approach was to be seen in Principle 22 adopted by the United Nations Conference on the Human Environment.⁵

15. The approaches of UNEP and OECD, though seemingly opposed, in fact arrived at virtually the same results and there were two particular examples of points on which they coincided. In the first place, article 3 of the Charter of Economic Rights and Duties of States included an important reference to "prior consultations" and that idea was echoed and mitigated in UNEP Principle 7. Secondly, the so-called principles of non-discrimination and equal access provided that States with differing environmental policies should none the less apply those policies without discriminating according to whether the damage would be caused on their own territory or on the territory of another State. That was akin to the principle of national law whereby an occupier of land was not permitted to throw his rubbish over his neighbour's hedge. The two approaches were also similar in that the classic approach made it essential to take account of the requirement of solidarity imposed by natural conditions, while the shared resources approach necessarily had to take account of the differences between States so far as their natural resources and technological and social systems were concerned. Whichever approach was adopted, therefore, the end result would lie somewhere between the two.

16. He had been somewhat surprised at the analogy with the *North Sea Continental Shelf* cases drawn in paragraphs 73 *et seq.* of the Special Rapporteur's report, since the International Court of Justice had in fact rejected the idea that the continental shelf was a resource shared by the States contiguous to it. The *Fisheries Jurisdiction* cases, mentioned in paragraphs 81 *et seq.* of the report, were also perhaps not entirely relevant to the concept of shared resources, although they were relevant to the obligation to negotiate. In the latter cases, the dispute had been mainly concerned with the appropriation of fish by ships, and territorial appropriation by coastal States.

17. The Special Rapporteur had also drawn an analogy with the navigational uses of international

watercourses. Freedom of navigation, however, involved the concept of human movement, and the development of that concept was mirrored in the development of the legal consequences of natural movement across frontiers. The difference between human movement and natural movement was also reflected in the opposition between the basic principles of freedom of navigation, on the one hand, and of equitable distribution of resources, on the other.

18. Mr. FRANCIS said that, from the very outset, many delegations to the General Assembly had asked when the draft articles would be ready, and the urgency of that question was a clear indication of the importance they attached to the topic. The Special Rapporteur was therefore to be commended on the speed with which he had responded. It was perhaps the same sense of urgency which had prompted one member to appeal to the Commission to dispel the atmosphere of doubt that had so long clouded the whole issue and get down to the task of preparing draft articles. Another member had rightly observed that, whereas the Commission had previously been engaged in the academic consideration of various topics, it was now dealing with a living subject and one of the most important to come before it for many years.

19. For his own part, he would stress the importance which the topic had assumed for the world community as a whole and its direct connexion with a universal right to development. For the very first time, the Commission's work would have an immediate effect on those for whom States existed, namely, people. Water was as vital to the remote regions of Asia, Africa and Latin America as it was to more heavily populated urban areas.

20. Reference had been made to the increasing demand for water for a variety of purposes and to the difficulty of balancing the rights of upper riparian States against those of lower riparian States, having regard to the right to development, depleted resources and increasing demand. In his view, the Commission could meet the challenge; but he spoke as an islander, and possibly his perspective was rather different from that of other members, many of whom lived with the problem and therefore had a more direct interest in it.

21. On the basis of the guidelines laid down by the General Assembly, the Commission should be able to produce some valid results, provided that members put their minds to the task and that there was a little more give and take. He was sympathetic to the suggestion that some definition of an international watercourse system should be adopted at the outset, since even a preliminary definition would lend purpose to the Commission's work. To leave the matter open would only make it more difficult for the General Assembly to lay down further guidelines.

22. He thought the members of the Commission were generally agreed that draft article 1, paragraph 1, should refer to the uses of the water of international

⁴ See OECD, *OECD and the Environment* (Paris, 1979).

⁵ See *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972 (op. cit.)*, Part One, chap. I, sect. II.

watercourses. They might, however, have different ideas about the wording of that paragraph, which should, in his opinion, be as neutral as possible. Draft article 1, paragraph 2, which referred to the use of water of international watercourses for navigation, might be considered incompatible with the title of the topic under consideration. The commentary might therefore be a better place for the provisions of that paragraph. He also suggested that, like draft article 3, draft article 1 might be placed in square brackets for the time being.

23. In draft article 2, unlike Mr. Riphagen, he found the term "user State" preferable to the term "system State", and he thought the article should take account of the uses of the water of international watercourses by non-riparian States.

24. In view of the delicately balanced community of interests which an international watercourse established among user States, he thought that draft article 5 should make negotiations obligatory.

25. Referring to chapter III of the Special Rapporteur's report (A/CN.4/332 and Add.1), he said that the plan of action adopted by the United Nations Water Conference (*ibid.*, para. 149) and the draft principles of conduct in respect of shared natural resources adopted by a working group of UNEP (*ibid.*, paras. 156 *et seq.*) were of particular relevance to the work now being carried out by the Commission. Chapter III also highlighted the need for a definition of the term "shared natural resources" that would, as the Special Rapporteur had pointed out in referring to the *Territorial Jurisdiction of the International Commission of the River Oder* case (*ibid.*, paras. 187 *et seq.*) have to take account of the principle that user States had a community of interests.

26. Mr. YANKOV said that the codification of the law of the non-navigational uses of international watercourses was obviously a task that would require great patience, but in view of the importance which States attached to the completion of that task, he was not sure that the need for patience would be understood. He therefore believed that the Commission should endeavour, at the current session, to make as much progress as possible on the formulation of specific draft articles.

27. The Commission had three basic choices to make. First, it had to choose between a general and a specific approach to the definition of the "uses" of the waters of international watercourses. The discussion had shown, however, that the Commission was well on the way to adopting a middle-of-the-road approach to the definition of that term.

28. Secondly, the Commission had to choose between a restrictive and a broad definition of the term "watercourse". He thought that in draft article 1, paragraph 1, it might consider the possibility of using terms such as "rivers, tributaries, lakes or channels dividing the territories of two or more States", which

were common in State practice and certainly more descriptive and pragmatic than the vague term "watercourse systems". The word "non-navigational" should also be added before the word "uses" in that paragraph.

29. The Commission's third choice related to the problems associated with international watercourse systems. It would have to decide whether to go as far as referring to natural phenomena associated with watercourses or simply to refer to the consequences of their uses. In his opinion, it should follow the cautious approach adopted by the Third United Nations Conference on the Law of the Sea in the "Informal Composite Negotiating Text"⁶ and refer specifically, in terms that were as precise and clear as possible, to the side-effects of the uses of international watercourses. It would, for example, have to refer to pollution resulting from the agricultural, industrial, commercial and domestic uses of such watercourses.

30. In draft article 2, it would be more in keeping with State practice to refer to "riparian States" than to "system States". In draft article 4, the use of the term "system agreements" would be acceptable if it was made quite clear that such agreements were based on the principle of non-discrimination, thus ensuring the eligibility of all riparian States to take part in them.

31. Although the idea of the need for negotiations expressed in draft article 5 was a good one, the wording of that article required further refinement. He hoped that draft article 6 could also be remodelled to take account of factors in local and regional co-operation among States, such as technical assistance and the monitoring and assessment of damage to the environment.

32. He fully agreed with the principle embodied in draft article 7, but thought that its wording required greater precision.

33. Lastly, he noted that it might be of great assistance to the Special Rapporteur if members of the Commission would try to make suggestions concerning the over-all structure of the draft articles, with a view to defining the boundaries of the legal rules to be formulated.

34. The CHAIRMAN, speaking as a member of the Commission, said he agreed with the Special Rapporteur's stated purpose of drafting a framework agreement that would set out the general principles of law governing the non-navigational uses of international watercourses and be supplemented by user-State agreements on detailed rights and obligations relating to the uses of particular watercourses.

⁶ "Informal Composite Negotiating Text Revision 2", drawn up in April 1980 by the President of the Third United Nations Conference on the Law of the Sea and by the Chairmen of the main committees of the Conference (A/CONF.62/WP.10/Rev.2 and Corr.2-5).

35. With regard to the scope of the framework agreement, he agreed that the purpose of draft article 1 should be to foreshadow draft articles dealing with the "uses of the water of international watercourse systems" and the associated problems of flood control, erosion, sedimentation and salt water intrusion, and, in addition, pollution. Since the uses of the waters of international watercourses were interrelated, it would not be practical to deal with navigational uses and non-navigational uses in separate, watertight compartments. Navigation was one of the possible uses of watercourses, and it could not be ignored if the internal logic and value of the draft articles were to be preserved. Draft article 1, paragraph 2, was therefore acceptable to him.

36. During the Commission's discussions, serious questions had been raised which showed that the meaning of some of the terms used in draft article 1 were not clear. For example, was the word "uses" in paragraph 1 to be taken to mean only uses of the intrinsic liquid or solvent properties of water, or did it also mean uses of its other physical properties, such as being a medium for the flotation of timber, the breeding of fish or, in combination with the earth's gravitational force, the driving of turbines for the generation of electric power? In his opinion, all those uses of the water of international watercourses should be covered in the draft articles. If necessary, a suitable provision in the article on the use of terms might explain that the term "uses" included all such uses.

37. The term "watercourse" also gave rise to problems of definition. He referred the Commission to the instructive report of the Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses,⁷ according to which watercourses must be of fresh water, as opposed to sea-water, and comprised rivers and other bodies of flowing water. In his opinion, the term "watercourse" made it clear that what was being referred to was water which flowed and over which objects moved. Any extension of the meaning of that term to include lakes, or drainage and river basins, would require a special provision in the article on the use of terms.

38. He was not convinced that it was necessary to attempt to define the term "watercourse" at present, because the scope of a rule regarding the use of the water of a watercourse would depend on the regulatory need to be fulfilled by that rule. He was therefore willing to follow the Special Rapporteur in his attempt to use the term "international watercourse system" without defining it, allowing the Commission's discussion of specific principles to bring problems of definition to the surface in a practical way. The Commission might thus gradually arrive at agreement on the scope of the term "watercourse".

39. For the time being, therefore, the Commission should proceed on the assumption that it was dealing essentially with international rivers flowing on the surface of the earth and thus offering themselves for direct human use, and with all the factors that were likely to affect those rivers "to an appreciable extent", to use the wording of draft article 5, paragraph 2, and thus need regulation. In that connexion, he noted that the Special Rapporteur seemed to imply that the "appreciable extent" concept might serve as a basis for a primary rule of conduct in the use of water, and not merely as part of a qualification for participation in a system agreement. In the context of such a rule it would, however, have to be shown that a change had taken place affecting the water in excess of a threshold standard or level, and that that change was in fact the result of some act or omission which could be attributed to one or more of the riparian States and did not have other causes for which they could not be held responsible. Even though threshold levels for the criterion of "an appreciable extent" would not be easy to establish, it would be necessary to ascertain whether appropriate scientific and technical data could be applied to determine, for the purposes of a given system agreement, whether the waters had been impaired for use and enjoyment, in terms of quantity, quality, direction of flow or availability, to such an extent that they no longer conformed to what could be expected by way of optimum use. Such a determination could, of course, give rise to serious difficulties of proof, as, for example, when atmospheric changes were attributed to man-made causes and were said to be the reason for a change in the quantity, quality, direction of flow or availability of the water of a system State. But that would not appear to invalidate the Special Rapporteur's basic approach, which was certainly worth pursuing.

40. With regard to water as a shared natural resource, the Special Rapporteur's approach was an interesting and modern one that was in line with recent thinking in the international economic and regulatory field. In paragraphs 140 and 141 of his report, the Special Rapporteur had made what might almost be called a passionate appeal for the adoption of the approach he proposed. He (Mr. Pinto) could agree with that approach, but thought that the Commission should be cautious about the implications of the title of chapter III: "Water as a shared natural resource".

41. He agreed with the central principle proposed for inclusion in draft article 7, namely, that the water of an international watercourse system was to be treated as a shared natural resource. That principle was implied in the provisions of draft articles 5 and 6. In other words, the rights and duties embodied in draft articles 5 and 6 were, in fact, natural and logical derivatives of those implied in draft article 7. He therefore suggested that draft article 7 might eventually be moved to the place now occupied by draft article 4.

⁷ *Yearbook ... 1974*, vol. II (Part One), pp. 301 *et seq.*, document A/9610/Rev.1, chap. V, annex.

42. It was because water was treated as a shared natural resource that all entitled to share were entitled to participate; that was the meaning of article 3 of the Charter of Economic Rights and Duties of States, which itself embodied the concepts of interdependence and co-operation. The fact of interdependence gave rise to the duty to share equitably and the duty to co-operate in achieving optimum use and in minimizing, eliminating or avoiding injurious consequences.

43. He found it difficult to agree with paragraph 148 of the report, in which the Special Rapporteur stated that article 3 of the Charter of Economic Rights and Duties of States was an exception to the rule of permanent sovereignty. Permanent sovereignty subsisted in a shared natural resource and was the very basis for the concept of equitable sharing of benefits. The fact that certain modalities might be prescribed for the use and enjoyment of a shared natural resource should in no way be understood as diminishing either a State's sovereignty or the permanence of that sovereignty over the natural resource in question. What was called for was a proper balancing of the various interests of the States concerned, not the postulation of a nominal equality that like the concept of the freedom of the seas, would tend to mask gross inequalities and perpetuate them indefinitely.

44. The principle that water was a shared natural resource gave rise to the need for institutional arrangements, to which reference had been made in many of the texts referred to by the Special Rapporteur in chapter III of his report, and which might take the form of inter-State commissions. In his (Mr. Pinto's) opinion, however, the draft articles should go further and require the establishment of such inter-State commissions, not merely as a necessary derivative of the concept of sharing, but as an integral part of it. A modern precedent for that requirement was to be found in the provisions on sea-bed mining contained in the draft Convention on the Law of the Sea.⁸ There were many similarities—and also many points of difference—between the uses of rivers and the uses of the sea, but the need for institutional arrangements to secure the rational and equitable utilization of a commonly held or shared natural resource was now accepted with respect to the sea, and was equally applicable to rivers. The scope of the powers and functions of the commissions to be established and the basic principles for their operation would, of course, be defined in specific agreements reflecting the particular needs of the States concerned. He hoped that the Special Rapporteur would consider the possibility of providing in the draft articles for the establishment of institutional arrangements to give effect to the principle that water was a shared natural resource.

45. Lastly, he considered that the draft articles submitted at the current session contained sound principles and that they should therefore be referred to the Drafting Committee.

The meeting rose at 1.05 p.m.

1610th MEETING

Thursday, 12 June 1980, at 10.05 a.m.

Chairman: Mr. Juan José CALLE Y CALLE

Members present: Mr. Barboza, Mr. Castañeda, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov

Tribute to the memory of Mr. Masayoshi Ohira, Prime Minister of Japan

1. The CHAIRMAN expressed to Mr. Tsuruoka the condolences of the Commission on the occasion of the death of Mr. Masayoshi Ohira, the Prime Minister of Japan.

On the proposal of the Chairman, the members of the Commission observed a minute of silence in tribute to the memory of Mr. Masayoshi Ohira.

2. Mr. TSURUOKA thanked the Commission for its condolences. He would not fail to convey that expression of sympathy for himself, and for Japan as a whole, to the Japanese Government and the family of the late statesman.

The law of the non-navigational uses of international watercourses (continued) (A/CN.4/332 and Add.1)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR¹ (continued)

3. Mr. TSURUOKA said it should be remembered, at that preliminary stage in the work of the Commission, that its mandate was to codify international law and ensure its progressive development. The Commission's task was to forge an international legal instrument which would facilitate the effective use of international watercourses in peace and equity, taking the interests of all States into account. That instrument should be easy to apply and drafted in such a way as to avoid abusive interpretation. The Commis-

⁸ See "Informal Composite Negotiating Text/Revision 2" (foot-note 6 above), art. 153 and annex III.

¹ For the text of articles 1 to 7 submitted by the Special Rapporteur, see 1607th meeting, para. 1.

sion should thoroughly understand its task in order to make a judicious choice of basic principles and determine the scope of its future draft articles.

4. Although his country, Japan, had no international rivers, he was personally very interested in the subject. He had participated in New York in the drawing-up of the Mekong project, with which Japan was associated and to which it made a large contribution. He noted with interest that the implementation of that project had continued until recently, despite the armed conflicts between the countries concerned and the very difficult operating conditions. He saw that as tangible proof that the interest of States in the project was the source of a very powerful feeling of international solidarity. It was probably a sign of the existence, around the Mekong, of a common area of civilization that was deeply conscious of the need for international collaboration.

5. In codifying the law of the uses of international watercourses, the Commission would be doing particularly useful work, and he hoped that henceforth it would make rapid progress.

6. With regard to the general structure of the draft articles, he had already endorsed the two-stage plan proposed by the Special Rapporteur, according to which the Commission would deal first with the framework agreement, which would then be supplemented by system agreements.² That seemed to be a very good way of ensuring legal uniformity despite the physical diversity of watercourses. Nevertheless, he supported the plan with certain reservations, since the Commission could not know at that stage whether it would still be necessary to provide for system agreements when it had drafted the framework agreement. He recommended that the Special Rapporteur should give the Commission a comprehensive view of the content of the framework agreement, and hoped he would draw up a list that would be as full as possible, so that the Commission could judge whether it was necessary to provide for system agreements.

7. In article 4, paragraph 1, the Special Rapporteur stated, with some temerity, that "These articles shall be supplemented ...". Greater caution seemed to be called for, since the countries concerned might be unable to conclude a system agreement. In order to allow for that eventuality, he would like the draft articles to be supplemented by a procedure similar to that provided for in article 66 of the draft articles on treaties concluded between States and international organizations or between two or more international organizations and the annex thereto, submitted to the Commission by Mr. Reuter.³ That procedure would come into play automatically in case of a deadlock over an agreement, and would thus have the great advan-

tage of defusing possible conflicts. At the same time, the possibility of recourse to judicial settlement or arbitration might also be mentioned. Finally, the system agreement was not the only means which interested States could employ.

8. In article 5, he thought that the expressions "All system States" and "applies to the international watercourse system as a whole" should be made more precise by amending them to read: "All system States of an international watercourse system" and "applies to that international watercourse system as a whole".

9. He also pointed out that paragraph 2 of the same article introduced the notion of "enjoyment of the water", which did not appear in any of the preceding provisions. He would like the exact meaning attributed to that expression in the context to be clarified; if its use was not strictly necessary, it would be better to delete it.

10. Despite the many details which remained to be considered, he believed that the time had come for the Commission to go resolutely ahead, with courage and confidence. The first stage would be to refer all the draft articles to the Drafting Committee.

11. Mr. DÍAZ GONZÁLEZ said he agreed with Mr. Reuter (1607th meeting) that in venturing into the unknown realms of the topic of international watercourses the Commission was not dealing with a classical subject of international law. It had reached a crucial point in its history and had to face the task of inventing new rules of conduct for States, on the basis of the few precedents that existed in instruments such as the Convention and Statute on the Regime of Navigable Waterways of International Concern (Barcelona, 1921),⁴ the Helsinki Rules on the Uses of the Waters of International Rivers (1966),⁵ the Charter of Economic Rights and Duties of States (1974),⁶ and the Draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States (1978), which had been prepared by an Intergovernmental Working Group of Experts under the auspices of UNEP (see A/CN.4/332 and Add.1, paras. 90 and 158-159).

12. He also agreed with Mr. Reuter that the key to the success of the Commission's study might lie in the term "international watercourse systems" introduced by the Special Rapporteur in draft article 1. That term was particularly appropriate because it reflected what the majority of representatives of States seemed to have had in mind when discussing previous reports on the topic under consideration. The concept of an "international watercourse system" was also fairly

² See *Yearbook ... 1979*, vol. II (Part Two), p. 166, document A/34/10, para. 134.

³ See 1589th meeting, para. 1, and 1593rd meeting, para. 58.

⁴ League of Nations, *Treaty Series*, vol. VII, p. 35.

⁵ *Yearbook ... 1974*, vol. II (Part Two), p. 357, document A/CN.4/274, part four, sect. C, 1.

⁶ General Assembly resolution 3281 (XXIX).

similar to the concept of the “international drainage basin”, which had formed the basis for the Helsinki Rules, the Treaty on the River Plate Basin (1969)⁷ and the Treaty for Amazonian Cooperation (1978) (see A/CN.4/332 and Add.1, para. 206). The term “system” introduced by the Special Rapporteur would, moreover, facilitate the Commission’s task of formulating rules to govern use of the waters of international watercourses, because it covered both the watercourse as such and all the elements, including water itself, which composed the watercourse.

13. In that connexion, he referred to the first report, in which the Special Rapporteur had noted that: “Although fresh water is a renewable resource, it is within man’s capability so to upset the order of nature that the hydrologic cycle can no longer produce ‘sweet water’”.⁸ It was because of the need to regulate man’s ability to upset the balance of nature and thus adversely affect the hydrologic cycle that the Commission had to formulate rules governing and restraining that ability to cause damages and to upset what nature had created.

14. Another of the key concepts on which the Special Rapporteur had based his second report was that of “shared natural resources”, which was perhaps not quite as fashionable a concept as it might seem, because it had existed for over two hundred years. A great deal of work had already been done by various United Nations organs in attempts to define the concept of shared natural resources and to formulate guidelines for the conduct of States in the conservation and use of such resources. In dealing with the problem of shared natural resources, it was quite natural to refer also to sovereignty, and that concept need not cause concern, for with the progressive development of international law it had gradually taken on a meaning different from its nineteenth-century acceptation. There was, however, no doubt that States exercised sovereignty over their natural resources and continued to do so even when those resources were shared.

15. The Commission would sooner or later have to deal with the problem of the definition of terms, even if attempts to solve that problem prevented it from making rapid progress on the formulation of draft articles. It should therefore assume that the basic term “international watercourses”, used in draft article 1, was acceptable, and proceed step by step to formulate rules on the effects of the use by States of the waters of such watercourses. Early acceptance of the terms proposed in the draft articles would, moreover, save the Commission having to retrace its steps later.

16. Although there was still a good deal of work to be done on the draft articles submitted at the current

session, he would have no objection to their being referred to the Drafting Committee, which might, for example, take note of the fact that in draft article 1, the wording of paragraph 2 should be brought into line with that of paragraph 1, which referred to “international watercourse systems”, not merely to “international watercourses”.

17. Mr. TABIBI said that at the thirty-fourth session of the General Assembly he had taken part in the work of the Sixth Committee, which had discussed the topic of the non-navigational uses of international watercourses, and in the work of the Second Committee, which had considered and merely taken note of the draft principles of conduct in the field of the environment prepared under the auspices of UNEP. He had thus been in a position to see that, on the whole, States were still rather cautious in their approach to the question of shared natural resources and were eagerly awaiting the results of the Commission’s current study.

18. The Commission was fortunate to be guided in its work by a Special Rapporteur from a country which was both an upper and a lower riparian and who thus had great technical and scientific experience of the topic under consideration and the problems it raised. The topic was a many-faceted one, with economic, social and political implications that had taken on increasing importance as a result of technical advances in the science of hydrology and in subjects such as water pollution and population growth. It was the Commission’s duty to formulate rules on the use of the waters of international watercourses that would promote co-operation between States and help to settle disputes, not complicate them.

19. Member States should be urged to reply to the questionnaire sent to them by the Commission⁹ and invited to include technical experts in their delegations when the Commission’s report on the topic was discussed in the Sixth Committee, at the thirty-fifth session of the General Assembly. UNEP, FAO and other bodies dealing with water-related problems should also be invited to send representatives to take part in the Sixth Committee’s discussions. The Commission should, moreover, consider the possibility of devoting more time to the topic at its next session.

20. Referring to draft article 1, he said he was concerned about the vagueness of the term “international watercourse”, for such vagueness would undoubtedly complicate the Commission’s task of formulating rules generally acceptable to all States. He thought it would be better to replace that term by “international river”, which had been used and defined in the Final Act of the Congress of Vienna (1815).¹⁰ Although the word “system” was frequently associated with the word “river”, its meaning was not entirely clear. In the past, it had merely denoted a “network” of riparian States, but now it could also be

⁷ United Nations, *Treaty Series*, vol. 875 (to be published), No. 12550.

⁸ Reproduced in *Yearbook ... 1979*, vol. II (Part One), document A/CN.4/320, para. 29.

⁹ *Ibid.*, document A/CN.4/324, para. 6.

¹⁰ *Ibid.*, document A/CN.4/320, para. 43.

used to refer to canals, lakes, tributaries and drainage basins. It would therefore be necessary to define the word "system" as clearly as possible if it was to be used in the draft articles.

21. Draft article 7—which in his opinion was the key article submitted at the current session—seemed to imply the idea of complete partnership in the use of natural resources. In a case in which 90 per cent of the waters of an international river flowed in the territory of upper riparian State A, he wondered whether, under the terms of draft article 7, it would be possible for lower riparian State B, in which only 10 per cent of the waters of the river flowed, to claim full partnership in the use of those waters and, if it so wished, deny State A its rightful use of the waters. Such a possibility would, in his opinion, be contrary to the principle of permanent sovereignty over natural resources. In that connexion, he referred to articles 2 and 3 of the Charter of Economic Rights and Duties of States and to paragraph 90 of the Mar del Plata Action Plan adopted by the United Nations Water Conference (see A/CN.4/332 and Add.1, para. 149), which might throw some light on the meaning and implications of draft article 7. He suggested that the Special Rapporteur might consider wording the article in softer terms, in order to reflect the cautious approach to the question of shared natural resources adopted by the General Assembly when it had considered the draft principles of conduct prepared under the auspices of UNEP.

22. Lastly, while it was true that navigation was the best established of the various uses that had given rise to the existing body of international law applicable to shared resources (*ibid.*, para. 186), he could not agree with the Special Rapporteur that the body of law respecting navigation should provide sources and analogies for the law of a non-navigational use of international watercourses such as irrigation, which, compared with navigation, was a relatively new activity.

23. Mr. JAGOTA said that the topic under consideration was of great practical importance for the whole world, particularly in view of the effects which the expected water shortage would have on development. It was true that water had a special kind of unity, but that was of little comfort to countries where even the drinking water had to be brought in from outside.

24. The uses of water were manifold. Fresh water flowing towards the sea served primarily as a means of transport and communication, but the movement of goods and persons would not of itself suffice to promote development. That could only be achieved by a proper use of water designed to ensure an adequate supply for urban areas, agriculture, industry and, where the course of the river was suitable, for the generation of electric power. The Commission's task should be to classify the uses very carefully and to examine the whole question independently, rather than by analogy with the rules developed for the navigation

of international watercourses. The General Assembly, it would be remembered, had taken the view that, since there was already a large body of conventional and customary law on the navigational uses of international watercourses, the Commission should concentrate on the non-navigational uses. He trusted that it would do so and that it would propose a set of draft articles based on a study that would serve to promote the codification and progressive development of international law in that area.

25. The non-navigational uses of international watercourses were of special interest to the part of the world from which he came, and he had been surprised to learn that 90 per cent of the water drawn from rivers of India was used for agriculture. With industrial development, however, that percentage would obviously change.

26. It had been suggested that an empirical approach should be adopted in studying the subject. That meant that the non-navigational uses of international watercourses should first be classified into consumptive and non-consumptive uses—the former embracing, for example, agricultural, industrial and domestic uses and the latter, generation of power and timber floating. Then, one or two uses should be selected and examined in the light of State practice, doctrine and the recommendations of various international conferences and expert groups, and on the basis of that examination certain propositions could be formulated for the Commission's consideration. The Special Rapporteur, however, favoured what might be termed a deductive approach, whereby the Commission would first determine the basic concepts, and then classify the various uses and determine the principles applicable to each particular use. While he was prepared to accept that approach, he thought it would take more time, since it involved the definition of the term "international watercourse", which was bound to give rise to difficulties. Indeed, it was for that reason that the Special Rapporteur had decided to use the term in a flexible manner without prejudging the scope of the draft.

27. The Commission would have been assisted in its task if a comparative table had been provided, setting out the ten draft articles proposed in the first report,¹¹ and the seven new draft articles and indicating the changes introduced and the reasons for them. He noted, however, that the Special Rapporteur had not modified his basic idea of a framework agreement that would be supplemented by system agreements to take account of the special features of a particular river system or of sections of that system.

28. He also noted that the main elements of the former draft articles 1, 2 and 3 remained in the new articles, although certain terms had been changed: for instance, "international watercourse" had been re-

¹¹ *Ibid.*, para. 2.

placed by “international watercourse system” and “user agreements” by “system agreements”. With regard to the first of those terms, he agreed that the concept of a watercourse was broader than that of a river, since a watercourse included lakes and the tributaries of rivers, but whether or not it also included ground water would have to be decided later. On the other hand, the terms “international watercourse” and “international watercourse system” conveyed exactly the same meaning to him, and there seemed to be no need to replace the original term. But he had no strong objection to the term “international watercourse system” and could accept it, as well as the term “system State”. It might, however, be advisable to explain, for the benefit of Governments, that it was a term of art, which had been adopted to define a concept.

29. The Special Rapporteur had been right, in his view, to omit the provisions of the former draft articles 5 and 6 that dealt with the somewhat controversial issue of the relationship between the framework agreement and system agreements and to replace them by a provision determining which States would be parties to system and sub-system agreements. The Special Rapporteur had likewise omitted the provision relating to the entry into force of an international watercourse agreement, which would be incorporated in the final clauses. In addition, he had combined the provisions of the former draft articles 8, 9 and 10 in a new draft article 6.

30. Draft article 7 introduced, for the first time in that context, the concept of a shared natural resource. The Special Rapporteur had referred in that connexion to article 3 of the Charter of Economic Rights and Duties of States, which, as explained in paragraph 148, his report interpreted as incorporating an implied exception to the terms of article 2 of that Charter: in other words, the principle of permanent sovereignty over natural resources did not apply to shared natural resources. That seemed to be a rather far-fetched idea and one which could raise highly political and sensitive issues, for it would be difficult to accept that a State had no power to decide how it used the waters which flowed through its territory. The main difficulty arose from the word “shared”; that word should therefore be defined to make it quite clear that the waters passing through the territory of a State were under the sovereignty of that State and that it could use them as it wished, so long as it did not do any substantial harm to another State. On that understanding, the expression “shared natural resource” would be acceptable, although the relationship between articles 2 and 3 of the Charter of the Economic Rights and Duties of States would have to be reviewed.

31. He had no objection to including lakes, boundary rivers and resources which straddled a boundary in the concept of shared natural resources. But that concept should not be understood as extending to a river until its elements had been defined so as to ensure that an equitable share in the rights over an international

watercourse system was given to each of the States belonging to that system. He feared that any such extension of the concept might create political problems. If, for example, a river flowed mainly through the territory of one State, and the lower riparian States which had only a minor share in that river caused damage to the upper riparian State, what recourse would the latter State have? The crucial point, therefore, was to determine the amount of water to which each State was entitled.

32. Referring to the individual draft articles, he said he saw some advantage in referring, in draft article 1, paragraph 1, to “the uses of the water” of an international watercourse system rather than to the uses of that system itself. In connexion with paragraph 2 of the article, the Special Rapporteur had given a very elaborate example of how the navigational uses of a river or a watercourse had developed the concept of a shared natural resource for application to non-navigational uses. That example, in his view, failed to take account of the basic differences between navigational uses and non-navigational uses.

33. He noted that the Special Rapporteur had explained that the word “flows”, in draft article 2, did not prejudice the scope of the articles, since even ground water could be said to flow. He trusted that the Commission would bear that point in mind.

34. There were certain basic differences between draft article 4, which related to system agreements, and the corresponding provision (art. 3) proposed by the Special Rapporteur in his first report. In the first place, the new draft article consisted of two paragraphs, rather than one, the first of which related to the obligation to conclude a system agreement and the second to the type of system agreement concluded. Secondly, the words “may be supplemented”, in the former article, had been replaced, in paragraph 1 of draft article 4, by the words “shall be supplemented”. In his view, the latter expression, which was mandatory, was out of place in a paragraph which included a phrase denoting a certain flexibility, namely, “as the needs of an international watercourse system may require”. The Drafting Committee could perhaps be requested to find some other suitable formulation. With regard to paragraph 2 of draft article 4, he agreed that the phrase “provided that the interests of all system States are respected therein” was very categorical. He proposed that it be replaced by: “provided that the interests of the system States are not adversely affected”.

35. The reference in draft article 5, paragraph 2, to the “provisions of a system agreement” did not seem very logical, since it was difficult to see how a system State could participate in the negotiation of an agreement that had already been concluded. He would therefore propose that the word “provisions” be replaced by the word “conclusion”. He was also uncertain as to the precise legal import of the phrase “affected to an appreciable extent”. The Special

Rapporteur had explained in paragraphs 119–123 of his report that, in that context, the meaning of the word “appreciable” lay somewhere between “substantial” and “minimal”, but the point was, where? The phrase “affected to some appreciable extent”, which appeared in paragraph 119 of the report, was no clearer. Hence it seemed that the criteria for determining whether another system State could participate in the conclusion of an agreement required further consideration.

36. Lastly, with regard to article 6, he considered that provision for the systematic exchange, as opposed to the collection, of hydrographic data pertaining to the planned uses of water should be made in a sub-system agreement, and not be incorporated in the draft as a general principle of law.

The meeting rose at 1 p.m.

1611th MEETING

Friday, 13 June 1980, at 10.10 a.m.

Chairman: Mr. Juan José CALLE Y CALLE

Members present: Mr. Barboza, Mr. Castañeda, Mr. Díaz González, Mr. Francis, Mr. Jogota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/332 and Add.1)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR¹ (*continued*)

1. Mr. CASTAÑEDA said that the Special Rapporteur's second report (A/CN.4/332 and Add.1), which in the main he endorsed, had the merit of being based on perception of contemporary needs. Rivers and watercourses were used far more widely than in the past, when navigation had been the main use and the sections of a watercourse which passed through each State, as well as the tributaries of rivers, had been regarded, quite logically, as having a certain autonomy, particularly as the exigencies of international life had not yet imposed the concept of shared resources. Since the beginning of the twentieth century, however, there had been a marked change in the situation, which was why a new legal regime for watercourses was required.

¹ For the text of articles 1 to 7 submitted by the Special Rapporteur, see 1607th meeting, para. 1.

2. The first question to consider was whether the Commission should start by drawing up a set of general principles common to all the uses of watercourses, or should deal first with specific uses and then move on to general principles. While either approach was possible, he thought the Special Rapporteur had been right to adopt the first, deductive, approach; for, as pointed out in paragraph 30 of the report, it would be difficult to draw up “a rule dealing with specific activities without knowledge of how the rule fits into a general scheme of things”. If the Commission decided to adopt the first approach, it would presumably determine certain general principles applicable to each of the specific uses of an international watercourse and then, in the second stage of its work, lay down the rules applicable to those uses.

3. The second question which had to be considered was whether the Commission should think in terms of a framework agreement that was residual in character and would be supplemented by system agreements. In his view, the Special Rapporteur's approach to the question was well conceived, since system agreements would obviously be required to take account of the widely differing features of international watercourse systems. Some thought should, however, be given to the possibility that, within the residual framework, certain basic principles might be determined which were not themselves residual, but were perhaps even in the nature of a *jus cogens* rule. The concept of shared natural resources, for example, when it had reached its final form, could constitute such a principle.

4. A third question was whether the draft articles should regulate the use of an international watercourse system or the use of the water of such a system. Mr. Ushakov had raised a valid point at the 1607th meeting when he had suggested that, in the case of hydroelectric power stations and timber floating, it was not so much the water itself that was used as the current or flow of the water, which should therefore also be treated as a resource. The Commission's mandate was to prepare draft articles to regulate all the uses of an international watercourse—not only the uses of the water, but also the uses of the current or flow. Possibly that point could be covered by an appropriate reference in draft article 1.

5. The latter part of paragraph 1 of draft article 1 listed certain problems associated with international watercourse systems, and it had been suggested that pollution should be included. That seemed to him to be a most important point. Pollution was an indirect consequence of one of the oldest and most traditional uses of watercourses, namely, as a vehicle for the disposal of human and other waste. With the development of industry, particularly the chemical industry, that problem had inevitably become more acute, and strict regulation was required, bearing in mind, especially, the effects which pollution would have on downstream riparian States. At a symposium on pollution which he had attended, his colleague from the

Netherlands, referring to the recycling of river waters, had said that every glass of water a Dutchman drank had been drunk at least four times before. That was a measure of the size of the problem.

6. The problem of defining an international watercourse involved two questions: first, how should a watercourse be defined for the purposes of the draft articles; and second, what should be the scope of the draft articles? As to the first question, he considered that the Special Rapporteur had been right not to attempt a precise definition at that stage. It would be necessary to do so before long, however, since in examining specific uses, the Commission would need to know exactly what it was talking about. His own preference would be for a definition which took as its central theme the flow of waters in a continuous movement towards a final point. The same idea had been conveyed in a proposal made by the representative of the Soviet Union in the Sixth Committee of the General Assembly, namely, that the term "international watercourse" should be taken to mean "waters flowing along a certain course" (see A/CN.4/332 and Add.1, para. 36). That wording, with some adjustment, could perhaps cover all international watercourse systems within the meaning of the draft articles.

7. The second question, that of the scope of the draft articles, was a matter of vital importance, on which every member of the Commission should express an opinion. For his own part, he considered that, bearing in mind the conditions of modern life, the only valid approach was to take the broad view and adopt the concept of the drainage basin; that, however, was an entirely different matter from deciding whether or not certain elements, such as ground water, should be regarded as part of the drainage basin. He agreed entirely that a river which flowed through the territory of one State but was fed by subterranean waters from another State should not be subject to the legal regime proposed in the draft articles. The essential principle was that of the ecological and hydrological unity of the basin. In varying degrees, the same conditions obtained for the majority of rivers, irrespective of whether they were long, with few tributaries and few riparian states, like the Nile, or short, with many tributaries and many riparian states, like the Rhine or the Danube—and those conditions required that the river be dealt with as one unit.

8. As the world's population increases over the coming decade, so would its water requirements. The classic concept of international rivers, as adopted at the Congress of Vienna (1815), had made sense in the days when supply exceeded demand and the use of rivers had not involved complex issues relating to the rights and obligations of riparian States. The present situation was akin to that which had arisen in regard to exploitation of the resources of the sea: it had been recognized that those resources would have to be used in a rational manner that was fair to all States, and

that mankind could no longer enjoy the total freedom it had had when the resources of the sea had been more than sufficient for all the world's needs.

9. Mr. Yankov had advocated, at the 1609th meeting, a pragmatic approach, urging the Commission to rely more on precedent and to guard against a tendency to draw analogies with the law of the sea. While he (Mr. Castañeda) agreed on the need to be pragmatic, he considered that where precedent was concerned it was necessary to be selective. The Commission should not refer to precedents that had been relevant in the very different conditions of the nineteenth century, but only to those that were relevant in the contemporary world. Indeed, that was the decisive criterion for the codification of any subject and the progressive development of the international law governing it. For instance, when the Commission had first considered the question of the continental shelf, none of the classic conditions for codification had existed; there had been no uniform doctrine, no uniform State practice, and virtually no precedent. The Commission had nonetheless drafted a convention which had been adopted and which, twenty years later, was recognized as constituting international law on the subject. Thus precedent should not be over-emphasized. Lawyers dealing with matters subject to great change, particularly technological change, should adopt a flexible approach and look to the future rather than to the past. During the nineteenth century, the only technological change introduced in navigation had been the use of steam for locomotion; that had revolutionized transport, but not the navigational uses of rivers—and still less the non-navigational uses. Radical changes in that area had been relatively recent, and had occurred mainly since the Second World War.

10. The importance of analogy was also sometimes over-emphasized, in his view, but in certain circumstances it could be useful. The examples given in the report, particularly those drawn from the United Nations Conference on the Law of the Sea, were very pertinent, but, once again, it was essential to bear in mind the decisive criterion of the needs of modern man. In the case of the exclusive economic zone, for example, precedent had held that any move to appropriate, or even to mark a preference for, the resources of the sea beyond the narrow band of territorial waters was illegal—and that precedent had been invoked only ten years earlier. Yet, at the Conference on the Law of the Sea, the lawyers had brought about a radical change in a relatively short space of time, on the basis of the clearly expressed will of States. Since 1964, there had been 62 unilateral declarations on rights relating to the exclusive economic zone beyond the territorial sea; that was an extremely important development, and one that indicated the path to be followed in an area of rapid change. Similarly, in the case of marine pollution, it was the international community's sense of responsibility that had led to the adoption of new standards.

11. The Special Rapporteur had wisely decided not to use certain concepts such as the catchment area of drainage basin and, instead, had simply adopted the word "system". It was a felicitous choice, for that word indicated a plurality of interests in an integrated whole, and would make for the requisite broadly based approach.
12. While he agreed with the provisions of draft article 4, he considered that emphasis should be placed on the obligation of States to enter into negotiations in good faith, within the framework agreement, with a view to settling all matters relating to the uses of the waters of an international watercourse system. As suggested by the Special Rapporteur, it might therefore be advisable to state that obligation in more specific terms.
13. He endorsed the basic approach and general principle adopted in draft article 5. At the same time, however, he recognized that the more general problem, referred to by Mr. Reuter (1607th meeting), of the right of States to participate in treaties, was not easy to solve and that some modification of the draft article might therefore be required.
14. With regard to draft article 7, although the legal effects of treating an international watercourse system as a shared natural resource had not been determined, he agreed with Mr. Riphagen (1609th meeting) that there was no need for the Commission to be wary of the idea. There were a number of documents, to which Mr. Barboza (*ibid.*) had already referred, that gave some idea of those effects, and the Commission should therefore be able to accept the "shared resource" approach, on the understanding that at a later stage a special regime would be established. In his view, however, it would be quite wrong for the Commission to say that it could not decide whether water was a shared natural resource until the legal effects of that concept had been determined. It should accept the principle of a shared natural resource and proceed, on that basis, to draw up a balanced and equitable body of rules to govern the rights and obligations of States.
15. Nevertheless, the precise legal character of the concept required further study and analysis before it could be more clearly delineated, particularly as it related to the sovereignty of States. One possibility would be to treat the concept of a shared natural resource as an exception to the exercise of sovereignty, though he had doubts about the viability of that approach. Another possibility would be to accept a form of shared sovereignty, but there again he was not convinced. It seemed to him that, in the case of a river which flowed through several territories, a State could perhaps exercise sovereignty over a part of the shared natural resource commensurate with its uses of that resource. In the case of boundary rivers and lakes, some other solution would, of course, have to be found. In his view, however, the Commission did not need to have a precise idea of the legal character of a shared natural resource before it proceeded to formulate the draft articles.
16. He would recommend that the draft articles proposed by the Special Rapporteur be referred to the Drafting Committee, in the hope that they could then be submitted to the thirty-fifty session of the General Assembly.
17. Mr. ŠAHOVIĆ, referring to the statement he had made at the 1607th meeting, said he had understood that the general debate on the Special Rapporteur's second report would be followed by a discussion on each separate draft article, but now it seemed that all the draft articles might be referred to the Drafting Committee. In his opinion, that step would be premature, because the Commission had not yet agreed on matters that were essential for the drafting of articles to be submitted to the General Assembly. In particular, the Commission should first decide on a method of work.
18. It should also be noted that some of the ideas put forward in the report, although they were accepted by the Commission and reflected in draft articles, would not meet the needs of the great majority of States and did not take due account of concrete situations. It was in order to meet the needs of States that the Commission had been entrusted with the codification and progressive development of the rules relating to the topic under consideration. In these rules, emphasis could be placed either on the uses of water as the common heritage of mankind, or on the interests of user States. However, there was an economic, political and legal fact which could not be overlooked: States were sovereign entities whose authority extended over all their territory. In particular, it extended to the water of watercourses which traversed their territory, even if that water was used by other States in other territories. Hence water should not be considered in the abstract, but having regard to the sovereignty of States.
19. In the past, States had gradually come to co-operate in the settlement of problems raised by international watercourses, and they had worked out legal rules which were now embodied in positive international law. Instead of trying to draw analogies with the law of the sea, the Commission should study the topic under consideration in the light of the solutions that could be provided by positive international law; many of the situations described by the Special Rapporteur could be regulated in that way. The Commission should not place too much emphasis on the innovative aspect of the work, but start out from positive law and adapt it, where necessary, to particular situations. If it dwelt too much on problems that were not really essential, it would be in danger of complicating its task.
20. For instance, it would be useless to discuss the concept of shared sovereignty as an exception to the principle of permanent sovereignty. He could not accept such a concept, and doubted whether it would

be acceptable to the great majority of States. The introduction of that concept might lead the Commission's work in an entirely different direction. It should not be forgotten, for example, that when rules had been formulated on freedom of navigation on international watercourses, a serious dispute had arisen between riparian States and other States which had claimed that they, too, enjoyed such freedom, independently of the sovereign rights of riparian States. It was to be feared that such a situation might arise again, and that industrialized States, invoking the concept of shared sovereignty, might claim the right to use the waters of certain international watercourses in defiance of the basic principle of permanent sovereignty.

21. With regard to terminology, he agreed with the Special Rapporteur that it was too early to define the term "international watercourse", though he noted that draft article 3 contained four alternatives. The Special Rapporteur should state his preference, in the light of the Commission's discussion and of all the political, economic, legal and other consequences those alternatives might have. Draft article 1, on the scope of the draft articles, would depend directly on the definitions appearing in draft article 3.

22. The Special Rapporteur had generally given good reasons for his decision to use one term rather than another, but, in paragraph 56 of his report, he had justified the use of the term "system" on the basis of principles adopted at Buenos Aires in 1957 by the Inter-American Bar Association. His reasoning was not very convincing, because that Association seemed to have made a distinction between a "watercourse" and "system of rivers or lakes". Now that he had adopted the term "system States", it might be doubted whether it really applied to all States belonging to a system, whether they were riparian States or not. The concept of a river basin should also be more clearly defined and should, perhaps, not include tributaries.

23. In view of those uncertainties, he thought the discussion should be continued until the Commission reached a consensus on articles which could then be referred to the Drafting Committee.

Co-operation with other bodies* (continued)

[Item 10 of the agenda]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

24. The CHAIRMAN said that it was his privilege, on behalf of all the members of the Commission, to extend a very warm welcome to Mr. Rubin, the Observer for the Inter-American Juridical Committee, and to invite him to address the Commission.

25. Mr. RUBIN (Observer for the Inter-American Juridical Committee) said that the Inter-American

Juridical Committee had been established in 1939 as the Inter-American Neutrality Committee and had been given its present title and status in 1942, at the Third Meeting of Consultation of Ministers of Foreign Affairs of the American Republics. Its mandate, given to it by the Organization of American States (OAS), was similar to that of the Commission, and it was clear that the two bodies had profited from the co-operation they had been carrying on over the years. The Committee had certainly benefited from Mr. Šahović's visit in 1979, and he hoped that the Commission would benefit from his own visit at the current session.

26. He then drew attention to the loss to the Committee and to the world of international law as a whole, caused by the recent deaths of two former presidents of the Committee: Mr. José Joaquín Caicedo Castilla, who had died from natural causes; and Mr. Adolfo Molina Orantes, who had been tragically killed during the occupation of a diplomatic mission in Guatemala.

27. One of the main items on the Committee's agenda was work in the field of private international law. Two specialized inter-American conferences on that subject had been held, in Panama in 1975 and Montevideo in 1979, under the auspices of OAS, for which the Committee had prepared preliminary documentation and draft conventions on topics such as letters rogatory, the taking of evidence abroad and proof of judgements. At the conference held at Montevideo, the United States of America delegation had suggested the adoption of an additional protocol to the Inter-American Convention on the Taking of Evidence Abroad. With the assistance of the secretariat of OAS and its Legal Counsel, a first meeting of experts on private international law had been held in April 1980 at Washington, D.C., and had discussed in detail the proposed additional protocol. That protocol would be very useful in reconciling differences between the two great systems of law which existed on the American continents, namely, common law and civil law.

28. He drew attention to the work of that conference because it had highlighted the great value of the technique of convening committees of experts to deal with specific issues within the broad areas in which a body like the Committee generally worked. That technique should, in his opinion, be used more widely, because members of the Committee had the problem of dealing with difficult technical issues with which they were not always entirely familiar. Indeed, increased use of that technique should make the Committee's meetings even more productive than they had been in the past.

29. Both the Committee and the Commission also faced the problem of trying to complete work on the many important and difficult topics typically on their agendas during the terms of office of the Special Rapporteurs assigned to those topics, on which progress often seemed to be made with the rapidity, if

* Resumed from the 1606th meeting.

not the certainty, of a glacier moving down a long slope. The Committee's agenda now included 11 very complex items, and it was unlikely that it would be able to deal thoroughly with any of them in the short time available at the two sessions it held each year.

30. At its most recent session, in January-February 1980, the Committee had however completed work on a draft convention defining torture as an international crime. Although the Committee had dealt reasonably successfully with the definition of problems raised by the question of torture, the draft convention was certainly not the last word on the subject, and would also have to be discussed by the Inter-American Commission on Human Rights. The agenda for the Committee's next session would include a proposed revision of the inter-American conventions on industrial property and the settlement of disputes relating to the law of the sea. The agenda item on the law regarding international peace and security might, however, be too broad for useful discussion by a regional juridical committee such as the one he represented.

31. Since many of the problems of the Commission and the Committee were very similar, he suggested that it might be useful for them, particularly since both of their agendas included an item on the jurisdictional immunities of States, to establish a more regular system of liaison by which they could exchange documentation and information on their programmes of work, if possible well in advance of their annual sessions, in order to enable their respective observers to make substantive suggestions while taking part in those annual meetings.

32. The CHAIRMAN thanked the observer for the Inter-American Juridical Committee, on behalf of the Commission, for his interesting account of the work being carried out by the Committee. Although there was a long tradition of co-operation between the Commission and the Committee, the suggestion by the observer for the Committee that such co-operation should be expanded was certainly a good one, which might be explored by the secretariats of the two bodies with a view to more regular exchanges of information and documentation.

33. The Committee's technique of convening committees of experts was a very interesting one, and he had been pleased to hear that it had been effectively used during the Committee's work on the additional protocol to the Inter-American Convention on the Taking of Evidence Abroad. In that connexion, he noted that, under article 16, paragraph (e), of its Statute, the Commission also could consult with experts.

34. Mr. ŠAHOVIĆ said that he had had the honour and pleasure of attending the most recent session of the Inter-American Juridical Committee, which he thanked for its kind hospitality. He welcomed Mr.

Rubin, whose contribution to the Committee's work he had greatly appreciated.

35. The session of the Committee which he had attended had been particularly fruitful, because the Committee had adopted a draft convention defining torture as an international crime. He had found that its work was characterized by efficiency and informality.

36. The Committee's deliberation showed a long tradition of careful consideration, following a general approach characterized by concern to derive rules from the sources of law available, for application to regional conditions, taking account of the requirements of the subject-matter and the universal development of international law. All the work being done by American jurists should be regarded as contributing to the development of international law, as was shown by the placing on the Committee's agenda of an item on the law regarding international peace and security, the study of which would take special account of the results of the work of United Nations bodies such as the Sixth Committee and the Third Committee of the General Assembly.

37. Since the Committee had been the first body with which the Commission had established co-operation, relations between them were of very long standing. In that connexion, he observed that the Committee had been set up even before the Commission, and that jurists from the American continent had always been wholeheartedly devoted to the development of international law. The Commission should maintain close relations with the Committee and he welcomed the suggestions to that effect made by Mr. Rubin.

38. Mr. FRANCIS, speaking on behalf of the Latin American members of the Commission, said that he wished to express condolences to the observer for the Inter-American Juridical Committee on the deaths of two of its former presidents and to thank him for his interesting account of the Committee's current and future work.

39. It was of the greatest significance that an observer from the Committee regularly attended the Commission's sessions. Indeed, the Inter-American system to which the Committee belonged was truly the senior regional political organization and legal co-operative institution and had been an inspiring force in the establishment of organizations of a universal character, such as the League of Nations and the United Nations. The Committee was thus a vital institution, and its commitment to the codification of international law and a stable world legal order was most commendable. He hoped that the Committee's contacts with the Commission would continue to promote its progress and development.

40. Mr. JAGOTA, speaking on behalf of the members of the Commission from the Asian region, also expressed sympathy to the observer for the Inter-American Juridical Committee on the deaths of two of its past presidents and thanked him for

reporting on the Committee's work with a view to continued co-operation between the two bodies.

41. The Committee's work on various topics of international law was of great value to the Commission and its Special Rapporteurs as source material for their own work on draft articles that would be proposed for acceptance by the international community as a whole. The Committee was to be commended for the work on which it had made definite progress in recent years, and particularly on the draft convention defining torture as an international crime.

42. He was also grateful to the observer for the Committee for referring to the technique of convening committees of experts to deal with complex and difficult topics. That technique might be used by the Commission in the future. The suggestion made by the observer concerning closer contacts between the Commission and the Committee was also an excellent one, to which effect should be given as soon as possible.

43. Mr. USHAKOV said that there were not only very close links between the Commission and the Committee; there was also competition between them, which could only benefit mankind, as would certainly be demonstrated by the parallel work being carried out by the two bodies on jurisdictional immunities. He wished the Committee every success in its future work.

44. Mr. RIPHAGEN, speaking on behalf of the western European members of the Commission, express appreciation to the observer for the Inter-American Juridical Committee for the overview he had provided of the Committee's work, from which the Commission could certainly benefit. Indeed, close co-operation between the two bodies would assist the development of international law as a whole, for the work of a regional legal institution like the Inter-American Juridical Committee complemented that carried out by the Commission.

45. Mr. SCHWEBEL also expressed appreciation to the observer for the Inter-American Juridical Committee for the informative report he had given on the Committee's substantive work and methods of operation.

The meeting rose at 1 p.m.

1612th MEETING

Monday, 16 June 1980, at 3.10 p.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Castañeda, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Rip-

hagen, Mr. Šahović, Mr. Schwebel, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

The law of the non-navigational uses of international watercourses (continued) (A/CN.4/332 and Add.1)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR¹ (concluded)

1. Mr. SCHWEBEL (Special Rapporteur), summing up the discussion, said that at the 1607th meeting Mr. Reuter had raised the question of the scope of the draft articles and the meaning to be attached to the term "international watercourse system", and had suggested two possible approaches. Other possibilities had been suggested by other members of the Commission. His own preference was for the first alternative suggested by Mr. Reuter, namely, that the term "international watercourse system" should be used without commitment as to its full contours, which could better be decided upon as the Commission's work progressed. That solution would be wholly consistent with the other alternative suggested by Mr. Reuter, and by a number of States, of applying a particular definition to particular provisions, but at a later stage.

2. He also agreed with Mr. Reuter that the right to negotiate was an important and sensitive one. But, when that right was confined to a shared natural resource, it was not unduly daring to insist on it. In fact, the *Lac Lanoux* arbitration had recognized its existence in respect of international water resources.

3. He fully agreed with Mr. Šahović (*ibid.*) that the Commission should strain out customary international law from the treaties and jurisprudence on the topic. As to the difficulties involved in treating the technical aspects of the topic, they must be dealt with if the Commission was to go beyond the level of general principles. There was no need to tackle them at the current session, however, or in all probability, at the next session. Like Mr. Šahović, he believed that, at the present stage, the Commission should seek to achieve concrete results in devising general principles applicable to the uses of international watercourses as a whole.

4. He saw every merit in Mr. Evensen's suggestion (*ibid.*) that non-navigational uses and pollution should be referred to in appropriate terms. Although the Commission had always thought of giving pollution a special place, that did not exclude specifying it earlier in the draft articles as well. Unlike Mr. Evensen, he found the term "system State" quite apt, but he would give it further consideration.

¹ For the text of articles 1 to 7 submitted by the Special Rapporteur, see 1607th meeting, para. 1.

5. While he sympathized with Mr. Ushakov's desire (*ibid.*) to clarify the meaning of the term "international watercourse system", he recommended that for the time being the Commission should defer taking a definite decision, since it would clearly be difficult to reach agreement on a genuine definition of the international watercourse. Mr. Ushakov's view that the development of a river whose surface waters were entirely in one State should not require the participation of another State whose contribution was confined to ground water was entirely understandable. But was it not desirable for the former State to involve the ground water State, whose pollution of, or other impact on, the waters it could then influence? Generally speaking, as Mr. Barboza had pointed out (1609th meeting), it was in the interest of the lower riparian to involve the upper riparian in joint notification, consultation and negotiation, and it was in the enlightened interest of the upper riparian to become so involved. However, its right to be consulted did not constitute a right of veto.

6. Mr. Ushakov had suggested that draft articles 4 and 5 could be better dealt with when more substantive principles had been agreed upon. That was a plausible position, but there seemed to be general agreement in the Commission that the problem of the diversity of watercourses was paramount and must be confronted. Perhaps the best way to proceed would be to address those draft articles provisionally, subject to the adoption of satisfactory substantive principles.

7. He shared Mr. Ushakov's view that the character of the international watercourse as a shared natural resource was self-evident. Nevertheless, it would be most useful to articulate that principle, since it provided sound ground for the development of more sophisticated principles. Like Mr. Riphagen, he did not believe that the principle of shared natural resources would be a Pandora's box; he hoped it might rather be something of an "open sesame".

8. With regard to Mr. Ushakov's comments on draft article 6, he acknowledged that, clearly, that article moderated and generalized the proposals in the Special Rapporteur's first report on the collection and exchange of information.²

9. He then summarized the statements of Mr. Sucharitkul (1608th meeting) and of Mr. Calle y Calle (*ibid.*).

10. He had considerable sympathy for the view Mr. Verosta had expressed (*ibid.*) that general principles should be derived from State practice, as evidenced by the cumulation of treaties on various non-navigational uses of international watercourses. To some extent, he was adopting that approach. For example, the principle of shared natural resources was shown to inhere in boundary waters treaties and could be shown to

inhere in treaties on hydroelectric power and other uses. When it came to demonstrating the principles of equitable utilization and the use by a State of its own resources in such a way as to avoid injuring others, he intended to make full use of treaties on various uses. The bulk of the material already collected in support of those principles consisted of extracts from treaties. He hoped that if the Commission succeeded in agreeing on draft articles enunciating such very general principles, it would proceed thereafter to scrutinize various specific uses, with a view to deriving principles—perhaps general, certainly particular—governing those uses.

11. He then summarized the statements of Mr. Quentin-Baxter (*ibid.*), Mr. Barboza (1608th and 1609th meetings), Mr. Riphagen (1609th meeting), Mr. Francis (*ibid.*), Mr. Yankov (*ibid.*), Mr. Pinto (*ibid.*), Mr. Tsuruoka (1610th meeting), Mr. Díaz González (*ibid.*), Mr. Tabibi (*ibid.*), Mr. Jagota (*ibid.*), Mr. Castañeda (1611th meeting), and Mr. Šahović (*ibid.*).

12. He noted that Mr. Jagota had objected to his construction of article 3 of the Charter of Economic Rights and Duties of States³ as an exception to article 2, in para. 148 of his second report (A/CN.4/332 and Add.1), on the grounds that every riparian was entitled to do as it pleased with its share of the water, which was therefore "its" water. Mr. Jagota had maintained that, if the concept of shared natural resources meant that a riparian could not use its share of the water as it chose, then it was unacceptable—at any rate until an understanding of the term "shared" was reached.

13. The following conclusions could be drawn from the Commission's discussion:

First, it was generally agreed that the Commission should prepare a framework treaty, to be combined with specific agreements concluded by riparians, which might be called "system agreements".

Second, there was general agreement that the Commission should first seek to draw up general principles applicable to the uses of the water of international watercourses, though there was some difference of emphasis on the means to be used in deriving such principles.

Third, he believed that there was virtually unanimous acquiescence in adopting the term "international watercourse system" as a working term, on the understanding that its adoption would be without prejudice to the Commission's eventual decision on the scope of the international watercourse. One member, however, preferred not to speak of the international watercourse, but of the international river, which he defined as a river forming or traversing an international boundary, while another member recommended that the Commission take as its working definition "rivers

² Reproduced in *Yearbook ... 1979*, vol. II (Part One), document A/CN.4/320, para. 2, arts. 8–10.

³ General Assembly resolution 3281 (XXIX).

and their tributaries as well as lakes and canals which traverse or divide international boundaries”.

Fourth, there was general agreement that a “system State” should be defined as a State through whose territory water of an international watercourse system flowed.

Fifth, there was apparent acceptance of the proposition that system States should, where necessary, seek to conclude system and sub-system agreements; it was also recognized that draft article 4 should be recast to express that proposition in terms that were not mandatory.

Sixth, there was general agreement on the complementary right of system States to participate in the negotiation and conclusion of system agreements to the extent of their real interests.

Seventh, there was predominant, but not unanimous agreement on the need for a draft article providing for the collection and exchange of data.

Eighth, there was also predominant, but not unanimous, agreement on the principle that the waters of international watercourse systems should be treated as a shared natural resource.

Ninth, and last, most members believed that the draft articles should be referred to the Drafting Committee with a view to the submission of some articles to the General Assembly at its thirty-fifth session.

14. In connexion with those conclusions, two key issues were the international watercourse system and the meaning of shared natural resources. In regard to the former, there appeared to be three possible choices. The first was to adopt the definition of an international river laid down by the Congress of Vienna in 1815. In his view, that was not a valid choice, since it would represent the regressive development of international law, would be a retreat from contemporary treaty-making and modern scholarship, would run counter to scientific fact and would invite the ridicule, rather than the support, of knowledgeable people all over the world. The second possibility was to adopt Mr. Yankov’s suggested approach (1609th meeting), confining the scope of the draft articles essentially to the river and its tributaries. While that suggestion merited consideration, the best solution, in his view, would be to adopt the admittedly amorphous term “international watercourse system”, at least for the time being, since it would not commit the Commission to a course that was divisive or unworkable. Eventually, that term could be given the content which Mr. Yankov had suggested or some other broader content; alternatively, different terms could be used for different articles.

15. With regard to the question of shared natural resources, it was not his intention to suggest that, if that concept were embodied in the draft articles, the commentary should reflect the argument advanced in paragraph 148 of his report, namely, that article 3 of

the Charter of Economic Rights and Duties of States constituted an exception to article 2. He could not, however, agree with Mr. Jagota’s interpretation of that argument. He had never said that a State could not treat its share of the waters of an international watercourse as it pleased, but simply that it could not, in law, act as though the shared natural resource of the waters of an international watercourse were its waters alone. That had no bearing on what it might or might not do with its equitable share. The way to settle that particular difference, however, was to avoid it, for it should not be allowed to impair the virtually unanimous agreement in the Commission on the need to recognize, as the first general principle to be applied, that the waters of an international watercourse system were to be treated as a shared natural resource.

16. He suggested that the draft articles be referred to the Drafting Committee for consideration in the light of the suggestions made. He trusted that draft articles 1 and 7, in particular, could be accepted, and that progress could be made on the other draft articles.

17. Mr. JAGOTA said he wished to explain how he had interpreted paragraph 148 of the Special Rapporteur’s report.

18. As he read that paragraph, the Special Rapporteur considered that article 2 of the Charter of Economic Rights and Duties of States did not have wide support, and that article 3 incorporated an implied exception to article 2. That was because, according to the Special Rapporteur, article 2 referred to the permanent sovereignty of a State over “its” natural resources, and where water was treated as a natural resource to be shared between two or more States, it was not the water of any one State; hence no one State could have permanent sovereignty over the waters which flowed through its territory.

19. If that interpretation was correct, the paragraph in question would be unacceptable to him, since he could not agree that a State traversed by an international watercourse whose waters were treated as a shared natural resource was not covered by the terms of article 2 of the Charter of Economic Rights and Duties of States. In other words, the concept of shared natural resources should not run counter to that article.

20. On the other hand, he would have no objection to paragraph 148 if it were interpreted to mean that water, when treated as a shared natural resource, had to be shared equitably with the other States of the watercourse system. A State would thus enjoy a sovereign right to regulate the portion of the water which flowed through its territory, subject to the principle of equitable apportionment and to the rule of international law that no State should so use its water as to cause injury to another State.

21. Mr. USHAKOV said that many of the details that had not been considered by the Commission could be examined by the Drafting Committee.

22. He noted that there had been much discussion of the concept of international watercourses as shared natural resources—a concept which seemed quite simple from the physical point of view, but was highly complex from the legal point of view. In paragraph 90 of his second report, the Special Rapporteur had quoted at length the draft principles of conduct in respect of shared natural resources. That text, which had been drafted from the general point of view of environmental protection, related primarily to the conservation of natural resources shared by two or more States; it applied only secondarily to the utilization of such resources. The concept of conservation was broader than that of utilization, for the problem of conservation arose even in the absence of utilization. The Commission would have to decide whether its field of investigation included the conservation of international watercourses as such, or was limited, as he thought it should be, to conservation necessitated by utilization.
23. The Commission must also bear in mind that, if it decided to treat international watercourses as shared natural resources, the watercourses would be only part of the subject-matter to be dealt with, since the scope of the draft articles would have to be extended to cover ground water as well.
24. He considered it most important for the Commission to determine clearly whether the use of the concept of shared natural resources meant that it intended to rely on already existing rules on shared resources or whether it wished to draft its own rules applicable to international watercourses; in the latter case, it would not have to use the concept of shared natural resources, since the rules it formulated would stand by themselves.
25. He was in favour of referring the draft articles to the Drafting Committee despite the many problems of detail which the Commission had not been able to deal with during its general debate, such as the legal consequences of the geographical location of a State in relation to an international watercourse.
26. Mr. VEROSTA said he considered it essential for the Commission to draw on State practice. If he had understood correctly, however, the Special Rapporteur did not intend to deal with that matter until 1982. He wondered, therefore, from what sources the general principles applicable to the non-navigational uses of international watercourse systems would be derived, and would like to know the Special Rapporteur's proposed programme of work for the next two years.
27. Mr. DÍAZ GONZÁLEZ said it was established practice for the Commission to refer any set of draft articles submitted by a Special Rapporteur to the Drafting Committee. That Committee had a broad mandate, which permitted it to consider questions of substance raised by the draft articles and to propose new wording. The Special Rapporteur had himself pointed out that State practice and precedent were of little use, because of the significant developments in the uses of water in recent years; and as had rightly been said, the United Nations Conference on the Law of the Sea would have made no progress at all if it had had to rely on State practice and precedent.
28. In the circumstances, he considered that the Commission, having fully discussed the subject, should refer the draft articles to the Drafting Committee with a view to the preparation of texts on the basis of the broad outlines set out in the Special Rapporteur's report.
29. Mr. ŠAHOVIĆ observed that at the previous meeting he had said he was not in favour of referring the draft articles to the Drafting Committee. But after hearing the Special Rapporteur, although he still thought the Commission had not settled all the preliminary questions, he would not oppose reference of the texts to the Drafting Committee. His great confidence in the Chairman of the Drafting Committee justified the hope that the Committee would not formulate any proposals contrary to State practice in the matters under study, which was particularly old-established and well developed.
30. Mr. SCHWEBEL, replying further to points raised, said he did not think there was any practical difference of consequence between Mr. Jagota's interpretation of the concept of shared natural resources and his own.
31. Mr. Ushakov had again raised some very interesting points, which, he trusted, would be dealt with to his satisfaction by the Drafting Committee.
32. With regard to Mr. Verosta's remarks, it was his intention, when dealing with the articles on equitable utilization and the *sic utere* principle, to refer widely to State practice, particularly as it was reflected in treaties, and possibly also in the operations of river commissions. His idea was that those two principles could be dealt with at the Commission's thirty-third session, after which the specific uses could be considered, when it would again be necessary to draw on State practice. It had been suggested that the examination of State practice might not be very instructive, but on that point he would reserve judgement. Certainly, there would be no difficulty in extracting from State practice certain general principles: for instance, that States had treated the water of international watercourses as a shared natural resource, and had recognized an obligation to act in such a manner as to afford others a right to equitable utilization. In the case of particular principles, it was less certain what could be derived from State practice. He entirely agreed, however, that full account should be taken of State practice both by the Commission and by the Drafting Committee.
33. The CHAIRMAN, noting that there were no further comments, suggested that the draft articles presented by the Special Rapporteur should be referred

to the Drafting Committee for consideration in the light of comments made.

*It was so decided.*⁴

State responsibility (continued)* (A/CN.4/318/Add.5 and 6, A/CN.4/328 and Add.1-4)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO

ARTICLE 33 (State of necessity)

34. The CHAIRMAN said that for over a decade the Commission had had the benefit of the skilled guidance and profound scholarship of Mr. Ago as it pursued its study of the topic of State responsibility. Mr. Ago, first as Special Rapporteur and then as a friend of the Commission, had created the grand design for the work and pioneered its execution. With the completion of his eighth report, the Commission was entering the final stage of its consideration of part 1 of the topic, to which the General Assembly had repeatedly accorded high priority.

35. He invited Mr. Ago to introduce the most recent sections dealing with chapter V of the draft articles on State responsibility, which were found in addenda to his eighth report (A/CN.4/318/Add.5 and 6), and more specifically draft article 33 (*ibid.*, para. 81), which read:

Article 33. State of necessity

1. The international wrongfulness of an act of a State not in conformity with what is required of it by an international obligation is precluded if the State had no other means of safeguarding an essential State interest threatened by a grave and imminent peril. This applies only in so far as failure to comply with the obligation towards another State does not entail the sacrifice of an interest of that other State comparable or superior to the interest which it was intended to safeguard.

2. Paragraph 1 does not apply if the occurrence of the situation of "necessity" was caused by the State claiming to invoke it as a ground for its conduct.

3. Similarly, paragraph 1 does not apply:

(a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law, and in particular if that act involves non-compliance with the prohibition of aggression;

(b) if the international obligation with which the act of the State is not in conformity is laid down by a conventional instrument which, explicitly or implicitly, precludes the applicability of any plea of "necessity" in respect of non-compliance with the said obligation.

36. Mr. AGO said that if the two latest sections of his eighth report were particularly long, that was because they dealt with two questions, state of

necessity and self-defence, each of which could, by itself, form the subject of a separate codification. It had therefore been necessary to consider those two questions in depth and document them as fully as possible.

37. The concept of state of necessity must be clearly distinguished from other circumstances precluding wrongfulness. Such delimitation of the subject-matter was all the more necessary because the various circumstances precluding wrongfulness had often been confused, both in doctrine and in practice. In that connexion, he had wished to avoid the error against which the Analytic school so wisely warned, of believing that the terms used in language had a proper meaning that was natural and innate, and fixed for all time. The meaning terms acquired was nearly always the result of a convention. It was nonetheless true that it was desirable to use terminology as precise and consistent as possible, to avoid disputes that arose only because of differences in the meaning attributed to the same terms.

38. At its previous session, the Commission had studied the concepts of *force majeure* and fortuitous event, both of which related to circumstances involving a decisive element of an unintentional nature. In the case of *force majeure*, an external circumstance beyond the control of a State made it materially impossible for that State to act in conformity with an international obligation. In the case of fortuitous event, an unforeseen external circumstance made it impossible for the person whose acts were attributed to the State to realize that these acts were contrary to what was required by an international obligation; it was the fact that the conduct was not in conformity with the international obligation, if not the conduct itself, which was "involuntary".

39. On other hand, the Commission had already had occasion to differentiate between a situation of distress and a state of necessity. In distress, natural persons, acting on behalf of the State, found themselves in a situation that endangered their lives, so that it could not be held that they were acting voluntarily and deliberately. Indeed, the volition of a person who acted in a certain way because it was the only way to save his life was nullified. A state of necessity, on the other hand, implied conduct freely and voluntarily adopted: it was not the persons acting on behalf of the State, but the State itself which then found itself in a situation jeopardizing one of its fundamental interests, and it acted accordingly.

40. Self-defence, which would be the subject of the next draft article, was also distinct from state of necessity, even though practice and doctrine had, on more than one occasion, confused the two terms. The concept of self-defence had appeared at the same time as the prohibition of the use of armed force, to which it was now a kind of acknowledged exception. However, whereas the conduct engaged in in self-defence was a

⁴ For consideration of the texts proposed by the Drafting Committee, see 1636th meeting, paras. 24 *et seq.*

* Resumed from the 1601st meeting.

form of resistance to the most serious of internationally wrongful acts, namely, armed aggression, state of necessity involved an act that injured, in its rights or interests, a State which might not even have done anything wrongful. That act was in fact justified only by the necessity for the State inflicting it to protect one of its essential interests that would otherwise be sacrificed. It followed that a distinction could also be made between action taken in a state of necessity and action taken in applying a counter-measure or sanction against a State that had committed an internationally wrongful act.

41. Before going to the heart of the matter, it was important to clear away the vestiges of natural-law theories that had done much to foster misunderstanding of the concept of state of necessity. Instead of looking to international practice for the basis of that concept, which existed in all internal legal orders, some people had sought it in an asserted right to self-preservation—that was to say, in one of those fundamental rights of States frequently mentioned in the late nineteenth century. The theory of fundamental rights had since been abandoned, but traces of it remained. It should not be thought, either, that a state of necessity created a conflict between two rights of two States, two rights of which the less important should be sacrificed to the more important; for the case of a state of necessity in fact assumed only a single right, that of the other State, which the act committed in a state of necessity failed to respect. That act was not the exercise of a right. The State that committed it had no “right” to act as it did; it only had an obligation. Consequently, the expression “right of necessity”, which had been used by some authors, must also be avoided. Necessity was a *de facto* situation in which a State, bound by an international obligation to another State, refused to fulfil that obligation because by doing so it would injure one of its vital interests.

42. The problem could not be arbitrarily simplified. To any question limited to asking whether, in general, necessity always excluded wrongfulness of a State’s conduct not in conformity with an obligation, the answer would have to be negative. For a State could not be released from compliance with an international obligation merely because one of its vital interests was endangered by that compliance. A number of conditions had to be satisfied.

43. First, the excuse of necessity was valid only if it was of an absolutely exceptional nature. Some had held that the vital interest to be protected must be the interest of the State in its existence. That view must be rejected, because, on the one hand, it was too restrictive, and on the other, it would justify what was not justifiable. A State would thus be able to claim that, in order to justify its own existence, it need not comply with the obligation to respect the territorial sovereignty of another State, whereas there was no necessity that could justify the failure to respect that

obligation. The necessity of protecting the existence of a State had, moreover, nearly always been invoked following an invasion of its territory or a violation of its neutrality. On the other hand, other essential interests that did not affect the existence of the State but might, for example, be of an ecological or economic nature could be invoked in support of an excuse of necessity. The threat must also be extremely grave and imminent and must not be attributable to the State invoking it. Otherwise, a State wishing to evade an international obligation might be tempted itself to create a threat which it could invoke for that purpose.

44. The action not in conformity with an international obligation must also be the only available means of protecting the essential interest threatened. And the State must not go beyond what was strictly necessary to safeguard that interest: any excess, either in proportion or in time, must be regarded as wrongful. As soon as such action was no longer “necessary”, no excuse of necessity could justify it. Lastly, the interest protected by the right that was injured must be clearly less important than the interest protected by the State acting in a state of necessity.

45. It was self-evident that a state of necessity could not be invoked to excuse the breach of an international obligation established by a peremptory rule of international law, for that was a rule from which no derogation was permitted, even by agreement between States. It would thus be absurd to maintain that such an obligation could be breached for reasons of necessity, when even the consent of the injured State did not suffice to excuse the breach. Those remarks were all the more essential because the concept of a state of necessity had been studied mainly in certain aspects, to the exclusion of others. The cases taken into consideration had frequently been those in which the international obligation breached was the obligation not to use force against another State, its territorial integrity or its political independence—and, in all such cases, the obligation derived from the most indisputably imperative rule of international law. Hence it was important to state the principle that a state of necessity could not excuse the breach of a peremptory rule.

46. At the same time, it was obvious that although the existence of a state of necessity could lead a State not to fulfil an international obligation towards another State, so that the wrongfulness of its conduct was precluded, an obligation to compensate for possible damage could still arise for the State *ex facto licito*. Moreover, such an obligation was often spontaneously recognized by the State invoking the state of necessity.

47. Like most of the other draft articles, draft article 33 called for a study of State practice. This study would be the subject of his statement at the next meeting.

The meeting rose at 6 p.m.

1613th MEETING

Tuesday, 17 June 1980, at 10.20 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Diaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

State responsibility (*continued*) (A/CN.4/318/Add.5 and 6, A/CN.4/328 and Add.1-4)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)

ARTICLE 33 (State of necessity)¹ (*continued*)

1. Mr. AGO said that, since lack of time had prevented him from introducing draft article 33 in detail at the previous meeting, he would begin his introduction anew.

2. It was important first, as he had said, to define the subject matter by distinguishing state of necessity from the other circumstances that could preclude wrongfulness. To begin with, emphasis should be placed on the voluntary and intentional nature of an act that a State sought to excuse by invoking necessity. Both *force majeure* and fortuitous event involved situations brought about by an irresistible external circumstance that cancelled *de facto* the will to act in conformity with a given international obligation, or else the awareness of acting in a way not in conformity with it. State of necessity also had to be differentiated from a situation of distress, in which the adoption of conduct required by an international obligation put an agent acting for the State in such a personal situation of peril that it could not in fact comply with the obligation. Lastly, the case of state of necessity was, of course, to be distinguished from a case of prior consent given by the injured State.

3. Again, it was important to emphasize the possibility, at least, of the innocence of the injured State, for in the other circumstances that precluded wrongfulness, an international obligation had been breached previously by the State in relation to which conduct not in conformity with an international obligation was adopted. State of necessity was therefore different from the legitimate application of a sanction or countermeasure as a result of an internationally wrongful act of another State. It was also different from self-defence, since the latter presupposed that the State

in relation to which another State was resisting had committed the most serious of all internationally wrongful acts, an act of aggression. In the case of state of necessity, the State that sought to excuse its behaviour had injured a right or an interest of a State that had, strictly speaking, done nothing whatsoever wrongful. The excuse, if excuse there were, had to do with an external factor—namely, a grave and imminent danger, that might ever not have been in any way provoked by the conduct or will of the State committing the act.

4. In order to get a clear picture of the concept of state of necessity, it was important to clear away all vestiges of jusnaturalist theories, as embodied in the concept of the “fundamental rights of the State” and, in particular, the concept of the alleged “right to existence” or the “right of self-preservation”. Some people had held to those concepts because they had thought it indispensable that the State invoking necessity as an excuse for its conduct, consisting of failure to respect the right of another, in so doing should put forward a subjective right of its own. They had therefore presented the situation as a conflict between two “subjective rights”, and had taken the view that when two rights attributed to two different subjects by an objective right met and clashed, the right of the State entitled to invoke necessity in its behalf should prevail over the other, because it was more fundamental. However, it was quite wrong to claim that the State that invoked a state of necessity did so to protect a right. A subjective right was an option one subject had of requiring a certain performance or conduct of another subject. Necessity was by no means expressed in the possibility of requiring something of another subject; it was only a *de facto* situation brought about by a grave danger that threatened a State’s interests, the result being that, in order to protect its interests, the State was compelled not to respect the rights of others. Hence the conflict was not between two rights but between the right of the injured State (the sole right that existed in that case) and an essential interest of the State that invoked a situation of necessity as a reason for not respecting the right in question.

5. Were there therefore, in international law as in internal law, situations in which a State that committed a breach of an international obligation toward another State could be regarded as not having committed an internationally wrongful act because the obligation could have been performed only by sacrificing an essential interest of the State that had committed the act? Viewed in such broad terms, the question could only be answered in the negative; otherwise it would be all too easy for a State to justify failure to comply with its international obligations. The problem had to be brought within the narrow confines of the practice that was followed.

6. First of all, it was obvious that, in principle, every international obligation had to be fulfilled; only very

¹ For text, see 1612th meeting, para. 35.

rarely could failure to respect the rights of others perhaps be excused. Secondly, not every interest deserved to be protected. Moreover, it had been mistaken to assert that a State's interest in safeguarding its own very "existence" was the sole interest that had to be taken into consideration for the purposes in question. Such a view, in fact, constituted a vestige of positions that had given rise to many abuses and, at one time, had helped to detract from the concept of the state of necessity. The interest at stake must be a truly essential interest, but not necessarily that of the existence of the State. On the contrary, when an alleged necessity of safeguarding its existence was put forth, with a view to justifying thereby something totally unjustifiable, namely, that affected the existence of another State, the question then arose as to why the second State's existence should be sacrificed to the interest of the existence of the first State. The essential interests that had to be taken into account could relate to fields as varied as economics, ecology, and so forth. Finally, it was not possible to decide *in abstracto* whether an interest was essential and whether or not the protection of that interest took precedence over compliance with a given international obligation. Everything depended on the circumstances. In some situations a specific interest might prove to be essential, particularly taken in relation to an interest of little importance protected by the subjective right that was being sacrificed, whereas in others the threat against that interest might not justify at all the failure to observe a right of another providing for the protection of an important interest.

7. The threat against the interest that was allegedly being protected had to be extremely grave and imminent, and its supervening had to be independent of the will of the State invoking the plea of necessity. Moreover, the adoption of conduct not in conformity with an international obligation had to represent the sole means available to the State of protecting the essential interest at stake. If a State could, in protecting a given interest, choose between conduct that was in conformity with an international obligation and conduct that was not in conformity with that obligation but was less costly, the first of those courses of conduct was the one it must choose. Again, there had to be taken into account proportionality between the interest the State wanted to protect and the interest sacrificed through non-compliance with the international obligation. A State could not claim to be protecting an interest of some importance if it breached an obligation towards another State that protected an interest of equal or greater importance to that other State. In other words, the interest sacrificed must be inferior to the interest protected, particularly since originally one had been legally protected and the other had not.

8. In some instances particularly, the possibility of invoking necessity was simply ruled out, as in the case of an international obligation especially designed to apply in situations that placed specific interests in

jeopardy. Obviously, if a State was in a position where it had to fulfil an obligation of that kind towards another State, it could not invoke necessity as a defence for non-compliance, and that because of the very nature of the obligation. The special scope of the obligation, moreover, might well be explicitly defined in the rule from which it stemmed or might be inferred from the nature of the rule.

9. The study of the concept of state of necessity had by now been considerably simplified by the fact that, in its codification work, the Commission had established the existence of obligations arising from a peremptory norm of international law. It was evident that, in the case of an international obligation regarded as so important that the State towards which it existed was prohibited from renouncing it by means of a treaty, the State on which the obligation was incumbent was with all the more reason obliged to comply with that obligation, even in a situation of necessity. Under the terms of draft article 29,² the consent given by a State to the commission by another State of an act not in conformity with an obligation arising from a peremptory norm of international law did not preclude the wrongfulness of that act. It was therefore indisputable that a peremptory obligation had to be respected even if the State towards which it existed consented to non-compliance with the obligation, and also that the State on which it was incumbent could not refrain from performing the obligation in order to safeguard an essential interest even when that consent had been given. The vast majority of cases in which the possibility of accepting the plea of necessity had been contested historically had been cases in which the obligation in question concerned respect for the territorial sovereignty or political independence of States. Since an obligation of that type clearly came under the heading of *jus cogens*, the plea of necessity was not admissible on that ground.

10. On the other hand, there was no reason for the principle of customary law providing for state of necessity as a circumstance precluding wrongfulness to apply in those cases in which a treaty provision enabled a State not to comply with a specific international obligation if the observation of the obligation jeopardized one of its essential interests. That was sometimes the case with obligations deriving from the law of war. Finally, it would be wrong to think that state of necessity meant that the wrongfulness of a course of conduct was precluded without any further consequences, more particularly with regard to compensation for any damages it might have caused.

11. Care should be taken not to follow the major part of the older doctrine, which had sought to justify state of necessity in terms of theories and principles. The

² For the text of all the draft articles adopted so far by the Commission, see *Yearbook . . . 1979*, vol. II (Part Two), pp. 91 *et seq.*, document A/34/10, chap. III, sect. B.1.

crucial element was the practice of States. At the Conference for the Codification of International Law (The Hague, 1930), States had not been asked the direct question of whether state of necessity should be viewed as a circumstance precluding wrongfulness. One State, Denmark, had nevertheless dealt with the issue and had shown that, in its opinion, necessity had standing in international law but that it was subject to strict limitations, which, however, were ill-defined at that time.

12. He had divided the cases considered in his report (A/CN.4/318/Add.5 and 6, sect. 5) into two broad categories, depending on whether state of necessity was invoked to justify a breach of an obligation "to do" or a breach of an obligation "not to do". Among the cases in the first of those categories, he had started out by mentioning those relating to obligations of a financial nature, and had also drawn a distinction between debts contracted by one State with another State and debts contracted by a State with a foreign bank or finance company. Even in the latter instance, practice showed that it was possible to plead necessity.

13. An example of a financial obligation by one State towards a foreign State was the *Russian indemnity* case (*ibid.*, para. 22). The Ottoman Empire, which had incurred a debt towards the Russian Empire, had been in such a difficult financial position that there came a time when it had not been able to meet its commitments, and the case had been brought before the Permanent Court of Arbitration. Instead of invoking in its argument an essential interest that must necessarily be safeguarded, the Ottoman Government had preferred to invoke the defence, considered more striking, of *force majeure*. However, a plea of *force majeure* should have signified, according to concepts the Commission has adopted, that there had been an effectively material impossibility to pay; yet such a material impossibility did not exist. In fact, the Ottoman Government had been in a situation of necessity, since performance of its obligation would have placed it in great danger. The Permanent Court of Arbitration found that the Russian Imperial Government had accepted that a State's obligation to implement a treaty could give ground if the very existence—or, rather, the economic existence—of the State was imperilled by performance of that obligation. The Ottoman Government, beset by serious financial difficulties, had argued that repayment of the loan in question would have imperilled the existence of the country or, at the very least, seriously jeopardized its internal and external situation. The principle itself had not been contested, and the entire discussion had therefore centred upon a point of fact: had the danger invoked actually existed? The negative reply to that question did not affect recognition of the principle.

14. Financial difficulties had also been invoked in the *Central Rhodope Forests* case (*ibid.*, para. 23). In an arbitral award, Bulgaria had been ordered to pay a certain sum of reparations to Greece. It had failed to

comply with the award within the specified time, and Greece had taken the case to the Council of the League of Nations. Bulgaria had invoked the financial difficulties which payment of the amount in cash would unfailingly have caused for the country and had made an offer of payment in kind, which had been accepted. Both Governments had therefore recognized that very serious financial difficulties could justify, if not repudiation by a State of an international debt, at least recourse to means of fulfilling the obligation other than the means actually envisaged by the obligation.

15. As to obligations contracted towards foreign banks or other finance companies, the first case in point was the reply given by the Government of the Union of South Africa to the request for information made by the Preparatory Committee for the 1930 Codification Conference (*ibid.*, para. 25). Regarding the repudiation of debts, the South African Government had pointed out that a State which was in such a position that it really could not meet all its liabilities was virtually in a position of distress. It then had to rank its obligations and first make provision for those which were of more vital interest. A State could not, for example, be expected to close its schools, universities and courts, disband its police force and neglect its public services to such an extent as to expose its community to chaos and anarchy, merely to provide the money wherewith to meet its foreign moneylenders.

16. The second paragraph of Basis of Discussion No. 4, like the other bases of discussion, drawn up by the Preparatory Committee in the light of the replies from Governments, therefore stated:

A State incurs responsibility if, without repudiating a debt, it suspends or modifies the service, in whole or in part, by a legislative act, unless it is driven to this course by financial necessity. (*Ibid.*)

The notion of necessity had therefore been clearly admitted in that connexion.

17. The *French Company of Venezuela Railroads* case (*ibid.*, para. 26) referred to the French/Venezuelan Mixed Claims Commission, had arisen as a result of rights assigned to France by Venezuela in territories which Venezuela had considered as its own but were being claimed by Colombia. To avoid risking a war with Colombia, Venezuela had been obliged to break its contract with France. The umpire had taken the view that Venezuela's conduct had been lawful because it could not have been expected to risk a war in order to meet the obligation incumbent upon it.

18. The case concerning the payment of various *Serbian loans* issued in France (*ibid.*, para. 27) had related to gold franc debts inherited by the Serb-Croat-Slovene State and contracted before the First World War. In its defence, that Government had pleaded *force majeure*, namely, the fact that it was materially impossible for it to pay off the debts in gold francs because the Banque de France no longer supplied them. However, the terms of the loans had in no

way prevented the debtor from discharging its debts by paying the creditors the equivalent in paper francs of the gold franc value of the debts. On the other hand, the creditors had not been willing to regard debts initially specified in gold francs simply as debts in paper francs. Furthermore, the Serb-Croat-Slovene Government had pleaded the state of necessity in which it found itself, by its account, because of its financial condition as a result of the war, and pointed out that France itself had called on its citizens, after the war, to agree, in a spirit of sacrifice, to a compulsory rate of exchange of one paper franc for one gold franc. In reply, the agent of the French Government, Mr. Basdevant, had not denied the existence of the principle that a plea of necessity should be admissible in a really serious and otherwise insurmountable situation, but had maintained that in the circumstances the situation had not been so serious as had been alleged.

19. The *Société Commerciale de Belgique* case (*ibid.*, paras. 28–31) had been brought before the Permanent Court of International Justice. By the terms of two arbitral awards, Greece had been required to pay a sum of money to the Belgian company in repayment of a debt contracted with the company. The Greek Government had not contested the existence of its obligations, but had argued that it had been under an “imperative necessity” to “suspend compliance with the awards having the force of *res judicata*” (*ibid.*, para. 29), maintaining that a State had a duty not to execute an international obligation if public order and social tranquillity might be disturbed by carrying out the award or if the normal functioning of public services might be jeopardized thereby. The entire discussion had then centred on whether or not such an “imperative necessity” had in fact existed. In the end, the two parties themselves and the Court had recognized the principle that, in international law, a duly established state of necessity constituted a circumstance precluding the wrongfulness of State conduct not in conformity with an international financial obligation.

20. A case involving an obligation “not to do” was the case of *Seal fisheries off the Russian coast* (*ibid.*, para. 33). At the end of the nineteenth century, the Russian Imperial Government had been concerned about the extent of the increase in sealing by British and United States fishermen near Russian territorial waters. To avert the danger of extermination of the seals, and despite the fact that the hunting took place outside its territorial waters, the Government had issued a decree prohibiting sealing in an area that indisputably formed part of the high sea. It had emphasized that the action had been taken because of “absolute necessity”, in view of the imminent opening of the hunting season, and had stated that the action was essentially provisional. Finally, it had proposed the conclusion of an agreement for a permanent settlement of the problem. The case was therefore one

that highlighted the concept of state of necessity as well as its strict limits.

21. An interesting case relating to the treatment of aliens was an Anglo-Portuguese dispute dating from 1832 (*ibid.*, para. 40). The Portuguese Government, bound to Great Britain by a treaty requiring it to respect the property of British subjects resident in Portugal, had invoked the pressing necessity of providing for the subsistence of certain contingents of troops engaged in quelling internal disturbances as a justification for its appropriation of property owned by British subjects. Not only had the urgency of the situation been invoked by Portugal but it had also been recognized by all those who had to do with the case.

22. In the *Oscar Chinn* case (*ibid.*, para. 41), the Belgian Government had adopted measures which had benefited a Belgian company and had created a *de facto* monopoly on river transport in the Belgian Congo. Those measures had harmed a British subject and been contested by the United Kingdom, which had brought the case before the Permanent Court of International Justice. The Court had held that the *de facto* monopoly was not prohibited in the case in question and therefore had not needed to rule on the existence of a state of necessity as ground for excluding wrongfulness. However, the question had been taken up in the individual opinion of Judge Anzilotti, who had taken the view that if proof had been furnished that there was an internationally unlawful monopoly, the Belgian Government could only have excused its action by proving in turn that it had acted under necessity. Judge Anzilotti’s definitions remain classic on the subject.

23. Again, the case concerning *Rights of Nationals of the United States of America in Morocco* brought before the International Court of Justice by the United States of America and France in 1952 (*ibid.*, paras. 42–43) also provided considerable support for recognition of the applicability of the plea of necessity, since the Court had not denied the value of the argument based on state of necessity advanced on that occasion by the agent of the French Government.

24. Similarly, the *S.S. “Wimbledon”* case (*ibid.*, paras. 44–46) attested to the admissibility in general international law of state of necessity as a circumstance precluding wrongfulness, and also made it possible to determine, from the arguments of the agents of the Governments concerned, the conditions under which the circumstance might be invoked: immediate and imminent danger, the absence of any other means of protection, and the continued existence of the danger at the time of the act.

25. The case of the “*Neptune*” (*ibid.*, paras. 47–48) tended to demonstrate that a state of war did not rule out a state of necessity. Moreover, it confirmed that state of necessity could be invoked only in a case of truly extreme and irresistible necessity.

26. On the question of so-called “necessity of war” and “military necessity”, he referred members to paragraphs 49 *et seq.* of his report and said that, in his opinion, the concept should not play any part in the work of the Commission in relation to the subject under consideration.

27. As to the essential question of whether state of necessity might constitute a circumstance that precluded the wrongfulness of any breach of a State’s obligation to respect the territorial integrity of other States, in modern international law any use of armed force by a State for an assault on the territorial integrity of another State—for example, by annexation, occupation or use for military purposes of all or part of its territory—was indisputably covered by the term “aggression” and, as such, was subject to the most typical and indisputable prohibition of *jus cogens*, both in general international law and in the United Nations system, and no state of necessity could be invoked as a circumstance precluding the wrongfulness of an act thus prohibited by international law. No effect of a “ground” could therefore be attributed to a claim of necessity, even if genuine, by the State using force. Article 5, paragraph 1, of the Definition of aggression³ stated that

No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.

28. Paragraphs 56 *et seq.* of his report discussed a number of opinions on well-known cases of intervention in which “necessity” had often been invoked by the Governments concerned even though such a circumstance had not been admissible in the event. In fact, the Governments in question had not considered their justifications as legal arguments so much as political justifications proffered to world opinion, that of neutral countries or their own public, for a Government’s need to defend itself vis-à-vis its own public opinion might be of particular importance—for example, on the brink of war.

29. The prohibition of the use of force against the territorial integrity or political independence of any State was set forth in Article 2, paragraph 4, of the Charter of the United Nations and, even before that, had formed part of the legal thinking of the members of the international community. Since the prohibition was a rule of *jus cogens*, it followed that no plea of necessity could justify the commission of such a grave and flagrant assault against the sovereignty and territorial integrity of a State, although the question might arise of whether the recognition in principle of a state of necessity as justification for an otherwise wrongful act might have the effect of precluding the wrongfulness of certain limited acts of force in foreign territory. It was a difficult question to answer, as there were conflicting opinions even within the United Nations system.

30. Before the Second World War, interventions of that type had definitely been considered lawful when justified by necessity. In support of such an assertion, it was possible to cite the “*Caroline*” case (*ibid.*, para. 57), cases of intervention in foreign territory in “hot pursuit”, or cases of intervention in foreign territory for “humanitarian” purposes on behalf of nationals or foreigners threatened by insurgents, hostile groups, etc. In such varied cases, the possibility of invoking necessity as justification had been generally admitted.

31. With the introduction of the principle of prohibition of the use of armed force and the adoption of the Charter of the United Nations after the Second World War, it could well be asked whether acts of such a kind might still be justified by a state of necessity. Unfortunately, the practice of States and of the United Nations was not entirely conclusive. In the case of the Belgian intervention in the Congo in 1960, the Belgian Government had indeed invoked the state of necessity as a basis for its act, but its arguments had been neither refuted nor admitted in any decisive way. In a number of more recent cases of armed action carried out in foreign territory for “humanitarian” purposes to assist nationals or free hostages from terrorist groups, etc., the Governments concerned had not invoked state of necessity but the “consent” of the State on whose territory the raid had taken place (Mogadishu, 1977; Larnaca, 1975), or “self-defence” (Entebbe, 1976). State practice simply gave an impression of a prevailing trend towards an attitude of the greatest severity to acts against the territorial sovereignty of States.

32. In that regard, it should be emphasized that it was not the task of the Commission to interpret the provisions of the Charter of the United Nations, since there already existed for that purpose competent bodies whose judicial opinion in regard to those matters could not be considered definitive. However, by concluding that it was certainly inadmissible to invoke state of necessity in order to justify an act that breached the peremptory rules of international law, the Commission would be covering the most important aspects of the matter. If the interpretation of the Charter, which must prevail, was that the peremptory character of certain prohibitions extended to any form of assault—even partial, limited or involving a restricted aim—on the territorial integrity or the political independence of another State, it was obvious that the essential situations would also be covered. However, as an additional precaution, the draft articles should indicate that, whatever the admissibility of the value of a plea of state of necessity, under certain conditions and within certain limits, in general international law, it should always be understood as being subject to any different conclusion warranted in a given area, not only as a result of the existence of a rule of *jus cogens*, but also as a result of any explicit provisions of a treaty or other international instrument, or the inferences to be drawn therefrom on implication.

³ General Assembly resolution 3314 (XXIX), annex.

33. Lastly, summing up the main aspects of the doctrine on the basic question of recognition by general international law of "state of necessity", he said that for the classical writers necessity had unquestionably been a circumstance that, if established, justified an act and precluded wrongfulness. However, writers had gradually introduced indispensable limitations to the recognition of such justification before and above all had become seriously concerned at the obvious abuses of that doctrine in the nineteenth century. It was at that time that the theory of the fundamental rights of States had emerged and had been greatly abused in order to justify the most arbitrary acts. That attitude had led to a reaction against recognition of the plea of necessity in general, a reaction that certain authors, such as Westlake, had however criticized. In the inter-war years and after the Second World War, opinions had been divided. Most writers had remained favourable in principle to the admissibility of state of necessity as a justification precluding the wrongfulness of an act, but the number of writers hostile to the applicability of that concept in international law had increased (A/CN.4/318/Add.5 and 6, paras. 70 *et seq.*). However, he doubted whether there was genuine conflict between two different schools of thought. In fact, the conflict was not as marked as it seemed, since the two schools reached similar conclusions after starting out from different positions. In short, nearly all writers ruled out the possibility of invoking necessity in the case of an assault on the territorial sovereignty of the State, but were prepared to accept it in other less dangerous cases.

34. In conclusion, he was convinced that international law recognized, and had to recognize, the concept of state of necessity, even though it might limit its use. From the point of view of the progressive development of international law, it was to be noted that no single legal order had entirely done away with the concept of state of necessity. Of course, its application had to be ruled out where it was particularly dangerous, but it was equally necessary to admit it where it was useful, if only as a safety valve to guard against the untoward consequences of too strict an application of the letter of the law, as reflected in the adage *summum jus, summa injuria*. It should not be forgotten that too sweeping and too rigid a prohibition ran the risk of shortly being bypassed by the spontaneous evolution of the law. The most advisable attitude was to acknowledge the applicability of state of necessity, if need be limiting its effect or even ruling it out altogether in certain areas; but the concept could not be ignored, since it was rooted in every system of law, whether it be internal law or international law.

The meeting rose at 1 p.m.

1614th MEETING

Wednesday, 18 June 1980, at 10.15 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

State responsibility (*continued*) (A/CN.4/318/Add.5 and 6, A/CN.4/328 and Add.1-4)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)

ARTICLE 33 (State of necessity)¹ (*continued*)

1. Mr. RIPHAGEN noted that, in paragraph 9 of Mr. Ago's report (A/CN.4/318/Add.5 and 6), Verdross was cited as having demonstrated that, in the situation described by the term "state of necessity" the conflict was not between two "rights", but between a "right" and a "mere interest", however vital. Yet how could such a conflict be resolved, under any circumstances, by giving legal precedence to the mere interest of one State over the legally protected right of another State? Such a result of precedence could be arrived at logically only by recognizing that international law gave a measure of protection to such a "mere interest", which was tantamount to saying that the Commission was confronted with a conflict between different abstract rules of international law arising from a fortuitous set of circumstances not allowing the respect of both rules at the same time.

2. That interpretation of the problem underlying article 33 provided an intellectually more acceptable explanation of the fact that the possible preclusion of the wrongfulness of a given act committed by a State, if accepted in a particular case for reasons of "necessity", would not in itself preclude the consequences for which the State committing the act in question would otherwise be held responsible under international law by reason of the wrongfulness of that act, as stated in paragraph 18 of the report. That interpretation also provided an explanation of the fact that some rules of international law were immune from being legitimately breached on the ground of "state of necessity", whereas other rules were not. It did not imply recognition of a right of self-preservation, whether as a fundamental right, or simply as a right, of every State. Recognition of a subjective right to act in order to preserve oneself was quite different from

¹ For text, see 1612th meeting, para. 35.

recognition of a rule of law giving a measure of protection to the essential interests of a State.

3. In that connexion, it should not be forgotten that, in modern international law, the recognition of some very essential interests of States, particularly economic interests, was in the process of elaboration in new rules imposing obligations on other States. In that respect, “new” international law differed fundamentally from “old” international law, which regarded States as “Powers”. The only vital interest of a Power was to expand, or at least not to contract. It was small wonder, therefore, that a right of self-preservation had been regarded with great suspicion by international lawyers.

4. The interpretation in question had the further advantage of implying that there must be a common yardstick to measure the allegedly essential interest of one State against the legally protected interest of another State, as well as to judge the previous conduct of the States involved. It also implied that, before any such “measuring” took place, it should be factually established that the conflict was really fortuitous.

5. A third level of comparison concerned the quality of the rule or obligation for the non-performance of which the excuse of “state of necessity” was invoked. On the one hand, there were international rules, such as those prohibiting aggression, non-compliance with which could never be excused on such a ground. On the other hand, there were rules of international law, particularly conventional rules, which explicitly, or more often implicitly, had already taken into account a possible conflict with the essential interests of a State and were adapted to the cases where such situations arose. In such cases, the inherent conflict was already resolved by the rule itself. Only if neither an absolute rule of international law, nor a rule already adapted to the possible conflict of interests was at stake, could the general plea of state of necessity come into play. It was only then that there was a fortuitous conflict and the two other levels of comparison could be applied.

6. However, although fortuitous from the point of view of the rules of law involved, the situation of conflict might still not be fortuitous in fact, in that it might be the outcome of the previous conduct of the State or States involved. Often, a situation in which a State’s essential interest was threatened by a grave and imminent peril could have been foreseen and avoided. In such cases, the international yardstick must first of all be applied. Inevitably, that implied assessing the internal policy measures that a State had taken, or failed to take, and that had brought about, or contributed to, the situation of peril. A State wishing to invoke a state of necessity as an excuse for not fulfilling its international obligations could not at the same time invoke its domestic jurisdiction as a ground for refusing to allow its previous policy measures to be subjected to the international test of what might reasonably have been expected of it, in order to avoid the situation of grave and imminent peril. If that test

led to the conclusion that the State could not be blamed for the situation, then the next level of comparison, whereby its interests were measured against those of the other State, could and must be applied.

7. Draft article 33, as proposed by Mr. Ago, though possibly based on a slightly different interpretation, nevertheless seemed to lead to the same result. The third level of comparison was reflected in paragraph 3 of the draft article, in that subparagraph (a) referred to norms of international law that were immune from the plea of necessity by virtue of their special peremptory character, and subparagraph (b) referred to cases in which the inherent conflict was already resolved by the conventional rule of international law itself. He attached particular importance to the words “or implicitly” in that subparagraph.

8. The second level of comparison, namely that relating to the fortuitous character of the conflict, seen from the factual point of view, was reflected in paragraph 2. However, the wording of that paragraph was perhaps both too strong and too weak. One could hardly expect to be confronted in practice with a case in which a State deliberately created a grave and imminent peril to its own essential interests. On the other hand, the very element of “fortuitousness” inherent in the plea of necessity implied that the State’s conduct was not the only cause of the situation. It might be better, therefore, to replace the words “was caused” by “could have reasonably been avoided”.

9. The first level of comparison—between the interests of the States involved—was reflected in the second sentence of paragraph 1.

10. Referring to paragraph 18 of Mr. Ago’s report, he said that, whatever plea of necessity might be accepted in law, the act of the State itself obviously remained an internationally wrongful act entailing new legal relationships very similar, though not identical, to those that would ensue from any other wrongful act of a State. In such cases, any treatment of the act according to other rules, such as those relating to liability for injurious acts not prohibited by international law, was *a priori* precluded.

11. A situation of grave and imminent peril threatening an essential interest of a State might also have been caused, provoked, or contributed to by the conduct of the other State, whose legally protected interest was sacrificed by the act of necessity not in conformity with the obligation owed to that State or else the conduct in question might have contributed to the supervening of that situation. The question whether such a circumstance affected the operation of the third level of comparison was, to some extent, addressed in paragraphs 55 to 66 of the report. However, the observations contained in those paragraphs centred only on a particular type of international obligation, namely that sector of the over-all international obligations of States that concerned respect by every State

for the territorial sovereignty of others. The question was whether all the rules pertaining to that sector had the same force of *jus cogens* as must be accorded to the prohibition of aggression. However, in principle, the excuse of state of necessity could be invoked in the case of breaches of other types of international obligation towards another State. Indeed, such other types of international obligation were mentioned at various points in the report.

12. Under paragraph 2 of draft article 33, the state of necessity could not be invoked if the situation must be blamed on the State invoking the excuse. However, what if the situation must be blamed on the other State? If the question of state of necessity was considered as reflecting a conflict between a rule of international law giving a measure of protection to the essential interest of a State and another rule protecting an interest of another State, it was impossible to avoid taking into account the conduct of the second State, in terms of its conformity or non-conformity with the first-mentioned rule. Could State A reasonably expect State B to act in conformity with its obligation towards State A if State A had brought about a situation in which State B could not do so without sacrificing its essential interests?

13. Obviously, the answer to that question was in the negative, and such an answer was not excluded by the terms of draft article 33. The only point to decide was whether, in such cases, the second sentence of paragraph 1 of the draft article would apply. In other words, was it not possible that "comparable" or "superior" interests of the other State could be sacrificed as a result of an act which arose out of a state of necessity? The principle that sentence set forth could be likened to the rule of proportionality, and it was difficult to apply the international yardstick that words such as "comparable" and "superior" necessarily implied to cases where the interests involved were of different dimensions. To take the example cited in paragraph 56 of Mr. Ago's report, how was the interest of a State that had crossed the frontier in pursuit of an armed band or gang of criminals to be compared with the interest of another State that was protected by the rule of international law prohibiting acts performed *jure imperii* by one State within another's territory? A similar question could be raised regarding the interest that a State had in protecting its nationals, even when abroad, particularly if such nationals were being held in foreign territory against their will.

14. In such cases, there seemed to be an inherent conflict between the functional, personal and territorial aspects of the sovereignty of States. In that connexion he noted from the report that, in the case of the "Caroline", that conflict had been solved by providing for an exception on the ground of "a strong overpowering necessity" (*ibid.*, foot-note 115), whereas, in a dispute between the United States and Mexico, it had been solved by an agreement concluded

between the parties that determined the personal dimension—"hostile Indians"—and the territorial dimension—"in desert areas and up to a specified depth" (*ibid.*, foot-note 116). In neither case, however, was one of the two common features of the other cases discussed in the report present since there was no danger involved "which the foreign State in question has a duty to avert by its own action but which its unwillingness or inability to act allows to continue" (*ibid.*, para. 56). In other words, the question whether the other State was to be blamed for the existence of a situation in which an essential State interest was threatened "by a grave and imminent peril" had been left open.

15. Accordingly, it was necessary to examine the connecting factors in the situation as a whole with a view to determining which types of relationship—functional, personal or territorial—should prevail in a given context. In so doing, it should be borne in mind that there could be cases where a state of necessity merged with a situation of self-defence, since the former involved a measuring of comparable interests in the event of a fortuitous conflict between different rules, and the latter involved the suspension of the rule whereby the use of force against the territorial integrity of another State was prohibited when the same rule was violated by that other State. In such cases, the blame for the existence of the situation in which an essential interest of State A was threatened by a grave and imminent peril rested on State B. That did not, however, necessarily mean that State B had previously committed an internationally wrongful act with respect to State A. The Commission, when it had agreed that consent should constitute a circumstance precluding wrongfulness, had not been thinking in terms of consent given by the organ of the State and in the forms prescribed for consent to be bound by a treaty. Similarly, in the case in point, it was not necessary that the blame resting on State B should arise out of the breach of an international obligation towards State A. That, in fact, was where the difference lay between circumstances precluding wrongfulness and the new legal relationships arising out of the breach of an international obligation, which latter subject was dealt with under part 2 of the topic.

16. In paragraph 80 of his report, Mr. Ago had rightly stressed the need to ensure that "the fundamental requirement of respect for the law does not ultimately lead to the kind of situation that is perfectly described by the adage *summum jus, summa injuria*". Justice, unlike the rule of law, was universal, permanent and, above all, definite. Indeed, that was the consideration which lay at the root of all the circumstances precluding wrongfulness, ranging from fortuitous event and *force majeure* through distress and consent to state of necessity and self-defence. All those circumstances, however, had a common dimension in that they merged into the topic of the content, forms and degrees of State responsibility at the point where a relationship had to be established between a given rule

and a sanction—the latter word being understood in the sense attributed to it by Mr. Ushakov.² The topic of the content, forms and degrees of State responsibility likewise merged into the topic of international liability for injurious consequences arising out of acts not prohibited by international law, which, in turn—viewing the matter from the preventive rather than the repressive point of view—merged into the question of the management of shared natural resources, which constituted the essence of the law of the non-navigational uses of international watercourses.

17. Sub-paragraph 3 (b) of draft article 33 dealt with the explicit or implicit effect of conventional provisions on situations of necessity (see A/CN.4/318/Add.5 and 6, paras. 67–69). It was clear that, in so far as a conventional provision covered the situation, it was that provision, rather than the general rule governing a state of necessity, which would apply. The difficulty was that the general rule consisted of both permissive and restrictive elements and, while the conventional provision could obviously expand or contract either element, the residual effect of the general rule was far from clear. The problem was very similar to that which had arisen in regard to negotiated reservations to multilateral treaties and the relationship of those reservations to the general rule concerning the admissibility of reservations. It seemed to him, therefore, that the public emergency clauses in human rights conventions, which were referred to in foot-note 145 of the report, dealt not with the general rule on necessity but rather with an exclusion of that rule in favour of a rule of *jus cogens*. Moreover, the provisions referred to in foot-note 146, and in particular article XX of the General Agreement on Tariffs and Trade (GATT), provided for derogations from the obligations laid down with a view to protecting, *inter alia*, public morals, public health or items of artistic and cultural heritage. In other words, those provisions dealt not with necessity but with matters that could not obey the laws of supply and demand that lay at the very heart of freedom of trade. It was significant that the GATT provisions did not imply that the interest in protecting, for example, public morals should be measured against the interest in promoting freedom of trade, whereas the Treaty establishing the European Economic Community did do so.³ As was rightly stated in paragraph 69 of Mr. Ago's report, however, "only through an interpretation of the convention in question" would it be possible to give a definitive answer in each case. The only question to be decided, therefore, was whether sub-paragraph 3 (b) of draft article 33 reflected a sufficient degree of flexibility. That, however, was a matter which could be settled by the Drafting Committee.

18. Mr. SCHWEBEL said that the Commission was concerned at the moment with the case where State A,

in failing to perform an obligation owed to State B, acted out of necessity because, for example, the performance of the obligation would prejudice an essential interest of State A. In so doing, however, State A was none the less in breach of its obligation, and in many cases would presumably inflict damage on State B, which was entirely innocent in the matter. In such circumstances, which of the two States should bear the burden of the damage? His own view was that it should be State A.

19. The position of a State that acted out of necessity was not the same as that of a State that took certain countermeasures or acted in self-defence. In the latter case, the otherwise wrongful act of a State was not qualified as wrongful because there had been a prior wrongful act by another State. A State that acted out of necessity, on the other hand, did so voluntarily, since it had a choice in the matter. Nor, again, was the position the same as that of a State which acted as it did because of *force majeure* or impossibility of acting otherwise.

20. In that connexion, he noted that paragraph 18 of Mr. Ago's report stated that the preclusion of wrongfulness for reasons of necessity would not in itself preclude the consequences that would follow if the act were deemed unlawful, and would not, therefore, extend to consequences to which the same act might give rise, such as the obligation to compensate for the damage caused, which would be incumbent on the State on a basis other than that of *ex delicto* responsibility. Did that mean that the state of necessity would mitigate, but not exclude, damages? And, if so, would it be perhaps preferable to treat the act arising out of a state of necessity as wrongful and to take the circumstances of necessity in mitigation of damages, rather than to treat such an act as not wrongful but to hold that damages were none the less payable?

21. Mr. REUTER said that, although a provision such as draft article 33 was essential and its wording could not have been better than that proposed by Mr. Ago, he (Mr. Reuter) was not fully satisfied, because some quite serious doubts remained to be dispelled.

22. According to the opening passage of the draft article, it would be the Commission's view that a state of necessity precluded the wrongfulness of an act of a State not in conformity with what was required of it by an international obligation. He wondered whether *force majeure* and state of necessity should not also be provided for in the law of treaties, from which such concepts had been partially excluded. He noted that a state of necessity usually did not affect the obligation itself, which might, for example, merely be suspended. That was, however, not a question to be dealt with by the Commission, because it was not one of responsibility. The issue before the Commission was whether the wrongfulness of the act disappeared, and whether it disappeared entirely or partially. That was a very sensitive question, and he was not really sure that the

² See for example *Yearbook ... 1979*, vol. I, p. 57, 1544th meeting, para. 28.

³ United Nations, *Treaty Series*, vol. 298, p. 11.

solution adopted was the right one. In dealing with the case in which, to use the more specific English words, there was "compensation" but not "damages" or, in other words, in which there was financial responsibility, but no wrongful act had been committed, the Commission would be entering a domain that was not really its concern at the moment—for it was considering, at that point, only the wrongful act of the State—and that would come more within the scope of Mr. Quentin-Baxter's topic.

23. In general, the concept of state of necessity was admitted only reluctantly. In the past, attempts had been made to restrict the exercise of the right of necessity to matters affecting the existence of the State. In his report, Mr. Ago had invited the Commission to take a different point of view and, without ruling out the right of necessity in situations where the existence of the State was at stake, not to place too much emphasis on that aspect. He proposed instead that emphasis should be placed on a more general characteristic of the right of necessity and that the Commission should realize that there was now general agreement on the concept of such a right. From that point of view, the inclusion of a draft article on state of necessity was essential. It was, however, essential only as a result of the position which the Commission had taken earlier on the concept of *force majeure* in the sense of a material or, in other words, absolute impossibility of performance. Yet that was not the way in which *force majeure* was commonly defined in modern legal terminology, in which, with regard to economic and financial obligations, for example, the term *force majeure* was used to describe a situation of relative, not absolute, impossibility of performance. Draft article 33 could thus be regarded as a provision counterbalancing an excessively strict position taken on another point.

24. In that connexion, he said that the case-law of the Court of Justice of the European Communities offered many interesting examples. The parties to the disputes adjudicated by that Court had, at various times, invoked *force majeure*, state of necessity and self-defence to justify non-compliance with their obligations. Hence the Court had had to define those concepts and apparently took the view that the definition of *force majeure* varied according to the field to which it applied. Those examples seemed to militate in favour of very specific wording, even if the Commission appeared to be going against the trend.

25. He also pointed out that situations could be visualized in which a state of necessity was combined with self-defence or, in other words, in which there was both a measure of self-defence and a measure of necessity.

26. He was not sure about the real nature of draft article 33, which could be seen as a technical rule, a general principle or even as a whole legislative programme. He thought, however, that in fact it laid down a general principle, for it was very hard to know

what exactly was meant by such expressions as "essential interest" or "grave and imminent peril". The wisest course would be to say that what was needed was a set of specific legal rules under broad headings. Draft article 33 did, in fact, seem to be a source of special rules relating to broad topics, as was clearly shown by the examples of cases of economic and financial problems. He could see why an attempt had been made to formulate a general article, but thought that it embodied a principle that was very difficult to apply and that it called for the largest possible number of agreements in the various fields in which it could apply. It could even be said that draft article 33 foreshadowed the whole problem of the new international economic order. The developing countries had, for example, signed many conventions—relating, *inter alia*, to drug control—which they considered to be in keeping with the interests of the international community. They were, however, incapable of performing the obligations they had undertaken in those conventions, and it had been necessary to invent the doctrine that, so long as a country had shown good will, under-development was an admissible cause of impossibility of performance.

27. Lastly, he noted that, although Mr. Ago had intended to exclude natural law from his draft articles, he had nevertheless been forced to reintroduce it in the form of a progressive natural law which was nothing more than the conscience of the international community.

28. Mr. VEROSTA noted that, because the word "excuse" was used in the French text of draft article 33, paragraphs 2 and 3 (b), it might be inferred that those provisions were meant to indicate an "exception" to the rule in the first sentence of paragraph 1, namely, that wrongfulness was precluded if the State had acted in order to safeguard an essential State interest threatened by a grave and imminent peril. An act committed by reason of necessity was, however, ultimately contrary to international law, and the word "excuse" could mean that compensation might be owed. In the English text of draft article 33, the word "excuse" had been translated in one passage by the word "ground" and in another by the word "plea".

29. By way of example, he referred to a case which had, regrettably, not been mentioned in the report, namely, that of the invasion of Belgium by Germany in 1914. Since Belgium, a permanently neutral State, had objected to German troops crossing its territory, the German Government had, in a statement made to the Reichstag by the Chancellor, admitted that it was wrong to disregard that objection, but had stated that it would compensate Belgium accordingly. The German Government had been in a state of necessity, and its only object in also invoking self-defence had been to be able to describe the invasion of Belgium as a defensive war—the only kind of war considered permissible by the Social Democratic Party.

30. He was not sure whether the general rule of the preclusion of wrongfulness in the case of state of necessity should be retained and whether the French word "*excuse*" was appropriate.

31. Mr. AGO, speaking in reply, said that the word "*excuse*" was not perhaps the most appropriate one, but it was used commonly by learned authors and even in State practice to describe the grounds for the preclusion of wrongfulness and, in particular, in cases of *force majeure*. Nevertheless, to avoid any misunderstanding, another term might be found to replace it.

32. He had not cited cases like that of the invasion of Belgium by Germany and others often associated with it because in his opinion the application of the excuse of necessity in such cases was today excluded, since what was concerned were acts that were contrary to a peremptory norm. Moreover, Governments had frequently invoked a state of necessity in such cases only so as to give their conduct the semblance of moral justification in the eyes of public opinion.

33. In reply to Mr. Schwebel's comments, he said that in his opinion it would be wrong to attribute to "state of necessity" the value of a cause attenuating, rather than precluding, the wrongfulness of the act of a State. The essential value of a plea of necessity was that it would take the blame of wrongfulness away from the act of the State, not that it would attenuate the consequences of the action, which remained wrongful. As for the obligation to compensate for any ensuing damages, it might prevail on other grounds, but remained an obligation to pay in full; it depended more on the wrongful consequences of an internationally lawful act than on the "attenuated" responsibility of an internationally wrongful act.

34. Mr. USHAKOV said that his reading of the report under consideration had convinced him that draft article 33 was unnecessary. The report showed that, in certain extremely rare circumstances, a State might have to adopt conduct not in conformity with that required by an international obligation in order to safeguard one of its essential interests. The State must, in such a case, be in a situation of dire necessity, an exceptional emergency situation. It would not be in such a situation if mere financial obligations were involved, for it was always possible to cope with the situation by means other than emergency measures. A situation of dire necessity would, however, exist in the case where a forest fire broke out beyond the border of a State and came dangerously close to a nuclear power station located inside the border; but even in such a case, the Government claiming to be acting out of necessity could first try to obtain the neighbouring country's consent to the emergency action it was planning to take. Only if the neighbouring country refused could emergency action be taken; even then, it should be temporary, and might give rise to an obligation to make good any damage caused.

35. In his opinion, cases of that kind were ones which were not covered by international law and in which a court should recognize that the existing rules of law did not apply. Such cases should be settled by the parties concerned in the light of the prevailing circumstances, which could mitigate the effects of the emergency action taken; there would, however, be no reason to preclude the wrongfulness of such action. If a developing country was unable to repay a loan, an arrangement could be made to facilitate the servicing of the debt or to reschedule the debt.

36. The effect of all the circumstances taken into consideration in the articles constituting chapter V of the draft articles was, in the final analysis, to preclude responsibility. In the cases covered by the other articles in that chapter, the situation could be evaluated objectively. In the case referred to in draft article 29,⁴ it was always possible to determine whether or not consent had been given. In that of draft article 30, it was possible to determine whether an internationally wrongful act had been committed before counter-measures were taken. In the cases of *force majeure* and fortuitous event referred to in draft article 31, the existence of an irresistible natural force and material impossibility could always be established. Similarly, in the case of distress referred to in draft article 32, it was possible to make an objective evaluation of the situation in which the organ of the State found itself. In the case of dire necessity, however, it was not always possible to assess the situation objectively. Nor could that case be equated with those of *force majeure* or fortuitous event, for it did not involve any irresistible force.

37. It was not logical to remove all traces of natural law and to claim that a fundamental right of one State could not be more important than the fundamental right of another State, and to present an article requiring a comparison between the essential interests of two States. It was no more possible to compare the essential interests of States than to compare their fundamental rights. Besides, it was impossible to make an objective evaluation of two interests, each one of which was considered by the State invoking it to be more important than the other. In specific cases, such interests could be evaluated, but it was not possible to lay down in advance a general rule sacrificing an interest protected by an international obligation to a social interest.

38. He was thus of the opinion that, although cases of dire necessity could, of course, arise, they should be treated as cases not covered by international law, just as it could happen in internal law that a court did not pass judgement because there was no applicable statutory provision. In his view, none of the examples

⁴ See 1613th meeting, foot-note 2.

mentioned in support of draft article 33 described a genuine situation of dire necessity; hence, the draft article had no *raison d'être*.

The meeting rose at 1 p.m.

1615th MEETING

Thursday, 19 June 1980, at 10.15 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

State responsibility (*continued*) (A/CN.4/318/Add.5 and 6, A/CN.4/328 and Add.1-4)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)

ARTICLE 33 (State of necessity)¹ (*continued*)

1. Mr. DÍAZ GONZÁLEZ said that he wished to lodge a formal protest regarding the quality of the Spanish version of documents submitted to the Commission. Specifically, he had noted a number of errors, not only of form but also of substance, in document A/CN.4/318/Add.5 that made it difficult at some points to understand what was meant. To cite but three examples, the term "self-defence" had been translated by "*autodefensa*", which had an entirely different legal meaning in Spanish, since "*autodefensa*" did not necessarily signify self-defence; in addition, "*autotutela*" was sometimes used when the correct term would have been "*autoconservación*", for the two terms also had a different legal meaning; lastly, in the second quotation in paragraph 48 of the report, the word "*terceros*" had been used when the sense clearly called for the word "*otros*". He requested that his protest be reflected in the summary records and that the Spanish version of documents submitted to the Commission be carefully revised before being reproduced in the *Yearbook of the International Law Commission*.

2. He had been somewhat concerned to learn from Mr. Ago at the 1613th meeting that an essential interest, which was one of the fundamental elements of

a state of necessity, could include an economic interest. His concern was explained more particularly by the fact that the Latin American countries had had some unfortunate experiences of attempts to justify intervention in their affairs on financial grounds. The concept of essential interest therefore seemed to be a two-edged sword. For example, the economic interests of the nationals of State A could be treated as an essential interest and, on that basis, State A could invoke a state of necessity on the ground that it had to defend an essential interest that was allegedly being threatened in State B.

3. The example given in paragraph 57 of Mr. Ago's report, concerning attacks made by Mexican Indians in United States territory between 1836 and 1896, was a little strange. In his view, the case was more one of self-defence on the part of the Indians than an example of state of necessity. Moreover it was the Indians who had had an essential interest in the matter, it was they who had been threatened with extermination and it was their lands which had been confiscated by the invaders. The example would have been more appropriately dealt with under the heading of human rights.

4. Lastly, he stressed the need to draft the article in such a way that it would not lead to any mis-interpretation of what constituted a state of necessity. That was particularly important in the case of small countries, whose only shield lay in correct interpretation of the few international legal instruments that were of benefit to them.

5. Mr. ŠAHOVIĆ said that draft article 33 had to be examined not only from the point of view of the draft articles as a whole, and particularly chapter V thereof, but also from the point of view of general international law. From that angle, the article seemed to be justified, although it might be necessary to specify more clearly the limits within which state of necessity could be taken into consideration.

6. An article on state of necessity, when viewed in terms of the draft articles as a whole, and particularly chapter V, did have its *raison d'être*. Since draft article 3, para. (a)² defined the subjective element of an internationally wrongful act of a State, and state of necessity included just such an element, the Commission could not disregard the concept. Again, having enumerated in chapter V a number of circumstances that could preclude wrongfulness, the Commission could not remain silent on the question of state of necessity. Furthermore, article 33 followed on logically from article 32, which was concerned with distress and presented an objective aspect in relation to article 2. Articles 32 and 33 also shared a common feature in that they both involved a deliberate act. It had therefore been proposed in the Sixth Committee that a distinction should be drawn between the articles of chapter V which involved an element of inten-

¹ For text, see 1612th meeting, para. 35.

² See 1613th meeting, foot-note 2.

tionality and those which did not. In view of the affinity between a situation of distress and a state of necessity, it might be said that they could be dealt with in a single article, in the way that the Commission had dealt with *force majeure* and fortuitous event in a single provision, but he was of the opinion that state of necessity, which was more complex than distress, should form the subject of a separate article.

7. When viewed in terms of general international law, state of necessity also had a place in the draft. The many cases cited by Mr. Ago showed that, although state of necessity had not become fully accepted, it did have some status in international law. Many of the misunderstandings to which state of necessity had given rise were the result not of the use of one term rather than another but of determining the facts, and of the difficulties experienced by some courts in deciding what intrinsic value the concept had in international law.

8. In modern international law, there was some hostility towards the concept of state of necessity. For extra-legal reasons, some people feared the potentially adverse consequences of recognizing the concept. It was, moreover, a difficult concept to define precisely. In order to do so, it was necessary to determine the conditions in which the plea of necessity could be invoked in the framework of State responsibility. Yet international law was constantly evolving; thus, after long controversy, a rule had emerged in international law to the effect that "military necessity" could not be considered as a plea in international law because it negated the principle of the settlement of armed conflicts by humanitarian law. The law of war no longer existed, but a single system of international law, which prohibited the use of force, had taken over. In that connexion, Mr. Ago had been right to emphasize *jus cogens* in general and the prohibition of the threat or use of force in particular. For his own part, he considered that state of necessity could constitute a plea in existing positive international law solely on the basis of those two elements, but it remained to be seen how and to what extent they should be taken into account.

9. Referring to the wording of draft article 33, he said that paragraph 1, which was in some ways a definition of state of necessity, should specify the conditions in which it applied. In that regard, account might be taken of the views expressed in paragraphs 12 to 15 of the report. For example, emphasis should be placed on the exceptional nature of measures taken by reason of necessity and on the innocence of the injured State. The meaning of the terms "essential State interest" and "grave and imminent peril" should also be clearly explained, either in the draft article itself or in the commentary thereto. However, the task of improving the wording of draft article 33 lay with the Drafting Committee.

10. The wording of paragraph 2 might, in so far as possible, be brought into line with the corresponding

provisions of the preceding articles, more particularly article 31, paragraph 2, and article 32, paragraph 2.

11. Sub-paragraph 3 (a) contained a reservation relating, in particular, to the case of non-compliance with the prohibition of aggression. Compliance with the peremptory norms of general international law, and especially the prohibition of aggression, was in his opinion a prerequisite for a plea of necessity, and sub-paragraph 3 (a) was therefore an essential provision. However, it was not wholly satisfactory. First, its contents should be included in paragraph 1. Secondly, the wording was not entirely in line with that of article 29, paragraph 2, in which the Commission had reproduced the definition contained in the Vienna Convention on the Law of Treaties³ for the purposes of referring to peremptory norms of general international law. The concise formulation used in the draft article under consideration might give rise to misunderstanding. The prohibition of the threat or use of force established in Article 2, paragraph 4, of the Charter of the United Nations and in article 52 of the Vienna Convention was of such importance in so delicate a matter as state of necessity that it was essential to be as explicit as possible on that point.

12. Since state of necessity continued to give rise to confusion, it might be claimed that the question was one which did not yet lend itself to the codification and progressive development of international law, but Mr. Ago's report had convinced him that, if the Commission agreed with such a claim, it would be disregarding positive international law.

13. Lastly, he noted that the problem of compensation could arise when the wrongfulness of an act of the State was precluded. The Commission had already stated that it was aware of that problem and that it would deal with it in part 2 of the draft articles. Once it had considered all of the draft articles in chapter V, it might nevertheless try to decide whether the problem should be mentioned in that chapter.

14. Mr. QUENTIN-BAXTER said that he had been very interested in the example given by Mr. Ushakov at the previous meeting, of a State which, in order to protect a nuclear power station on its territory in the event of a forest fire, crossed the frontier where the forest extended; in the absence of consent by the other State, such action would clearly amount to a physical invasion of that other State's sovereignty. However, it seemed preferable to deal with that kind of ground for precluding wrongfulness under the heading of self-defence, with the very rigid limitations that had attached to that particular ground since the "*Caroline*" case. In fact, if a State was faced with a situation of danger on a relatively deserted part of its neighbour's

³ For the text of the convention (hereinafter called "Vienna 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.

territory and the situation was out of control and represented a much greater threat to that State than to its neighbour, the sense of urgency would be similar to that which arose in a case of an imminent peril in which wrongfulness could be excluded on the ground of self-defence.

15. How then should the question be resolved? And was it, in fact, necessary to include state of necessity among the circumstances that precluded wrongfulness? In principle, the purpose of any system of law was to provide the rules that reasonable people required. That, however, was not a complete answer if one bore in mind the adage that "hard cases make bad law". Nevertheless, it would sometimes prove necessary, in order to uphold a rule of major importance, to allow situations that would be very hard, from the moral standpoint, on the party in breach of the rule. That was particularly true in the penal law of States, where issues such as the right to life were involved—but the same kind of issue could arise under international law. For all that, he did not think that those considerations would resolve the matter with which the Commission was concerned.

16. Another possibility was to disallow any preclusion of wrongfulness in such cases but to maintain the obligation to make compensation, not in the narrow sense of payment of money, but in the sense of doing what was necessary to put matters right. Such an obligation might fall either under the regime of international liability for injurious consequences arising out of acts not prohibited by international law or under the regime governing part 2 of the topic of State responsibility (content, forms and degrees of State responsibility). If the danger to the State that violated the frontier was great and if the other State had taken no measures to abate that danger, no court or tribunal and no judgement of States would deal harshly with the State that had infringed its obligation, irrespective of whether or not the wrongfulness of its act had been precluded. There were a number of factors that would be taken into consideration, in which connexion Mr. Riphagen had rightly suggested (1614th meeting) that the situation could be viewed from the angle of shared resources. For example, if the State committing the act had endeavoured, by negotiation in good faith, to reach agreement on a regime for the protection of a joint interest or a shared resource and the other State had not manifested any interest in such an agreement, that would affect the measure of liability, irrespective of the topic under which the case fell. However, that approach would not solve the problem either, although it did indicate certain possibilities.

17. The preclusion of wrongfulness on the ground of necessity was closely circumscribed by the terms of draft article 33, something that the Commission should welcome. Thus, if the obligation breached arose out of a peremptory norm of international law, wrongfulness was not precluded. The will of the parties as expressed in treaty instruments was paramount. Lastly, a strict

rule of proportionality had to be observed. For those reasons, and because there could be no contributory cause on the part of the State which committed the act, the concept of necessity was much more restricted than had formerly been the case. As Mr. Reuter had pointed out (*ibid.*), article 33, if read together with the draft article on *force majeure* and fortuitous event, would be far narrower in ambit than the traditional understanding of *force majeure* alone. But that still did not dispose of the Commission's problem, since preclusion of wrongfulness on the ground of a state of necessity differed from the other grounds of preclusion. A State which invoked necessity had to consider, for instance, whether its intended action was in keeping with the rule of proportionality, whether peremptory norms were involved, whether it could be said, by reversing the chain of causation, that the State itself had contributed to the situation, and whether there were any treaty instruments that had a bearing on the matter. In the case of the other grounds of preclusion, however, States did not engage in that kind of exercise, and in the face of an imminent peril they acted without a moment to think. His concern on that score was somewhat heightened by the fact that much of the relevant State practice related to economic circumstances, and situations could be characterized differently depending on the view taken by the State concerned at a particular moment in time. For example, if a general election was pending, the Government might consider that the matter could wait until the elections had been held.

18. For all those reasons, he felt somewhat hesitant. The Commission had perhaps been right in considering that its position might depend to some extent on the view that it would take of the regime governing international liability for injurious consequences arising out of acts not prohibited by international law. In that connexion, he would remind members that the Working Group appointed to consider that topic had suggested that it should be limited to issues arising out of the physical use of the environment,⁴ a suggestion to which Mr. Riphagen had voiced some reservation. For his own part, he was not even tempted to question that limitation. Nor did he think that the views on that point would be divided when the time came for the Commission to consider the topic. Therefore, he had no intention of seeking to take over from the regime of State responsibility cases having an economic content, which obviously did not fall within the physical use of territory. At the same time, inasmuch as the regime of international liability for injurious consequences arising out of acts not prohibited by international law would be developed by reference to the physical use of territory, it would, in addition, undoubtedly define to some degree the areas that did not fall within that topic.

⁴ See *Yearbook . . . 1978*, vol. II (Part Two), pp. 150–151, document A/33/10, chap. VIII, sect. C, annex, para. 13.

19. He therefore considered that the preclusion of wrongfulness on the ground of a state of necessity should be maintained, and enunciated in a provision that was worded as carefully and restrictively as possible. His position could largely be explained by the fact that the kind of consideration to be taken into account bore a relation to the regime of international liability for injurious consequences arising out of acts not prohibited by international law, and those same considerations to some extent eluded the categories of lawfulness and unlawfulness. The Third United Nations Conference on the Law of the Sea, for example, clearly demonstrated how States could, by negotiation and agreement, make the necessary accommodations to combine the maximum amount of freedom with the maximum degree of security against unlicensed freedom on the part of other States. In the same way, the consequences of a state of emergency in a particular State, such as non-payment by that State of its external debts, could be covered more appropriately within the flexible framework of the topics to which he had referred than in the context of the questions of lawfulness and unlawfulness. In that connexion, the kinds of exceptions that were required in terms of the developing countries and of UNCTAD immediately came to mind, as did perhaps Principle 23 of the Declaration of the United Nations Conference on the Human Environment.⁵ That was not to say, however, that only the developing countries stood to benefit from them. There were other cases in which limitations of liability were required in respect of a given regime, such as those in which the economics of the industry concerned dictated such a limitation. He had in mind, for example, the carriage of oil by sea.

20. In the light of those considerations, an article based on draft article 33 should, together with recommendations by the Commission, be submitted to the General Assembly. He trusted, however, that the set of draft articles would incorporate a general reservation to the effect that the draft articles in no way affected the obligations which might be incurred in connexion with injurious consequences arising out of acts not prohibited by international law.

21. Sir Francis VALLAT said that, in the past, there had been much theoretical controversy regarding the preclusion of international wrongfulness on the ground of necessity. It was significant that, although the cases in which a plea of necessity had been upheld were very few in number, on many occasions both sides had in principle accepted that the establishment of the existence of a state of necessity would preclude wrongfulness. On the basis of the information available to it, the Commission would therefore be justified in concluding that the concept of necessity was generally accepted by States.

22. Admittedly, many of the cases referred to in the report related to financial obligations and the doctrine of necessity could be more readily accepted in that field than in others, but the Commission should be careful not to limit to financial obligations the situations in which the plea of necessity could be invoked.

23. As to the question of the effect of a plea of necessity, an examination of the doctrine expressed in the statements of Governments revealed that, in general, States considered that the establishment of a state of necessity precluded wrongfulness, and did not simply modify the consequences of an act. Accordingly, it seemed that the best course would be to include draft article 33 in part 1 of the draft and also to provide for the preclusion of wrongfulness if an excuse of necessity was established. However, regardless of whether the draft article was included in part 1, the question would have to be taken up again in part 2. Furthermore, in almost all circumstances, reliance on a plea of necessity would be completely frustrated if the other State concerned was allowed to take counter-measures. Consequently, once a state of necessity was established, it would normally be quite justifiable to rule out the possibility of adopting such measures.

24. As to the text of the draft article, greater stress should be placed on the exceptional character of the plea of necessity. One way of doing so would be to place the draft article after draft article 34 (Self-defence), so that its effects would be recognized as being different from those of the other circumstances precluding wrongfulness, and to redraft it in a negative form along the lines of article 62 of the Vienna Convention on the Law of Treaties.

25. In the main, he agreed with the limits that draft article 33 placed on the excuse of necessity. However, it should be emphasized that the use of armed force by a State outside its own jurisdiction or within the jurisdiction of another State would rule out any plea of necessity.

26. Lastly, there was inevitably a substantial element of subjectivity in assessing a state of necessity, something which rendered the application of article 33 more difficult than that of most of the articles relating to other circumstances precluding wrongfulness. In the context of draft article 33, it would be important to ensure an adequate system for the settlement of disputes.

27. Mr. USHAKOV pictured a case in which draft article 33 was in force and State A, which had breached an obligation towards State B, justified its conduct by pleading necessity. State B, finding that the obligation had been breached, did not, however, accept the plea of necessity and took legitimate counter-measures against State A in keeping with draft article 30. He would like Mr. Ago to indicate, in that instance, which State was acting within its rights and which State incurred international responsibility.

⁵ *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I.

28. Similarly, if State A considered that the countermeasures taken by State B were not legitimate because the grounds that it (State A) had invoked precluded the wrongfulness of its initial act and it, in turn, took countermeasures, the question of responsibility would arise again. The possibilities for further complications in a case of that kind were endless.

29. In his opinion, it was advisable to identify all the relationships to which article 33 could give rise and, in particular, the links between that article and article 30.

30. Mr. ROMANOV (Secretary to the Commission), referring to the comments made by Mr. Díaz González at the beginning of the meeting, apologized to the Commission for the errors of translation in the Spanish version of document A/CN.4/318/Add.5. The comments made by Mr. Díaz González would be brought to the attention of the Spanish Translation Service in New York, and the necessary steps would be taken to correct the errors.

The meeting rose at 12.50 p.m.

1616th MEETING

Friday, 20 June 1980, at 11.35 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

State responsibility (*continued*) (A/CN.4/318/Add.5-7, A/CN.4/328 and Add.1-4)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)

ARTICLE 33 (State of necessity)¹ (*continued*)

1. Mr. FRANCIS said that, at the Commission's previous session and also at the beginning of the current session, he had had serious doubts about the advisability of tackling the question of necessity as a circumstance precluding wrongfulness and of including a provision to that effect in the draft articles. His doubts had arisen mainly because the concept of necessity had been open to great abuse in the past.

2. However, his misgivings had been dispelled after engaging in a careful study of the excellent Secretariat

study entitled "'*Force majeure*' and 'fortuitous event' as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine",² and section 5 of the addenda to the eighth report by Mr. Ago (A/CN.4/318/Add.5-7). Mr. Ago had surveyed a welter of information on State practice, international judicial and arbitral decisions and doctrine, found the golden thread which ran through all the doctrinal polemics, placed before the Commission in his eighth report the indisputable essentials of the question of necessity and established beyond any doubt that article 33 should be included in the set of draft articles under consideration.

3. As a result of Mr. Ago's successful completion of his task, it was now clear that possible abuses of the concept of necessity should not have been a matter of such great concern to him (Mr. Francis) because safeguards against such abuses, and thus a justification for draft article 33, were provided in the broad legal framework that was formed by the Charter of the United Nations, more particularly Article 2, paragraph 4 thereof, and by the jurisprudence of the Organization, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,³ the Definition of Aggression⁴ and articles 53 and 73 of the Vienna Convention.⁵

4. A practical justification for draft article 33 was also to be found in the technological developments which had taken place in recent years, in the structure of the modern State system and in the social, economic and political forces at work in today's world, a world that was quite different from what it had been only five or ten years previously.

5. With regard to technology, he did not think it far-fetched to assume that when, for example, a State engaged in the exploration and exploitation of the resources of the sea-bed or the continental shelf, it might encounter difficulties that would require it to plead necessity to justify the conduct it adopted in dealing with such difficulties.

6. As to the structure of the modern State system, when the United Nations had been established in 1945 it had had 51 Members, but it now had more than three times that number. If the 51 original Members of the United Nations had considered it necessary to provide for the concept of necessity, it was all the more likely that the present Members would consider it important to be able to invoke that concept.

7. It was a well-known fact that the social, economic and political forces at work in the world of today had

¹ For text, see 1612th meeting, para. 35.

² *Yearbook ... 1978*, vol. II (Part One), p. 61, document A/CN.4/315.

³ General Assembly resolution 2625 (XXV), annex.

⁴ General Assembly resolution 3314 (XXIX), annex.

⁵ See 1615th meeting, foot-note 2.

completely disrupted the finances of many countries, particularly the developing countries. It was of interest to note Mr. Reuter's remark (1614th meeting), that in relation to some international conventions on narcotics, these latter countries had assumed obligations which they could not reasonably be expected to discharge. To the extent that Mr. Ago had based his justification for the concept of necessity on examples of financial obligations, he (Mr. Francis) was of the opinion that draft article 33 had direct, but not exclusive, relevance to the situation of developing States.

8. Lastly, he agreed with other members of the Commission that, in a case involving the use of force, necessity could not be deemed a circumstance that precluded wrongfulness.

9. Mr. SCHWEBEL said that Mr. Ago's report was a model of scholarship, discernment, analysis and, indeed, courage, for it took moral courage to advocate that a state of necessity precluded the wrongfulness of an act of a State. He had shared the uneasiness of other members of the Commission at having to deal with a draft article relating to the concept of state of necessity, which was in bad odour for good reasons, but he had reluctantly come to accept the draft article submitted by Mr. Ago.

10. However, there was merit in the suggestion made by Sir Francis Vallat at the previous meeting that draft article 33 should be cast negatively in the style in which article 62 of the Vienna Convention dealt with *rebus sic stantibus*. There was even greater merit in subjecting judgements relating to a state of necessity to third party adjudication. If, under the Vienna Convention, a plea of *jus cogens* was seen to demand subjection to third party adjudication, the same should certainly be true of so delicate a plea in avoidance as state of necessity, for as Mr. Ushakov had pointed out (1615th meeting), the dangers of self-judgement by the State pleading necessity were too great. He therefore hoped that the commentary to draft article 33 would be enriched by the observations made in that connexion by members of the Commission during the current discussion.

11. While he could accept the substance of draft article 33 and most of the commentary, he still had doubts about the way in which the article treated the question of who bore the burden of an internationally wrongful act. It was clear to him that the burden of compensation should fall not on the innocent State whose rights had been violated but on the State which pleaded necessity. Other members of the Commission seemed to agree with that view. Again, Mr. Ago had not opposed it and had said that, instead of qualifying an act committed out of necessity as unlawful but allowing mitigated damages, it would be better to treat the act committed out of necessity as lawful but contemplate full compensation. If that was in fact the Commission's view, draft article 33 and the commentary should clearly say so. Perhaps Mr. Ago would

consider adding a new paragraph 4 worded along the following lines:

"The applicability of paragraph 1 does not affect equitable considerations of distribution of loss; as between an innocent beneficiary of an international obligation and a State which fails to perform that obligation for reasons of necessity, the latter shall bear the resultant burdens and pay any compensation necessary to make whole the former."

12. Admittedly, it could be argued that a provision of that kind belonged in part 2 of the draft articles, but if one bore in mind that the damage suffered was not the result of a wrongful act because wrongfulness was precluded by reason of necessity, it could be argued that the matter came under the topic of international liability for injurious consequences arising out of acts not prohibited by international law. He was, however, not sure that any of those approaches was satisfactory and therefore requested Mr. Ago to consider the possibility of including in draft article 33 a provision along the lines of the one he (Mr. Schwebel) had just suggested. It would then be clear that an act committed out of necessity was not wrongful, that the obligation whose evasion or avoidance was thus justified did not have to be performed, but that the burden of non-performance was not to be borne by the innocent party.

13. Lastly, further consideration should be given to the suggestion made by Mr. Riphagen (1614th meeting, para. 8) that draft article 33, paragraph 2, should be amended to read:

"Paragraph 1 does not apply if the occurrence of the situation of 'necessity' could have reasonably been avoided by the State claiming to invoke it as a ground for its conduct."

14. Mr. CALLE Y CALLE said that Mr. Ago's report was largely concerned with the question posed in its paragraph 10, namely, whether the obligation of one State towards another State could be sacrificed because it was impossible for the first State to respect that obligation or because it was compelled to act as it did out of necessity. In seeking to answer that question, Mr. Ago had not referred to any abstract notions of law but had instead drawn widely on State practice and doctrine. In other words, he had looked to the realities of international life in order to determine whether the wrongful element in the conduct of a State should be precluded in cases where compliance with its obligation would gravely, and perhaps irrevocably, imperil an essential State interest. Thus, an otherwise unlawful act would become lawful not by virtue of any primary rule but because the wrongfulness of that act was extinguished. The question was not one of a right inherent in all obligations—of a kind of *rebus sic stantibus* clause—but of a state of necessity that should be covered by international law.

15. It had been said that a state of necessity must by definition be absolute and imperative, but he did not

think that the Commission was required to consider extreme cases in which the very survival of a State was at stake. Nor was it required in that context to consider obligations that arose under *jus cogens* and humanitarian law, or related to the fundamental sovereignty and integrity of the State. Rather, the Commission should deal with situations in which a State was unable, for some very pressing reason, to fulfil a given obligation, normally an obligation that was set forth in a convention and, consequently, was of somewhat lesser importance. It was in such situations that the State had to decide whether, in certain circumstances, it should disregard its obligation in order to protect an essential interest.

16. Mr. Francis had raised an important point regarding the interaction between political, social and economic factors. In a world order that left much to be desired, States sometimes had urgent social needs that prevented them from complying with, for instance, obligations of a financial kind or obligations which arose under contracts with private persons; in such cases, the treaty or contractual obligations of the State had to yield before its overriding interests. In his view, however, a State could not derogate from all norms. It could derogate from only a certain category of norms, for a certain time, and in cases in which an essential State interest was imperilled.

17. The preclusion of the wrongfulness of an act of the State did not, of course, remove the obligation to compensate for the damage caused by an act that would otherwise have been unlawful. In that regard, he agreed entirely with Mr. Quentin-Baxter (1615th meeting) that compensation should be viewed not only in monetary terms but also as a means of restoring, in so far as possible, the *status quo ante*.

18. In the light of those considerations, he considered that a carefully and restrictively worded draft article would certainly command wide support in the Sixth Committee of the General Assembly. However, a provision should be expressly incorporated in paragraph 1 of the draft article to the effect that the existence of a state of necessity must be proved. In other words, it must be established that the State had acted as it had because there had been no other way of protecting an essential interest threatened by a grave and imminent peril.

19. Also, in the Spanish version of sub-paragraph 3 (b), the word "*texto*" should be amended to read "*instrumento*", in line with the original French text. In that connexion, he endorsed the remarks made by Mr. Díaz González at the previous meeting: it was regrettable that the reports presented by special rapporteurs should lose some of their clarity in translation.

20. Mr. VEROSTA said that the wording of paragraph I of draft article 33 should be more restrictive, in order to emphasize the exceptional nature of a state of necessity. In his opinion, it was not really certain that the example of financial difficulties

given by Mr. Ago came within the framework of state of necessity.

21. The use of the words "invoke it as a ground" in paragraph 2 showed that Mr. Ago had some doubts about the absolute nature of the principle laid down in paragraph 1. If the wording of paragraph 1 was to be retained as it stood, it would be more accurate to refer, in paragraph 2, to an "exception". Mr. Ago had, moreover, agreed that the Drafting Committee might consider the text from that point of view. The same paragraph should also contain a provision on the burden to be borne by the injured State, the purpose being, once again, to attenuate the absolute nature of the rule.

22. He supported the text sub-paragraph 3 (a), but wondered whether it was desirable to retain in sub-paragraph 3 (b) such absolute wording as that proposed by Mr. Ago, who had not cited among the examples included in the report any of the dramatic situations in which some States had actually found themselves. He had in mind, in particular, the case of the Danubian Empire, which had been bound to Germany by a convention dating from before the First World War and, despite strong domestic pressure as from 1916 onwards, had refused to plead necessity in order to free itself of its obligations; the fact that it had kept its word had led to its downfall. Another example was the case of the Kingdom of Italy, which had been linked to Germany and Japan during the Second World War by a convention which had not provided for state of necessity; yet, in 1943, the Fascist Grand Council had decided to depose Mussolini and to change sides. In his opinion, those examples militated in favour of the inclusion of less absolute wording in sub-paragraph 3 (b).

The meeting rose at 12.35 p.m.

1617th MEETING

Monday, 23 June 1980, at 3.15 p.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yankov.

Also present: Mr. Ago.

State responsibility (continued) (A/CN.4/318/Add.5-7, A/CN.4/328 and Add.1-4)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (continued)

ARTICLE 33 (State of necessity)¹ (*continued*)

1. Mr. YANKOV said that he agreed with Mr. Ago's analysis of the main constituent elements of the concept of state of necessity, namely, the intentional aspect, the innocence of the injured State, and the relationship with other circumstances precluding wrongfulness. He had been particularly impressed by the analysis of the exceptional nature of the "excuse of necessity". In that connexion, he noted that the interest of a State which was at stake must be "of exceptional importance to the State seeking to assert it" (A/CN.4/318/Add.5-7, para. 12); and, further, that the concept of state of necessity was not necessarily linked to the existence of the State, since an erroneous identification of that concept with the concept of self-preservation might "create a false picture of the question" (*ibid.*). It seemed to him, however, that the requirement that the state of necessity must be of an exceptional nature was partly a subjective condition, for it was extremely difficult to detect any objective criterion. In his view, that point deserved further consideration.

2. In referring to the interest of the State which would call into play a plea of necessity, Mr. Ago had normally used the term "essential interest". There again, it was difficult to find the legal yardstick by which that interest could be determined. Clearly it had to be, as provided for in draft article 33, "comparable or superior to the interest which it was intended to safeguard", but the same question involving a subjective judgement arose in any given circumstances. For example, in certain areas of the law on the protection of the environment, different values had been found to obtain depending on the national, political, economic and other priorities of the State concerned. What was perhaps qualified as a superior ecological interest could none the less be challenged on the ground of the economic or political interest which, for certain countries, prevailed. As Mr. Ago had observed, it was relative rather than absolute values that were involved, but the basic problem of measuring that relativity remained. Mr. Ago's reasoning was very convincing, but there was a missing link in the series of propositions, and that link would have to be supplied before the notion of an essential interest could be regarded as having a valid basis.

3. He endorsed the basic requirement that a state of necessity could only be invoked if an essential State interest was threatened by a grave and imminent peril. He also agreed that the situation "must be entirely beyond the control of the State whose interest is threatened" (*ibid.*, para. 13), and that the measures taken by the State must be "the only means available to it for averting the extremely grave and imminent peril which it fears" (*ibid.*, para. 14); in other words, it "must be impossible for the peril to be averted by any other means, even one which is much more onerous

but which can be adopted without a breach of international obligations" (*ibid.*). Once again, subjective judgement would be paramount in determining whether the act in question was indeed entirely beyond the control of the State whose interest was threatened. In his view, therefore, there was no reliable basis on which that element could be accepted as part of the concept of necessity.

4. He agreed with the limitation on the concept of necessity referred to in paragraph 16 of the report, since the area involved was one in which evidence could be adduced. He also agreed with the limitation referred to in paragraph 17, since, while there might be difficulties in producing evidence, the area was one which afforded a greater degree of certainty and was less open to unilateral interpretation.

5. A further limitation to the concept of necessity was provided by the rules of *jus cogens*. In that connexion, he welcomed Mr. Ago's reference to the prohibition of the use of force against the territorial integrity and political independence of a State and to the prohibition of acts of aggression. He considered, however, that other peremptory rules of international law recognized by the international community as norms from which no derogation could be permitted should be treated on the same footing. He would be grateful for Mr. Ago's views on that point. For instance, should the rule *pacta sunt servanda* apply, which was laid down in article 26 of the Vienna Convention,² or the rule laid down in article 27 of the same Convention, whereby the internal law of a State could not be invoked as justification for the failure of that State to perform its obligations under a treaty? His own view was that in such cases the treaty obligation would prevail and no state of necessity could be invoked.

6. In the light of those limitations, it seemed to him that the concept of state of necessity would operate, first, with regard to financial obligations, secondly, with respect to obligations relating to the protection of the environment and, thirdly, possibly in the case of obligations relating to international communications and other technical areas of international co-operation. For example, if a State was threatened by the spread of a cholera epidemic, the international health regulations of WHO would apply. Those regulations provided that a neighbouring State could introduce certain restrictions but could not close its frontiers or prevent the normal operation of transport and communications. If the neighbouring State, considering that its interests were comparable or even superior to those of the first State, did not comply with its obligations, it would invoke the state of necessity and the relative importance of the two interests would be weighed, with the result that the responsibility of the State which had closed its borders in order to prevent the spread of cholera would be precluded. Such a case had, in fact, been referred to arbitration.

¹ For text, see 1612th meeting, para. 35.

² See 1615th meeting, foot-note 3.

7. On balance, therefore, it seemed to him that state of necessity was a vulnerable concept, first, because of the possible confusion with other circumstances precluding wrongfulness and, secondly, because of the dubious parameters of the concept, which relied more on subjective judgement than on objective criteria. Subjective judgement was the backdoor through which unjustified breaches of international obligations could enter. Mr. Ago had indeed quite rightly expressed concern on that score. But there remained a serious possibility that the concept of state of necessity would have an adverse impact on the stability of the international legal order. Accordingly, it was right to say that a State claiming to be released from an international obligation, on the ground that it had an interest which it unilaterally averred to be "essential" must inevitably "suffer a rebuff, lest the entire system of international legal relations should be annihilated" (*ibid.*, para. 11).

8. The concept of state of necessity would, moreover, inevitably widen the area of disputes, particularly in times when the world financial situation was volatile, and it would also exacerbate the conflict between State interests and subjective rights as recognized under international law; the question of ecological considerations and national priorities was a case in point.

9. From the discussion, he noted that there was a trend which favoured caution. That being so, another approach might be to confine the circumstances precluding wrongfulness to concepts which were based either on objective criteria or on a standard of sufficient evidence. His own inclination was to adopt a cautious approach at that stage and to include in the commentary a passage to the effect that the concept of state of necessity was applicable only to the question of the degree of international responsibility and to circumstances mitigating rather than precluding that responsibility. He further considered that the matter should be referred to Governments, on the basis of whose comments the Commission could then endeavour to find a solution. The concept of state of necessity as outlined by Mr. Ago was both tenable and logical, but was it viable?

10. Mr. JAGOTA noted that, in his report, Mr. Ago had explained that the controversial nature of the concept of state of necessity was due to the fact that many legal writers had been unable to agree on the basis for such a plea or had been concerned at the possibility of its continued abuse. Mr. Ago had, however, pointed out that, in practice, any concept was open to abuse. Even though they fully realized that many thieves went unpunished, States retained an internal law of theft, because they realized that such a law was necessary and useful to society. By the same token, the concept of state of necessity should be considered on its merits, regardless of the abuse to which it might give rise. Mr. Ago had suggested that the question of abuse could perhaps be dealt with when the concept and its constituent elements were defined.

Mr. Ago had also pointed out that most cases of abuse had occurred in connexion with the use of force against another State's territory—particularly after the Second World War, since when aggressive war had become an international crime under *jus cogens*. Since rules of *jus cogens* were to be excluded from the operation of the concept of necessity, the mischief inherent in the doctrine of necessity had, in effect, been removed.

11. One point to be decided by the Commission was whether to use the term "necessity", "state of necessity" or some other term. It was quite clear that there was a difference between "necessity" and "state of necessity", just as there was between "war" and "state of war", and the Commission should therefore mark its preference. The terminology used in draft article 33 would also have to be standardized.

12. Mr. Ago had said that a state of necessity was not a right, but a factual situation precluding wrongfulness. Consequently, the Commission should consider the concept under that heading rather than under the heading of a right which flowed from international law. He had likewise said that the concept must be pleaded and proved by the State which invoked it, to the satisfaction of those called upon to determine whether or not the plea was justified.

13. So far as the substantive aspects of the concept were concerned, Mr. Ago had explained that it was designed to protect an exceptional or essential State interest, as opposed to any interest regulated by treaty, and his report cited a number of examples to indicate the type of case in which a plea of necessity could be invoked. However, in view of the subjective elements involved in the concept, there was a danger that a plea of necessity might suffer the same fate as a plea of vital interest, and it was therefore necessary to determine the difference between a vital and an essential interest, and whether the subjective element of the latter should in fact be retained. His own initial impression had been that Mr. Ago would soften the subjective element by referring to the other elements surrounding the concept, which would be objective in nature. Those objective elements would in turn affect the restrictive conditions imposed on the operation of the concept of necessity.

14. What were those conditions? The first was that the essential interest must be threatened by a grave and imminent peril, and the second that the State must have exhausted all possible remedies, so that it had no other choice but to act as it did. The concept was, however, further refined in relation to counter-measures. If a State was injured as a result of another State's breach of its international obligation and that other State invoked a plea of necessity, the former State was an innocent State: any damage done to the innocent State must be less or comparatively less than the damage that would have been caused to the State invoking necessity. Implicit in that analysis was the recognition that the innocent State might be able to claim compensation—depending on the facts of the case—for the damage it had suffered as a result of the

justifiable act of another State: therein lay the difference between countermeasures and necessity. The question of compensation was not, however, expressly referred to in draft article 33. Possibly, therefore, the draft article should include a cross-reference to mark the distinction between countermeasures and necessity—or some reference to the matter should be embodied in Part 2 of the topic.

15. The report dealt with two basic exceptions to the concept of necessity, the first of which related to *jus cogens* and the second to treaties under which necessity could not be invoked, either expressly or by implication. So far as the first of those exceptions was concerned, Mr. Ago, referring to Article 2 (4) of the Charter of the United Nations, had posed the question whether all uses of force, including the threat of force, were aggressive, but had also pointed out that the Commission was not competent to interpret the Charter. The Commission was, however, expected to pronounce on certain matters, for example, whether the use of force which was less than aggressive against another State was permitted. If it was permitted, the question of necessity did not arise; but if it was prohibited, the question was whether that prohibition could be extinguished by a plea of necessity. The report, which did not refer to that question, could perhaps have been more specific in its treatment of the exception.

16. The treatment of the second exception to the concept of necessity—that based on treaty provisions—was, on the other hand, excellent, and Mr. Ago's analysis of treaty provisions and practice provided a valuable indication of the way in which certain treaties could be modified or suspended in times of emergency. Thus, a treaty could provide expressly for a variation of its terms on specific grounds. Such a provision could be cast in positive terms, to the effect that a state of necessity could be invoked in regard to certain articles, the operation of the concept then being excluded by implication in the case of the other articles, or, conversely, in negative terms.

17. Paragraph 80 of the report seemed to contain a somewhat categorical statement, and he was particularly doubtful about the last sentence. He was, however, prepared to accept the statement subject to any further comments he might wish to make after he had studied the report more fully. He was also prepared to agree to draft article 33, subject to the restrictions and conditions outlined by Mr. Ago.

18. With regard to the text of draft article 33, he said that an effort should be made to standardize the terms used as far as possible. He wondered why, in paragraphs 2 and 3, the word "necessity" was placed in quotation marks, whereas in the title, it was not. He suggested that the words "or contributed to" should be inserted after the word "caused" in paragraph 2, in order to place the onus on the claimant State for using all its resources to avoid the occurrence of the situation of necessity. Similarly, the words "or of it did not take

effective steps to avoid that grave or imminent peril" might also be added at the end of the paragraph. In sub-paragraph 3 (a), the words "and in particular if that act" might be replaced "or if the act relates to an international crime or".

19. Mr. BARBOZA associated himself with the comments made by Mr. Díaz González at the 1615th meeting regarding the Spanish version of the report, which contained a number of mistranslations.

20. In a report that was even more brilliant than the Commission had come to expect of him, Mr. Ago had set out a wealth of material that made it possible to decide whether or not the draft should include an article on state of necessity, a matter that was of great controversy because of the abuses that it had occasioned in the past. Like Mr. Ago, the Commission should take the necessary precautions not only to prevent similar abuses from occurring in the future but also to pinpoint the nature of the opposition to the concept of necessity and to restrict its scope in law.

21. Mr. Ago had engaged in a threefold process of refinement of the concept, firstly by considering whether it had any connexion with natural law. It was true that, in the past, cases of acts where unfair advantage had been taken of weaker States had often involved a very general plea under natural law, with no reference to the restrictions thereon or to the exceptions to those restrictions. His rejection of any link with natural law had led Mr. Ago to consider whether there was a customary rule that embodied the principle of state of necessity, since the existence of a relevant customary rule placed the matter under the heading of positive law. Secondly, in paragraphs 7, 9 and 10 of the report Mr. Ago had then discussed and rejected the idea that state of necessity constituted a subjective right and, thirdly, he had gone on to express opposition to the idea of a right of self-preservation. Quite properly, Mr. Ago preferred to speak of "essential interest", an approach that was more consistent with the philosophy underlying the concept of state of necessity and was more comprehensive in that it took account of all instances in which a state of necessity might arise.

22. The report did not offer any definition of "essential interest", but paragraph 2 afforded useful examples, such as a grave danger to the existence of the State itself, its political or economical survival, the continued functioning of its essential services, the maintenance of internal peace, or the preservation of the environment of its territory, etc. Admittedly, the view had been expressed that too great an element of subjectiveness was involved in comparing State interests, but for his own part he believed that, like *force majeure* or any other concept in international law, the assessment of a state of necessity inevitably entailed some degree of subjectiveness. Obviously, it would not be possible for the Commission to establish some kind of scale of interests, yet no great difficulties should

arise in determining which interest was higher in a specific case.

23. On the question of whether or not there was a rule of positive law, and more particularly a customary rule, embodying the principle of state of necessity, it was evident that learned opinion was less divided than might have been supposed. Some writers adopted a negative position by rejecting the principle but none the less recognizing its application in certain areas of international law. Other writers took a positive position and affirmed the existence of the principle but specified very restrictive conditions in order to prevent abuses from being committed. Hence, it could be seen that there was some common ground. Much more important, however, was the fact that the practice of States did acknowledge the principle of necessity. Particularly valuable in that regard were the learned opinions of judges, arbitrators and Government agents, opinions from which it was apparent that the actual principle of necessity had never been denied. They had simply held that the requisite conditions for the validity of a plea of necessity had not been met in a particular case. Again, most important of all, the cases cited in the report were more significant than doctrine alone because they bore witness to the practice of States. In his view, an appropriate rule did exist in customary international law and it was not only reflected but partly developed in draft article 33, which had a logical place in the structure of the draft.

24. Mr. Šahović (1615th meeting) had correctly pointed out that chapter V of the draft enumerated the exceptions to draft article 33, and more especially to paragraph 3, subparagraph (b) thereof. At its thirty-first session, the Commission had, after wide-ranging discussion, strictly limited the concept of *force majeure* to cases of material impossibility—in other words, to cases in which the obligation could not be performed because of some irresistible external force or an unforeseeable event. However, other situations had been described as involving a relative impossibility to perform the obligation, and they had at one time been covered both in learned opinion and in State practice by the concept of *force majeure*. Nevertheless, at that session, the Commission had agreed to an article on a particular instance of necessity, namely, the necessity of an organ of the State provided for in article 32, concerning distress.

25. Article 33 therefore filled a gap in the draft and acted as a counterpart to article 32. Since the Commission had accepted the principle of necessity in the case of an organ of the State, there was no reason for it to reject the principle of necessity in the case of the State itself. Furthermore, the provisions of article 33 lent flexibility to the rules on State responsibility and avoided the kind of situation exemplified by the adage *summum jus, summa injuria*. The principle of necessity was, so far as he was aware, one that existed in all legal systems. Consequently, it had to be incorporated in the draft, subject to the limits and

conditions wisely indicated by Mr. Ago, for they would prevent any abuse of the plea of necessity in the future.

26. The obvious but none the less essential point of departure in considering article 33 was the premise that the obligation had already been breached and could not be performed. What was done could not be undone. Consequently, a new legal relationship arose between the defaulting State and the State towards which the obligation had existed, something that was readily apparent in obligations *not to do*. To take the case of the hunting of fur-seals in the Bering Sea (see A/CN.4/318/Add.5–7, para. 34), for example, if the Government of the United States of America had sent vessels to prevent operations by the Canadian sealers, the obligation would have been breached, and the only course would have been to establish a new legal relationship between the United States Government and the Canadian Government in which the obligation of the United States Government would have been to make reparations. However, Canada could have taken countermeasures—for instance, by blocking United States funds. On the other hand, if the United States Government had claimed and justified a state of necessity, the obligation would have been breached, but the conduct on the part of the United States would have been lawful and any countermeasure on the part of the Canadian Government would have been wrongful. If any damage had been caused, there would have been an obligation to make reparation, but that matter came under the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

27. The same effects were to be seen, although perhaps less clearly, in the case of obligations *to do*. If State A failed to pay, by a specific date, a sum owed to State B, it breached its obligation, because the time element was an essential aspect of the obligation. A court could order *restitutio in integrum*, but if the debtor State justified a plea of necessity, the court might well specify various methods of paying the sum after the state of necessity had ended. Clearly, the consequences of a breach of an obligation depended on whether or not a state of necessity could be shown to have existed. The purpose of draft article 33, therefore, was not to mitigate the responsibility of the State but to preclude wrongfulness, although responsibility might subsist for any damage caused by lawful acts.

28. In that respect, unlike other members of the Commission, he considered that financial obligations represented one of the areas in which a valid plea of necessity could be made. As Mr. Ago had shown, in their replies to the request for information made by the Preparatory Committee for the Conference for the Codification of International Law (The Hague, 1930), a number of Governments had maintained that a State could not deprive its people of essential services in order to perform financial obligations on time. Indeed, under international law non-compliance with financial

obligations had long been ruled out as grounds for armed intervention by creditor States. As a result of coercion used against Venezuela by creditor States, in 1902 Luis María Drago, the Argentine Foreign Minister, had expounded the doctrine that the debts of a sovereign State could not be collected by armed force, a view which he had again expressed at the Second International Peace Conference (The Hague, 1907) and which had led, at the initiative of the United States, to the conclusion of a new convention stipulating that armed force could not be used for the collection of contractual debts, unless the debtor State rejected arbitration or failed to comply with the arbitral award.

29. Lastly, the assertion that urgency was a requisite for establishing the existence of a state of necessity had no basis in the learned opinion on the topic. In that respect, it was important to remember that situations might arise in which a State could not perform its obligation for many reasons other than mere lack of time.

30. As to the text of article 33, the first and second sentences of paragraph 1 should form separate paragraphs, since the first sentence set forth the general principle of state of necessity, whereas the second sentence placed qualifications on the principle. It was one thing to enunciate a principle and another to speak of the cases in which the principle did not apply. In addition, it might be desirable to express the principle in a negative form, in order to meet the concerns of those who wished to put a restrictive interpretation on the concept of state of necessity. Furthermore, paragraph 2 referred to "the occurrence of the situation", but it might well be better to follow the wording of articles 31 and 32, which spoke of the State which "has contributed" to the occurrence of the situation. Such a formulation would cover cases in which States failed to take steps to prevent the particular situation from arising.

31. Mr. TSURUOKA paid a tribute to Mr. Ago's devotion to the cause of codification and the progressive development of international law.

32. Like most of the members of the Commission who had spoken, he approved the main lines of draft article 33. He was in favour of retaining the article on state of necessity, for in the light of the practice of States and of the general structure of the draft, such an article, which would supplement preceding provisions, had to be included. However, he shared the concern of those members who had said that the concept of state of necessity was somewhat vague and open to abuse. Accordingly the areas where it was admissible should be carefully distinguished from those where it was not admissible.

33. As other speakers had said, Mr. Ago had made it clear that the concept of state of necessity operated only exceptionally in international law. If possible, it should become even more of an exception.

34. Some members of the Commission had taken the view that the subjective element should be entirely removed from the definition of cases in which the concept might be applied—which he felt was in itself evidence of a certain subjectivity. Accordingly, if it was not possible to eliminate that element of subjectivity altogether, the Commission should include in its commentary a detailed analysis of the concept, together with a wealth of examples from practice of cases of the application and of the exclusion of the concept, so that States would in that way have criteria enabling them to avoid abuse. There should also be a procedure for recourse to the judgement of a third party in order to avoid or correct any misapplication of the concept.

35. So far as the form of draft article 33 was concerned, he hoped that the language would be brought into line with that of articles 31 and 32 and, in particular, that the wording of article 33, paragraph 2, would be brought into line with that of article 31, paragraph 2, and article 32, paragraph 2, both in English and in French.

36. Lastly, he noted that the question of compensation caused some concern to several members of the Commission. He believed it indispensable that the innocent State should be indemnified, and the best solution would be to add to draft article 33 a paragraph 4 on the following lines:

"The preclusion of wrongfulness by virtue of paragraph 1 does not imply the preclusion of the obligation to make good the damage occasioned by the act of necessity".

The meeting rose at 5.55 p.m.

1618th MEETING

Tuesday, 24 June 1980, at 10.20 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yankov.

Also present: Mr. Ago.

State responsibility (continued) (A/CN.4/318/Add.5–7, A/CN.4/328 and Add.1–4)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (continued)

ARTICLE 33 (State of necessity)¹ (*concluded*)

1. The CHAIRMAN, speaking as a member of the Commission, said that, throughout the history of international law, and of law in general, reference had been made to the existence of a defence of necessity. The concept had been known in Roman law as a defence in an action for damages: in such cases, if no more had been done than a reasonable man would have done, fault had been precluded and no compensation had been required for the harm thus lawfully caused. Grotius had accepted the concept, while prescribing precautions and restrictions which bore a striking resemblance to those so carefully distilled from the wealth of material in Mr. Ago's report. In that connexion, he drew attention to article 142, paragraph 3, of the draft convention on the law of the sea,² which referred to the rights of coastal States to take such measures as might be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastlines or related interests.

2. However, despite the wealth of supporting material and the persuasiveness of the conclusions contained in the report, he still had doubts as to the advisability of including a provision on necessity in the draft articles. In the first place, it seemed that most of the authorities quoted in the report, while speaking of a defence of necessity as being part of the law, had not actually felt obliged to make it the basis of a decision. Secondly, draft article 33 contemplated the safeguarding, not of rights, but of an essential State interest, and called for an assessment of whether the interest of the other State was comparable or superior to the interest that the act had been intended to safeguard. The term "interest" could be given many meanings, and was likely to compound the difficulties of applying the provision in a manner that would ensure that justice was secured in a particular case. The need to compare interests, which would appear to call for value judgements, in the absence of a universally accepted scale of values, could pose problems which would seriously impair the utility of the concept of necessity, and therefore of the draft articles.

3. Even more troubling was the fact that the concept of necessity, by its very nature, imported a subjective element so pervasive as to make a rule based upon it incapable of proper application by a tribunal. For all the references to a "state of necessity" cited in the report, and for all the rules with which lawyers had tried to confer objectivity and precision on the concept, it might well be that necessity was not a state or condition of things, but rather an interpretation or

evaluation of a situation, and therefore a state of mind. Moreover, the content of the notion might be so subjective as to be unhelpful in the ordering of relations between States. Alternatively, its application might be so circumscribed as to deprive it of usefulness altogether. It was true that the examples of financial cases in which judges or counsel had theorized that severe financial or economic constraints might relieve debtor States of their duty to repay, or to repay according to a certain schedule, could evoke considerable sympathy at a time when most developing countries were waging a constant battle to support their economies through foreign loans, and repayment schedules threatened to overwhelm them. However, a debtor State availing itself of the defence of necessity in order to avoid or reschedule repayment could be faced with a very serious situation in that no State might be willing to offer it financial assistance in the future. To provide a legal basis for action in situations of economic necessity could undermine the force of treaties in that field and have the effect of strengthening trends towards protectionism in the industrialized world.

4. Despite those doubts regarding the recognition of a legal norm concerning necessity in international law, he was willing to agree that draft article 33 should be referred to the Drafting Committee. Nevertheless, in order to mitigate an apparently high level of subjectivity in the application of the provision and to assist tribunals which might have to interpret it, it might be worthwhile considering introducing into the text a standard of "reasonableness" which would ensure that States exercised at least a minimum of objectivity before concluding that a situation of grave and imminent peril existed.

5. It would seem logical that the concept of necessity should preclude wrongfulness altogether, and should not be simply a mitigating circumstance, but it was clear that the duty to compensate remained. The position of third States suffering damage as the result of an act done in a situation of necessity needed further thought.

6. With regard to the wording of the draft article itself, he supported the introduction of the criterion of "reasonableness" in paragraph one. There was also a need to make clear the exceptional nature of the plea of necessity by drafting the article along the lines of article 62 of the Vienna Convention,³ as suggested by Sir Francis Vallat (1615th meeting). The provisions of paragraph 1 required the State invoking the plea of necessity to prove that it had had no other means of safeguarding an essential State interest. That would place such a burden on the State concerned as to raise again the question of the utility of the draft article.

7. In paragraph 2, the term "situation of 'necessity'" was used without warning and, although the meaning

¹ For text, see 1612th meeting, para. 35.

² "Informal Composite Negotiating Text/Revision 2", drawn up in April 1980 by the President of the Third United Nations Conference on the Law of the Sea and by the Chairmen of the main committees of the Conference (A/CONF.62/WP.10/Rev.2 and Corr.2-5).

³ See 1615th meeting, foot-note 3.

was clear, some introduction was needed, if only for the sake of presentation. In addition, it should be provided that paragraph 1 would apply, not if the situation had been “caused by the State” but if the State had “contributed to” the situation.

8. In sub-paragraph 3 (b), the term “implicitly” should be expanded to introduce the idea of a necessary implication having regard to all circumstances.

9. Mr. AGO, commenting on the various points raised by the members of the Commission in discussing draft article 33, said that Mr. Riphagen’s account of the interesting theory of state of necessity as a conflict of rules (1614th meeting) had troubled him at first, for he had tried to show in his report that, in cases where a State pleaded necessity, it could not be claimed that there was a conflict of two rights or that one right ultimately prevailed over the other. However, he had been relieved to find afterwards that Mr. Riphagen had not been thinking of a conflict of two rights but rather of a conflict of two rules, one of which was that from which derived the subjective right of another that was not being respected, and the other that was that being drafted by the Commission. From that point of view, Mr. Riphagen’s statement therefore could not fail to promote a better understanding of the theory underlying the concept of state of necessity.

10. With regard to the criterion to be applied in assessing the relative weight of the interests involved, Mr. Riphagen, although starting from different premises, had reached conclusions very close to his own. He had, moreover, pointed out that different imperative rules could co-exist. On an earlier occasion, when discussing article 19,⁴ the Commission had noted that some international crimes could be more criminal than others and that some imperative rules could be more imperative than others. His own view was, nevertheless, that the entire field of imperative norms should be kept apart from the plea of state of necessity.

11. Another point effectively stressed by Mr. Riphagen was that the drafting should be as clear as possible so as to avoid misunderstanding. With regard to the possibility of compensation for damages, he (Mr. Ago) considered that, if the right to compensation was recognized, it would not preclude the act in question from being regarded as wrongful. While the act was certainly not in conformity with an international obligation, it could not be described as wrongful if the precluding of wrongfulness was the result of a state of necessity. On the other hand, he agreed with Mr. Riphagen that the object of chapter V of the draft articles was to avert the injustice that might occasionally result from the strict application of certain rules of law.

12. Mr. Reuter had rightly recognized (1614th meeting) that, even if not wrongful, the action in respect of which the defence of necessity was raised

might yet give rise to a claim for compensation. His main argument was that the Commission had very properly decided to formulate in precise terms the concepts in the other draft articles in chapter V and to circumscribe clearly their respective limits. The comment was entirely correct, and he (Mr. Ago) had himself suggested, during the discussion on *force majeure*, that a distinction should be drawn between two concepts of impossibility of performance: “material” and “absolute” impossibility, and “relative” impossibility,⁵ the latter being typical of situations in which the strict application of the rule would involve such grave consequences for the party submitting to it as to make it doubtful whether performance was really possible—from the “human” point of view, if not from the “material” point of view. On that occasion, Mr. Ushakov had proposed that the Commission should restrict the application of the concept of *force majeure* to cases of material and absolute impossibility. The Commission had followed that proposal—probably rightly—leaving, however, a lacuna to be filled, and it was within the compass of state of necessity that that should be done.

13. Commenting further on Mr. Reuter’s statement, he wished to dispel any possible misunderstanding about his attitude to natural law. He had spoken in his report of some jusnaturalist theories because certain eighteenth- and nineteenth-century authorities had caused confusion by describing as principles of natural law a body of rules whose virtue was rather that they coincided with their own views. For his part, he was convinced that there was a law which he preferred to describe not as natural but as spontaneous, a law that arose in the conscience of subjects of law and preceded positive law, and in some respects was superior to it.

14. In his statement at the 1614th meeting, Mr. Ushakov had urged the Commission to venture into the subject of state of necessity only with the utmost caution. He (Mr. Ago) agreed with this, but would point out that it would perhaps be incautious to leave so vital a concept as state of necessity undefined. Mr. Ushakov had taken the view that state of necessity could not apply to financial obligations; on the other hand, he had also cited examples in which that concept would apply, such as a fire which broke out in inhabited territory on the frontier between two States and which would necessitate crossing the frontier to fight it. But principally he had emphasized the highly subjective nature of comparisons between State interests, and had suggested that the Commission might perhaps agree to treat the defence of necessity as an extenuating circumstance rather than as one precluding wrongfulness. He had also envisaged (1615th meeting) the complications that would arise in a situation in which a State B, which was the victim of an act of necessity of State A, reacted by taking

⁴ See 1613th meeting, foot-note 2.

⁵ See *Yearbook . . . 1979*, vol. I, p. 185, 1569th meeting, paras. 5 and 6.

countermeasures, which in their turn were followed by a reaction on the part of State A, and so on. He (Mr. Ago) wished to point out, in the first place, that in his view it would be wrong in such a case to speak of real countermeasures if, in regard to the first act, the excuse of necessity had been justified, since in that event the action taken by the State in question could not be described as wrongful. Such complications were inherent in international relations and could arise in situations of *force majeure* or distress, and not only where state of necessity was invoked.

15. He sympathized with Mr. Díaz González's complaint (*ibid.*) about the Spanish translation of the report and thought that even the English version was open to criticism. On the other hand, he knew from experience how difficult it could be to convey an author's ideas precisely in a foreign language when the subject-matter was as delicate as that dealt with by the Commission.

16. He had noted Mr. Díaz González's remark about cases in which it should be decided whether the vital interest to be protected was that of the State which invoked state of necessity on its behalf or that of the victim State. He strongly supported the call for maximum clarity, to avoid any misinterpretation of the future draft articles.

17. Mr. Šahović (*ibid.*) had set the problem of the state of necessity in its proper perspective within both the system of international law and systems of domestic law. His view, with which he (Mr. Ago) concurred, was that the field of application of the notion of state of necessity must be precisely delimited. However, Mr. Šahović also held that it was essential that the draft articles should contain a provision relating to state of necessity. He (Mr. Ago) wished to point out that state of necessity did not deserve all of the reproaches sometimes made about it, since it met a basic requirement of justice, the concern that the application of rules of law should not be made too rigid. Misuse was admittedly open to criticism, but the notion itself was an indispensable component of any system of law if excessive friction in the application of rules was to be avoided. Mr. Šahović had gone so far as to regard it as a necessary complement to the other provisions of the draft articles, and had drawn attention to the fundamental importance of an exception regarding the prohibition of the use of force, even otherwise than in cases of aggression.

18. Mr. Šahović had suggested that the terms of the draft articles should be strengthened, and that perhaps an express clause should be added relating to compensation for possible damage. The Commission might possibly accede to that suggestion, although it should remember that during the discussion of an earlier draft article raising the same problem, Mr. Riphagen had taken the view that it would be preferable to include a separate general provision—a solution that seemed preferable to him.

19. Mr. Quentin-Baxter (*ibid.*) had likewise cited some interesting examples, for instance the crossing of frontiers in emergencies. He had rightly emphasized that the principle under consideration was common to all systems of law and, in fact, could not be eliminated. He had also pointed out that the obligation to compensate for damages might very well persist even where wrongfulness was precluded. He (Mr. Ago) agreed with that remark and added that the rule to be adopted by the Commission on that point must be very flexible.

20. Mr. Quentin-Baxter had stressed the constituent elements of the state of necessity. He had taken the view that it was just to make provision for some exceptions, but that he would strongly oppose the dropping of draft article 33, on the grounds that the Commission was bound at least to draw the attention of Governments to the immense problem of state of necessity so as to elicit their views on the matter.

21. Sir Francis Vallat (*ibid.*) had adopted a practical—and particularly welcome—approach. Referring to the practice of States rather than to jurisprudence, which was more rare, Sir Francis had noted that in many cases the parties had agreed in recognizing the validity of the principle of state of necessity, irrespective of whether they accepted or rejected its application to the particular dispute between them. He had inferred from those precedents that the principle was one that was generally accepted in international law.

22. He had visualized situations (the "*Torrey Canyon*" case, for example—see A/CN.4/318/Add.5-7, para. 35) in which two distinct grounds for precluding wrongfulness might be simultaneously invoked and had suggested that the article should be drafted in negative rather than positive terms, by the use of such language as: "It is not permissible to invoke state of necessity, except . . .". The proposal deserved careful consideration and he (Mr. Ago) intended to return to it later.

23. Sir Francis had also rightly emphasized that the object of draft article 33 was to settle a problem of circumstances precluding wrongfulness, and not of circumstances precluding some portion of responsibility or of the obligation to compensate, for a wrongful act produced two kinds of possible consequences, as the Commission had already noted in connexion with countermeasures: namely, sanctions and compensatory measures. Sir Francis had stated that, even if wrongfulness was precluded the obligation to compensate for damages might subsist, although the aggrieved State would not be justified in applying countermeasures precisely because where there was damage there was no wrongful act. He had also stressed the concept of balance of interests; in conclusion, he had requested the Commission to consider the problems raised by the use of armed force.

24. Mr. Francis (1616th meeting) had said that the oral introduction of article 33 had convinced him of

the need for such a provision. In his view, article 33 was justified by considerations related to the practice of States, to doctrine and to the nature of the international legal order. However, he had considered that the Commission should specify in the text of the article what were the circumstances under which state of necessity could be invoked. He (Mr. Ago) fully agreed with him on that point.

25. Mr. Schwebel had initially taken the view (1614th meeting) that state of necessity should preclude responsibility rather than wrongfulness, but had subsequently dropped the idea. At the 1616th meeting, he had expressed a preference for the article to be drafted in the negative, and had stressed the advisability of providing for the possibility of compensation for damages. In regard to that point, he (Mr. Ago) pointed out that in some cases, compensation should be made, even in full, whereas in others it might not be required at all. Each case had to be considered on its merits, and the Commission should not go into too much detail, in case it were to draft a provision on the question. Besides, the problem of compensation normally arose after wrongfulness had been precluded, and the amount of damages to be paid could be settled by an arbitral tribunal or a conciliation commission. Mr. Schwebel had in another connexion rightly proposed that the plea of necessity should clearly be precluded in all cases where the State in question could have avoided the danger by other means.

26. As regards the use of the words "contributed" or "caused by", it should be left to the Drafting Committee to choose the most appropriate wording. The verb "contribute" had the advantage of having been used in other draft articles, even if to use it in article 33 might make the provision somewhat strict. It was a moot point whether a State was in a "state of necessity" if it found itself in a situation which was not really "caused by" it but to which it had contributed, for instance by pursuing too lax a financial policy. If that situation was nevertheless fraught with extreme danger for it, was it fair to not allow it any excuse?

27. In the opinion of Mr. Calle y Calle (1616th meeting), article 33 was justified by the realities of international life, although he considered that the plea of necessity should be subordinated to stringent conditions. In that connexion, he (Mr. Ago) pointed out that, since it had been agreed that state of necessity could in no event justify recourse to armed force, there was no point in attempting to limit the application of that notion to the cases where the interest to be safeguarded was the very existence of the State. The interest should be an essential one, but in most cases it had nothing to do with the existence of the State which invoked it.

28. Mr. Calle y Calle had also called attention to the possibility that necessity might be pleaded to justify the non-observance of humanitarian rules. In that context, unlike that of *jus cogens*, it was in fact conceivable that it might not be entirely inadmissible to be allowed

to invoke the plea of necessity. In fact, the various conventions in which humanitarian rules were laid down dealt differently with the state of necessity. In some, the preamble or the final clauses stipulated that the obligations laid down in the instrument should be construed as being valid only within the limits imposed on a State in circumstances of grave necessity. In such a case, the applicability of state of necessity was therefore automatically admitted, but the conditions had to be established in the light of the terms of the convention rather than according to the rules of general international law. Other conventions, on the contrary, laid down a general rule debarring any plea of necessity, which meant that the plea could in no circumstances be invoked. But not uncommonly, an individual article of a convention contained a provision specifically concerning state of necessity. If that provision stated that necessity could not be pleaded in some particular case, the inference to be drawn was that it could be pleaded in all other cases covered by the convention. If, however, the provision stated that it was open to the parties to waive the observance of a certain obligation in case of necessity, it could be inferred that the plea of necessity was inadmissible to justify the non-observance of the other obligations defined in the convention. Hence, where the provisions of conventions were involved, everything depended on their interpretation, and the most complicated situation might arise.

29. Finally, Mr. Calle y Calle had taken the view that the existence of a state of necessity should be well established. The use of the term "established" could in fact assist the Commission in providing the necessary guarantees of objectivity. Moreover, the term had been used several times in the draft in order to emphasize the objective character that a situation must present, particularly a situation likely to lead to the wrongfulness of a particular behaviour being precluded.

30. The exceptional nature of the plea of necessity, and the limitations on its application, had been emphasized by Mr. Verosta (*ibid.*). He had also expressed the hope that the burden placed on the innocent State could be reduced, and had raised the question of the relationship between customary law and treaty law.

31. Mr. Yankov (1617th meeting) had, on the one hand, clearly recognized the merits of the rule and, on the other, had expressed the fear that the subjective aspect inherent in the rule was a serious drawback. In the end, he had expressed readiness to accept the notion of state of necessity, which indeed had the backing of State practice, although he emphasized that there still remained the problem of what criterion should be adopted to measure the seriousness of the threat and to assess the interests involved, and notably to determine which should prevail. Mr. Yankov shared his (Mr. Ago's) view that the plea of necessity was inadmissible in the case of important obligations,

though it would be a mistake to try to define what those obligations, taken separately, were.

32. When codifying the law of treaties, the Commission had stressed that the concept of imperative rules was constantly evolving. A rule that was imperative at one moment might cease to be imperative later, and vice versa. It was accordingly better to rely on safe examples than to lay down rigid definitions. Mr. Yankov had even questioned whether the rule *pacta sunt servanda* was not an imperative rule of international law which a State should not be able to evade by pleading necessity. That was not his (Mr. Ago's) view, for Mr. Yankov's line of reasoning would lead to the conclusion that in no case where a treaty obligation was involved would it be possible to plead state of necessity—which would be going too far.

33. Mr. Yankov had cited a number of examples of obligations, including the interesting one of a country that was forced to close its frontiers, in violation of an international obligation, in order to prevent the spread of an epidemic. Mr. Yankov had added that the Commission should pay due regard to the stability of the international legal order, should not adopt categorical positions and should proceed with the greatest caution in continuing its work on the draft articles.

34. Mr. Jagota (*ibid.*) had approved the article under consideration after a searching analysis of the subject and after mature reflection. As he saw it, state of necessity could only be invoked as a circumstance precluding wrongfulness if all of the conditions indicated were fulfilled. In commenting on that view he (Mr. Ago) felt constrained to repeat what he had said in connexion with Mr. Yankov's position: he could not share Mr. Jagota's point of view that the conditions were so numerous that they could probably never all occur simultaneously. In reality, the conditions (not so numerous, in the end) were essential; they had to be present, not in order to impede the application of the rule, but in order to avoid abuses. Mr. Jagota had also wondered what conclusion should be drawn regarding a series of facts constituting non-observance of the obligation not to resort to the use of force although they did not constitute an act of aggression or an armed attack.

35. In addition, Mr. Jagota had inquired who would adjudicate possible disputes. The problem was not a new one: it could arise in connexion with the application of all the draft articles. In some cases, a dispute might arise between States bound by a compulsory jurisdiction clause. In other cases, the States in question would simply need to comply with the provisions of the Charter of the United Nations relating to the peaceful settlement of disputes. The problem might arise in an acute form in connexion with some cases where state of necessity was pleaded, but that was no reason for dealing with it in article 33.

36. Mr. Barboza (1617th meeting) had mentioned the abuses to which the concept of state of necessity

had given rise and had also stressed the limitations which made the concept acceptable. With regard to the subjective aspect of the rule, he had stressed that in case of disagreement on the assessment of a situation, an objective assessment was always possible. Mr. Barboza had rightly stressed the flexibility given to international law by the application of the concept of state of necessity, and emphasized that the effect of the article under consideration was to preclude responsibility for wrongful acts rather than mitigate it.

37. Although Mr. Tsuruoka (*ibid.*) had approved the main lines of article 33, he had nevertheless drawn attention to a number of subjective aspects which could not be removed. He had counselled caution, weighed the merits of the verbs "contributed to" and "caused by" and referred to the question of compensation, and in that connexion, had proposed the addition of a paragraph 4 to article 33. He (Mr. Ago) believed that the additional provision might be introduced in a separate article stipulating that the various circumstances which precluded wrongfulness did not prejudice the obligation to make good any damage.

38. Finally, the Chairman, speaking as a member of the Commission, had pointed out that Roman law had recognized the concept of state of necessity. He had also mentioned article 142 of the draft convention on the law of the sea. The object of that provision was that application of an excuse of necessity to the obligations set forth in the text should not be precluded; it was drafted along the lines of Article 51 of the Charter of the United Nations. In his (Mr. Ago's) opinion, rather than a purely conventional disposition of acceptance of principle, it was a reminder and a reaffirmation of the existence of the principle of state of necessity in general international law. However, Mr. Pinto had expressed some doubts and some fears. In that connexion, he (Mr. Ago) stressed that the Commission's task was precisely to ensure that necessity could only be invoked to preclude wrongfulness if the necessity was established conclusively.

39. In general, the discussion had shown that the Commission approved of the inclusion of article 33 in the draft, and seemed prepared to request the Drafting Committee to try to work out a generally acceptable text.

40. The dangers which had been mentioned should not be overestimated. If the application of the plea of necessity was subordinated to strict conditions, those dangers would be seen to be less formidable. The Commission had managed perfectly well to avoid the similar dangers of other circumstances which precluded wrongfulness.

41. Nor should the possible difficulties of the interpretation of the concept of essential interest be exaggerated. In most cases, it was not even a question of waiting to determine whether or not an interest was essential and whether or not it prevailed over another

less essential interest. In the “*Torrey Canyon*” case it had not been necessary to ask if Great Britain’s interest in avoiding serious pollution of its coast really took precedence over the flag State’s interest in avoiding the destruction of the wreck.

42. As to practice he noted that, taken as a whole, the cases could be divided into two categories. In some cases, the state of necessity had not ultimately been recognized, but the parties or judges had recognized the validity of the principle. In others, the parties or the judge had found that the conditions for the existence of a state of necessity had existed. Thus, in the *Russian indemnity* case (see A/CN.4/318/Add.5–7, para. 22) both parties had admitted that, if the situation of the Ottoman Empire had been such as its Government described, state of necessity could have justified the debtor State’s refusal to fulfil its obligation to pay a certain sum at a given moment. In the *Société Commerciale de Belgique* case (*ibid.*, paras. 28 *et seq.*) the existence of conditions of applicability of state of necessity was recognized by the parties.

43. One member of the Commission had inquired whether a rule which apparently favoured the developing countries might not turn to their disadvantage, since they might be inclined to invoke an excuse of necessity in order to avoid paying their debts, which would impair their creditworthiness. He (Mr. Ago) pointed out that unwillingness to pay a debt was not enough to support the plea of state of necessity: the situation had to be one of extreme peril.

44. Referring to other cases mentioned in his report, he said that in the case of fur seal fisheries off the Russian coast (*ibid.*, para. 33), the measures taken by the Russian Government would normally have been unlawful, but in the absence of such measures an ecological disaster would have occurred, which would have prejudiced not only Russia’s interests but also those of the other States concerned. The preclusion of wrongfulness was therefore entirely justified. In the case of properties of the Bulgarian minorities in Greece (*ibid.*, para. 32), as in the General Company of the Orinoco case (*ibid.*, para. 39), it had not been necessary to apply any pre-established criterion of comparison for the purpose of determining which interest should take precedence and the applicability of the plea of necessity was accepted. In all those cases, therefore, no subjective aspect had complicated the situation. The importance and frequency of the difficulties which might arise out of some subjective elements should not, therefore, be exaggerated.

45. With regard to the drafting of article 33, he said that a negative formulation might give more force to the rule. However, the positive formulation would have the virtue of conforming to that of the other articles in chapter V of the draft; furthermore, in that drafting, it was a negative formulation which was employed for the exception to the obligations created by preemptory norms. That was a question which the Drafting

Committee should examine in the light of specific proposals.

46. So far as *jus cogens* was concerned, he said it would be wrong to think that the only possible example was aggression. No State could invoke a state of necessity to justify its committing genocide, or apply a policy of *apartheid*, etc. All the rules of *jus cogens* acted as a bar to the plea of state of necessity. As regards the use of armed force falling short of aggression, he said that, admittedly, his proposal was perhaps somewhat cautious, but was it really arguable that some of the prohibitions mentioned by members of the Commission formed part of the existing *jus cogens*? There were, of course, forms of behaviour involving the use of force in another State’s territory which were clearly covered by *jus cogens*, but in other less clear-cut cases, surely it would be going too far to deny the admissibility of the plea of necessity altogether. To go that far would prevent a State from entering the territory of another State to remove a danger of fire on its own territory. The Commission had the choice between the cautious solution he had proposed and a yet more cautious, but perhaps extreme solution.

47. Some members of the Commission had asked what would happen if the Commission refrained from mentioning the state of necessity. Would its silence mean that the notion of state of necessity was inoperative in international law? Since state of necessity was recognized in all legal systems, the Commission’s silence might, on the contrary, have the effect of allowing the concept to play a dangerous role, whereas by recognizing it the Commission could fix strict limits. In any case, by failing to take a clear decision on state of necessity, the Commission would only be rendering a disservice to the cause of international law.

48. The CHAIRMAN suggested that draft article 33 should be referred to the Drafting Committee.

*It was so decided.*⁶

The meeting rose at 1 p.m.

⁶ For consideration of the text proposed by the Drafting Committee, see 1635th meeting, paras. 42–52.

1619th MEETING

Wednesday, 25 June 1980, at 10.20 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Diaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yankov.

Also present: Mr. Ago.

State responsibility (continued) (A/CN.4/318/Add.5–7, A/CN.4/328 and Add.1–4)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (continued)

ARTICLE 34 (Self-defence)

1. The CHAIRMAN invited Mr. Ago to introduce draft article 34 (A/CN.4/318/Add.5–7, para. 124), which read:

Article 34. Self-defence

The wrongfulness of an act of a State not in conformity with an international obligation to another State is precluded if the State committed the act in order to defend itself or another State against armed attack as provided for in Article 51 of the Charter of the United Nations.

2. Mr. AGO said that not until relatively recent times had the concept of self-defence, one long recognized in national legal systems, made its way into international law and acquired certain connotations associated with the concept as elucidated in internal law by the general theory of law. Admittedly, the classical writers on international law had drawn a distinction between “just war” and “unjust war”, but—aside from the fact that an identification between what they meant by “just war” and self-defence would be entirely arbitrary—he was reluctant to take the view that the distinction had been based on the law current at that time. It had relied on ideas that were more akin to ethics rather than law. Emmerich de Vattel, for example, had mentioned two causes for a just war, namely, defence against an armed attack and, above all, reaction to a “wrong”, by which Vattel had meant the violation of a subjective right suffered by a State. Again, it had to be remembered that a more recent entire period of the history of international law had been marked by legal positivism, a theory which had prevented the concept of self-defence from evolving since it had regarded war in all its forms as lawful. It had sometimes been said that war had to be defensive in character, but the assertion had been made more to gain the support of public opinion for the actions undertaken than as a declaration of a principle of law to be respected. For example, in 1914 some Governments, anxious to keep up their image at home and abroad, had maintained that certain manifestly offensive wars were defensive in character. It was only in the inter-war years and during the Second World War that self-defence had gradually taken on its present form in international law.

3. Like state of necessity, self-defence had to be differentiated from the other circumstances that precluded wrongfulness. First of all, the concept of self-defence should be confined to a defensive reaction against an armed attack by another State, and should

exclude an attack by private individuals. Without that restriction, the concept would be far too vague. Self-defence could exist in international law only as an exception to a general prohibition of the use of armed force by a State. However, just as there could be no exception without the rule, there could be no rule without the exception. In national legal systems, self-defence was also defined in terms of another factor: the centralization of the use of force, which Kelsen had regarded as a State monopoly on the use of that force. In internal law, self-defence therefore was based on the general ban on the use of armed force by a subject of law and on the State monopoly on the use of force. It followed that the area reserved for self-defence was a very restricted one. Only by derogation from the general rule banning the use of force, and not withstanding the existence of the monopoly in question, could an individual be authorized to resort to armed force in self-defence; what was more, the situation had to be one involving urgent necessity and one in which the organs of the State were not able to intervene.

4. In international law, the first of those requirements regarding self-defence had been fulfilled by the general ban on resorting to the use of force for the purposes of aggression. On the other hand, it was questionable whether the second requirement had been fulfilled. Admittedly, the Charter of the United Nations had been drafted with the aim of achieving centralization of the power to resort to the use of force. Such centralization was provided for in Chapter VII of the Charter, but the system envisaged therein had not been completely effective. Nevertheless, it did not follow that the concept of self-defence had no standing in international law, for the first requirement, the prohibition of the use of force, was by far the most essential.

5. Self-defence could now be considered as the sole form of armed self-protection or self-help still recognized by international law. On the other hand, it should not be thought that self-defence had to be justified by the concept of self-protection or self-help, just as state of necessity was not justified by the concept of self-preservation. For the purposes of establishing the existence of self-defence in international law, it sufficed to demonstrate that it was enunciated by a rule in force in the international legal system. It is true that among the circumstances precluding wrongfulness some writers specifically mentioned self-protection or self-help, a notion which, however, in his opinion, came under the heading of legal technique but did not constitute a special circumstance precluding wrongfulness. According to the theory of law, the term “self-protection” is defined as the system for safeguarding subjective rights adopted in a human community which had not been institutionalized to such an extent that a higher authority had a monopoly on the use of force. In such cases, subjective rights could be exercised only by the holders of those rights. On the other hand, that concept of self-protection encom-

passed both self-defence and the adoption of countermeasures against the State committing a wrongful act. In considering the question of the application of countermeasures, the Commission had taken the view that armed reprisals were no longer admissible in modern general international law. Although not unanimously accepted, that view was none the less the prevailing one. Both self-defence and the application of countermeasures were manifestations of self-protection or self-help, but they were different from each other in that self-defence alone could include recourse to armed force.

6. Another distinction should be made, moreover, between self-defence and state of necessity. The conduct of a State that sought to excuse its act by pleading a state of necessity must necessarily have been aimed at safeguarding an essential interest of that State vis-à-vis a threat to a State that might even be totally innocent. On the other hand, a State that relied on the concepts of countermeasures or self-defence had acted against a State which had committed a breach of international law. In the case of countermeasures, the wrongful act might well be one of a whole range of breaches of international obligations other than an act of aggression, whereas in the case of self-defence it was clearly a question of an act of aggression. Nevertheless, the factor that really distinguished action adopted in the form of countermeasures from action taken in self-defence lay in the purpose of the actions at the time at which they occurred. In the first instance, the aim was to punish, to secure enforcement or to issue a warning against repetition of a particular act, whereas in the second instance the aim was to prevent an act of aggression from taking place. Moreover, the time at which a reaction in the form of countermeasures took place was logically that of the implementation (*mise en oeuvre*) of the responsibility occasioned by an internationally wrongful act. However, action taken in self-defence preceded the implementation of the responsibility and took place at the moment when the wrongful act was actually being carried out. That action was defensive in character; it had to prevent the act from taking place.

7. The twofold rule concerning the prohibition of the use of armed force and the lawfulness of resistance by armed force to an aggression had made its appearance as of 1925. The international instruments of that time that could be taken into account fell into two categories, depending on whether or not they made any explicit reference to self-defence. It could therefore well be asked whether an instrument that was silent on that point and that contained a general ban on the use of armed force was also intended to prohibit the use of force in the form of self-defence.

8. One of the instruments that mentioned self-defence was the Protocol for the Pacific Settlement of International Disputes, adopted at Geneva on 2 October 1924 (see A/CN.4/318/Add.5-7, para. 97). The Protocol, which had never entered into force, had

contained an interesting provision authorizing "resistance to acts of aggression", an expression that clearly referred to self-defence. The Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy (*ibid.*) had been signed at Locarno on 16 October 1925 and had imposed an obligation on France and Belgium, and also on Germany, to refrain from attacking or invading each other or resorting to war against each other. It had been added that the obligation did not apply in the case of exercise of the right of "legitimate defence", in other words, of resistance to a violation of the provision in question, or to a flagrant breach of articles 42 or 43 of the Treaty of Versailles, if such breach constituted an unprovoked act of aggression and, by reason of an assembly of armed forces in the demilitarized zone, immediate action was necessary. The purpose of the treaty had been to preserve the security of the frontier between Belgium and France on the one hand, and Germany on the other. However, the Treaty of Versailles had also imposed on Germany the obligation to demilitarize the Rhineland. For that reason, the treaty of 1925 had envisaged, as action in self-defence, resistance not only to armed attack but also to any occupation of the demilitarized zone by Germany. The treaty had been the first to set forth in clear terms the twofold rule prohibiting recourse to armed force and legitimizing recourse to self-defence. During the same period, the rule had also been embodied in bilateral agreements and model treaties of reciprocal assistance and non-aggression prepared in 1928 by the League of Nations.

9. The Covenant of the League of Nations was among the treaties that did not mention self-defence. That instrument had prohibited recourse to war but had not dared to go any further, so that there had been a number of lacunae. States had been urged to settle their disputes by peaceful means, and when necessary, to submit the dispute to the Council of the League, but if the Council was not unanimous in providing a solution, they could, within a period of three months, legitimately resort to the use of armed force. The relevant provisions of the Covenant had been interpreted restrictively by some writers and more widely by others. Whatever the case, and although self-defence was not mentioned in the Covenant, at that time no one had doubted that a State which suffered an attack was entitled to resort to force in order to defend itself.

10. The most decisive step towards outlawing recourse to war had been taken with the signature, on 27 August 1938, of the General Treaty for Renunciation of War as an Instrument of National Policy, more commonly known as the Briand-Kellogg Pact or the Pact of Paris (*ibid.*, para. 100). The aim of that treaty had been to fill the gaps in the Covenant of the League of Nations and, more specifically, to declare an absolute prohibition on recourse to war. In the treaty, the parties had condemned recourse to war for the solution of international controversies, renounced it as

an instrument of national policy in their relations with one another, and agreed that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin should be sought only by peaceful means. Apparently, the prohibition of recourse to war had not absolutely prevented the possibility of the use of armed force for more limited purposes. The main point, however, was whether armed self-defence against a violation of that prohibition against war had also been prohibited. The diplomatic correspondence that had preceded the conclusion of the Briand-Kellogg Pact clearly showed that that had not been the case. F. B. Kellogg, the American Secretary of State, had himself explained that renunciation of war did not exclude the right of self-defence. It had not seemed necessary to him to make an express reservation regarding self-defence, as that reservation had been considered implicit in any instrument banning war, but it was wiser, in his opinion, not to mention that exception explicitly, so as not to weaken the impact that the solemn declaration outlawing war was intended to have on public opinion.

11. At the time, some authors such as Lamberti Zanardi had taken the view that self-defence already formed the subject of a customary rule of international law, a rule that would have authorized any State suffering an act of aggression committed in breach of the instruments in question to resort to armed force in self-defence. Such a customary rule, however, would have been inadequate to guarantee the right recourse to self-defence once treaties absolutely prohibiting recourse to war were concluded. If a treaty confined itself to providing that the parties fully renounced recourse to war, in any form and in any circumstances whatsoever, it could legitimately have been presumed that such an instrument also signified a departure from the customary rule relating to self-defence. The fact was, rather, that the rule banning recourse to the use of armed force and the rule providing for self-defence had then gradually both become peremptory rules of international law. Once they existed in general international law, it was no longer possible to derogate from them. No contractual rule prohibiting recourse to armed force could cause a departure from the peremptory rule allowing self-defence.

12. Like most of the writers on the topic, he was convinced that the international community had accepted the principle of a complete ban on war, the use of armed force or even of the use of any kind of force, as a principle of general international law that had been in existence before the Charter of the United Nations and was independent of that instrument. The principle was therefore binding on all States. Article 2 of the Charter had simply set forth a principle that already existed in the *opinio juris* of States, overwhelmed by the horrors of the Second World War. The principle had been duly confirmed by the International Military Tribunals of Nürnberg and Tokyo, which had considered whether self-defence could excuse certain

acts committed by Nazi Germany. At that time, while they had replied negatively in the specific case, they had expressly recognized that any legal prohibition of the use of force was necessarily limited by the right of self-defence.

13. The history of the matter therefore showed that self-defence now had won recognition in the international legal system. There existed a twofold rule whereby any recourse to armed force was prohibited, but a State that was a victim of a violation of such a prohibition was authorized to resort to force to defend itself or others. Those two rules were enunciated in Article 2, paragraph 4, and Article 51 of the Charter of the United Nations. Thus, by the end of the Second World War and at the time of adoption of the Charter, both general international law and the law of the United Nations system had included that twofold peremptory rule.

14. That raised some problems, however, which were essentially connected with the existence of that twofold rule in general international law and also in the Charter of the United Nations. It was legitimate to ask what the relationship was between the two expressions of principle, whether the content of the rules in the two systems was identical, and which rule the Commission should call upon in formulating its draft articles.

15. Aside from any matters of drafting, he found it difficult to imagine that there could be any difference in substance between the rules in the two systems. In his view, the authors of the Charter could not have had any intention of departing from the *opinio juris* of the time. He emphasized, however, that Article 51 of the Charter incorporated the principle of self-defence in the system set out in Chapter VII of the Charter, the chapter concerning action with respect to threats to the peace, breaches of the peace and acts of aggression, which must necessarily affect the concept of self-defence.

16. Article 51 of the Charter could be divided into two parts, the first part dealing with the preservation of the right of self-defence and the second with the adaptation of self-defence to the system then being established. The first part, which made it possible to say that the exercise of self-defence constituted a circumstance precluding wrongfulness, did not appear to presuppose any divergence between the Charter system and general international law. There was, however, a conflicting school of thought according to which the idea of self-defence embodied in general international law was broader than the straightforward case of resistance to an act of aggression. The authors of the Charter had simply wished to refer, as an example, to only one of the possible cases of recourse to force in self-defence.

17. According to that school of thought, general international law thus allowed for recourse to armed force in a number of cases, and the authors of the Charter had chosen to cite only one example, while the

Charter system referred to general international law as regards the others. It could be thought that self-defence was but one example drawn from general international law. If that opinion was wrong, and, therefore, the scope of the rule was the same in general international law and in the United Nations system, all of the problems would be solved, and the Commission would have to codify the question by reference to the Charter. On the other hand, if that school of thought was right, the Commission would have to take account of general international law, and the concept of self-defence it was required to codify would be much broader than that set forth in the Charter, for Article 51 merely cited one example.

18. He had taken care to discuss that school of thought at some length in section 6 of his report. By way of illustration, he mentioned the opinion of Bowett, reproduced in the last foot-note to paragraph 111 of that document, for it tended to give a particularly broad definition of the concept of self-defence. He also pointed out that Mr. Schwebel, in a course at the Hague Academy of International Law,¹ had given a very clear account of the opinions of the writers of that school without however associating himself with them. The arguments they invoked were numerous, and they considered, in particular, that the use of force was possible in the following instances: in countering a threat of aggression (notion of preventive self-defence); in a case of use of force not involving recourse to arms; in a case of opposition or of reaction to action wrongfully harming the State's subjective rights, even without the use of force; and in the case of a threat to the State's vital interests.

19. Without wishing to go too far into the interpretation of the Charter, he (Mr. Ago) considered that the writers who followed that school of thought had been misled by an outmoded and incorrect use of the concept of self-defence that involved something more than self-defence. It was not surprising that they cited *The "Caroline"* case, regarding it as one of self-defence, while in fact, as the Commission had observed in its work on state of necessity, the case was altogether different, because the State which had been the victim of the action had not committed the slightest aggression and the aim had in fact been simply to move against private individuals for fear of their acts. The fact that private action was being prepared against a State on the territory and without the knowledge of another State did not constitute aggression on the part of that other State. Care should be taken to avoid any misguided use of the concept of self-defence and to seek at all times to distinguish clearly between the three closely related, but none the less distinct, concepts of *force majeure*, state of necessity and self-defence.

¹ S. M. Schwebel, "Aggression, intervention and self-defence in modern international law", *Collected Courses of the Hague Academy of International Law, 1972-II* (Leyden, Sijthoff, 1973), vol. 136, pp. 479 *et seq.*

20. The writers on the topic did not for the most part share the opinion of the authors in question, mentioned in paragraph 114 of the report. Certain mental reservations could also be discerned among some of them when they maintained that general international law recognized a broader concept a self-defence than did the Charter. When the Commission had considered the question of countermeasures adopted for the purpose of sanctions, it had been obliged to note that the United Nations system deprived States acting individually of one possibility open to them under earlier international law, namely, the possibility of using armed force when applying countermeasures. Hence, the idea that the concept of self-defence was wider in general international law than it was in the Charter seemed to reopen the possibility of the use of armed force under the pretext of self-defence in the case of infringement of a right, for such a possibility would be excluded as a countermeasure and because the United Nations system did not in fact offer all of the guarantees it had seemed to promise in the beginning.

21. In his opinion, it was not possible to go so far as to change the existing law in that way. It might admittedly be desirable to change the United Nations system and make it more restrictive or more flexible. No such change appeared to have been made so far, however, and distorting the concept of self-defence was not the best way of bringing about such a change. With the prevailing doctrine, he did not think the authors of Article 51 of the Charter could have had any intention of departing from the concept of self-defence recognized by general international law, namely, self-defence allowed only as a response to aggression and not as a reaction to other unlawful acts. He therefore considered that the Commission's point of departure should be a concept of self-defence which, in substance, was identical in general international law and in the United Nations system.

22. It should be emphasized that general international law was none the less useful in solving certain other problems, such as that of the concept of collective self-defence. For some writers, that concept merely denoted the juxtaposition of a number of courses of conduct adopted in individual self-defence, whereas for others the authors of the Charter had simply wished to affirm that a State could legitimately come to the defence of another State which suffered armed attack and invited or consented to help, even outside the context of any regional mutual assistance agreement.

23. The concept of self-defence was in itself strict enough to make it unnecessary to define the requirements in any great detail. Nevertheless, doctrine generally required three characteristics in order for an action to be qualified as self-defence: it must be necessary, it must be proportional to the objective it was supposed to achieve, and it must take place immediately.

24. The aspect of necessity was self-evident. If any means other than armed force was available, it had to

be employed before resorting to armed force, the use of which was justified only if it constituted an *ultima ratio*. Moreover, if self-defence was confined to resistance to armed attack, it was unlikely that the State in fact had any means other than recourse to armed force available to it.

25. As far as proportionality was concerned, he emphasized that there was some danger of confusion between reprisals and self-defence. In the case of reprisals, it was obviously necessary to ensure some proportionality between the injury suffered and the injury resulting from any sanctions. In the case of self-defence, it was essential to avoid the error of thinking that there should be some proportionality between the action of the aggressor and the action of the State defending itself. Proportionality could be judged only in terms of the objective of the action, which was to repel an attack and prevent it from succeeding. No limitations that might prejudice the success of a response to attack could be placed on the State suffering the attack. The concept of reasonable action must of course enter into the matter, since self-defence could not justify a genuine act of aggression committed in response to an armed attack of limited proportions.

26. As to the question of immediacy, the reaction could not fail to be immediate if its aim was to halt aggression. That was an inherent aspect of self-defence, and not one of the requirements for the existence of that concept.

27. The concept of self-defence was therefore clear and straightforward: its purpose was necessarily and exclusively that of repelling an attack and preventing it from succeeding. The Commission must, however, determine its attitude with regard to Article 51 of the Charter before resolving the wording of draft article 34. It must decide whether to refer to that provision, paraphrase it, or set out a definition of the principle of self-defence, as in the case of all the other circumstances, without taking the Charter definition into account but ensuring that it was not contradicted. For the sake of prudence, and bearing in mind that the Commission was a United Nations body, he personally had opted in favour of an express reference to Article 51.

28. He emphasized that he had used the French expression "*agression armée*", which was not completely identical with the English equivalent "armed attack" or with the Spanish "*ataque armado*", and the situation was complicated by the fact that a recent instrument contained a definition of aggression, yet the two concepts of aggression and armed attack were not exactly the same. The Commission and its Drafting Committee should choose what they considered to be the most appropriate solution in the light of all the circumstances.

The meeting rose at 12.55 p.m.

1620th MEETING

Thursday, 26 June 1980, at 10.15 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Also present: Mr. Ago.

State responsibility (*continued*) (A/CN.4/318/Add.5-7, A/CN.4/328 and Add.1-4)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)

DRAFT ARTICLE 34 (Self-defence)¹ (*continued*)

1. Mr. RIPHAGEN said that there were three options open to the Commission in dealing with the phenomenon of self-defence. It could decide to deal with the matter more or less along the lines proposed in draft article 34; it could choose not to deal with the matter at all, on the grounds that it could not, or should not, add to or detract from the relevant provisions of the Charter of the United Nations; or it could make an explicit reference to international law, as it had done in respect of draft article 30.²

2. There were a number of variables influencing the choice. First, if the Commission intended to introduce, at some stage, in Chapter V of part 1 of the draft, an article along the lines of article 42 of the Vienna Convention,³ it would have to deal with self-defence in some way, even if only by a "saving clause" such as that contained in article 75 of that Convention. If the Commission did not intend to include such an article, the option of not dealing with self-defence at all would be open to it.

3. Personally, he would not be in favour of making Chapter V an exhaustive enumeration of circumstances precluding wrongfulness, because of the danger of inadvertent omission and because the rigidity of such a clause would be particularly unrealistic in the field of international relations. Furthermore, draft articles 33⁴ and 34 did not deal with the situation where a state of necessity, in the sense of draft article 33, was caused wholly by the State against which it was invoked. He doubted whether in such a case the rule of proportionality, as expressed in the second sentence of draft article 33, paragraph 1, was fully valid.

¹ For text, see 1619th meeting, para. 1.

² See 1613rd meeting, foot-note 2.

³ See 1615th meeting, foot-note 3.

⁴ For text, see 1612th meeting, para. 35.

4. He agreed fully with Mr. Ago that, in the case of self-defence against an armed attack, the question of proportionality did not arise. State practice showed that, in many cases, the suffering of the aggressor State often exceeded that which it had intended to inflict on the victim State. He disagreed, however, with the statement contained in paragraph 121 of the report (A/CN.4/318/Add.5-7) to the effect that, even in national law, excessive forms of self-defence were punishable. In his own country, a certain amount of excess had been accepted in a number of judicial decisions, and even the International Court of Justice seemed to have accepted something along the same lines in the *Corfu Channel* case.⁵

5. Draft article 33 contained a number of elements which were missing from draft article 34. For example, paragraph 3 (a) of article 33 referred to *jus cogens* as limiting the possibility of invoking a state of necessity. Article 34, on the other hand, conveyed the impression of translating the old maxim *adversus hostem aeterna auctoritas*. Surely, however, the rules of *jus cogens* relating to the protection of human rights in armed conflicts remained valid even in the relationship with an aggressor State.

6. Another element contained in article 33 but missing from article 34 was the reference to the impact of conventional instruments in the field of self-defence. Draft article 34 related to what the Charter called "collective self-defence". In that respect, he did not entirely agree with Mr. Ago's analysis. The right to collective self-defence was a real extension of the right of self-defence and was inspired by a sound scepticism as to the capacity of the Charter system to protect the territorial integrity and political independence of all States. On the other hand, a conventional instrument might be regarded as enlarging the *casus belli* beyond the armed attack, in the sense of an armed invasion of the territory of another State. In that connexion, he referred, in particular, to the Rhine Pact, cited in paragraph 97 of Mr. Ago's report.

7. One point had been overlooked in both draft articles 33 and 34. As they stood, those texts seemed to leave themselves open to the interpretation that an act of necessity or of self-defence precluded the wrongfulness of the act *erga omnes*, which could certainly not have been the intention of the drafter. Even in the case of self-defence against an aggressor State, the neutrality of a third State must in principle be respected.

8. Although it might be possible to deal with the points he had referred to by expanding on draft article 34, there were obvious dangers in such an approach, just as there were obvious drawbacks in the simple reference to Article 51 of the Charter in the existing text of draft article 34. It might be preferable, therefore, to adopt the option of making a general reference to international law. Although that might

appear to be avoiding the issue, it should be remembered that even the Definition of aggression⁶ contained a rather vague saving clause. Until such time as the United Nations was in a position to protect effectively the territorial integrity and political independence of all States, the Commission was practically forced to accept the inherent right of self-defence as it stood, without going into any details.

9. Mr. USHAKOV said that, although not endorsing entirely the approach chosen by Mr. Ago, he nevertheless considered that a provision concerning self-defence was undoubtedly needed in the draft.

10. He doubted that the Commission would be able to produce conclusive evidence in its commentary of the actual existence of a generally recognized principle of international law concerning self-defence. He did not consider that the existence of such a principle should be proved by reference to history, since the rule that would appear in the draft was the rule contained in Article 51 of the Charter of the United Nations, a rule which undoubtedly existed and which was so self-evident that it was unnecessary to prove its basis. The problem was different when the Commission tried to codify a rule derived from practice, case law or the writings of learned authors, for in such cases the Commission first had to prove the existence of the rule before codifying it. In the case of self-defence, the rule definitely and manifestly existed in fact. Accordingly, he considered that the Commission's commentary on draft article 34 should be short and refer expressly to the existing rule, which was that of Article 51 of the Charter.

11. In his report, Mr. Ago tried once again to prove that the rule in the Charter was identical to that of general international law. *Nolens, volens*, therefore, one was constrained to inquire what connexion there existed between the Charter and general international law.

12. He realized that some writers who were strong partisans of customary international law tried to prove that, side by side with that law, there was a written and separate international treaty law. In his opinion, the Commission could not take a position of that kind and regard the Charter as being distinct from general international law, for if the Charter was not part of modern general international law, the latter would be no more than customary international law, whereas in reality there were two sources of general international law.

13. No Soviet writer on law had ever contended that the Charter and the United Nations system did not form part of existing international law. It could even be said that the Commission shared that view, as was shown, for example, by article 6 of the Vienna Convention on Succession of States in Respect of

⁵ *I.C.J. Reports 1949*, p. 4.

⁶ General Assembly resolution 3314 (XXIX), annex.

Treaties⁷ or article 3 of the draft articles on succession of States in respect of matters other than treaties,⁸ which spoke of 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". Both of those provisions, which had been drafted by the Commission, clearly indicated that it held that the principles embodied in the Charter formed part of modern international law. Indeed, it would be dangerous to argue otherwise.

14. Actually, Mr. Ago recognized the fact. In his report he had merely concentrated on analysing the writings of learned authors. It had never been disputed by any State that the principles of the Charter formed part of modern international law, and in so far as learned authors did not share that opinion it was not the Commission's business to argue with the authors on that point.

15. Nor did he (Mr. Ushakov) think that the Commission was competent to interpret the principle of self-defence laid down in the Charter by trying to prove that it formed part of general international law. For that matter, it was unthinkable that the Commission should claim to interpret Article 51 of the Charter one way or another. He appreciated Mr. Ago's zeal in dealing with all the aspects of the question in his report, but considered that it would be dangerous for the Commission to aspire to substitute itself for States and for the competent bodies of the United Nations that were alone competent to interpret the Charter. Hence, the commentary on draft article 34 should be as short as possible and should refer to Article 51 of the Charter as a rule that was generally admitted, with all its possible interpretations, by the States or the competent bodies.

16. Referring to the nature of the principle of self-defence, he considered that self-defence was not a circumstance precluding the wrongfulness of an act; in his opinion, the principle of self-defence was of greater scope, and to say that self-defence precluded wrongfulness was tantamount to regarding it as the sole limitation on the prohibition of the use of armed force, as Mr. Ago affirmed in the second sentence of paragraph 108 of his report. He (Mr. Ushakov) did not share that view, and he pointed out that Chapter VII of the Charter authorized the United Nations to employ force in a number of circumstances other than aggression. To think of self-defence as the sole limitation on the prohibition of the use of armed force was like regarding suicide as lawful murder. It would be strange, to say the least, to describe self-defence as something like lawful aggression.

⁷ See *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III, *Documents of the Conference* (United Nations publication, Sales No. E.79.V.10), p. 185.

⁸ See *Yearbook ... 1979*, vol. II (Part Two), pp. 15 *et seq.*, document A/34/10, chap. II, sect. B.

17. Accordingly, he considered that it was not the correct approach to regard self-defence as a circumstance precluding the wrongfulness of an act; the notion should be understood as such, and not by reference to the use of force, and might be defined as the inalienable right of a State that suffered armed attack—in other words, self-defence was lawful *per se*. In his opinion, self-defence was a perfectly legitimate action and did not operate as a circumstance precluding the wrongfulness of an act. The issue was not to establish that an act constituted a breach of an international obligation and then to hold that the act was not wrongful by reason of certain circumstances; on the contrary, the point to be affirmed was that self-defence typified an action which at no point was tainted by wrongfulness and which took the form *ab initio* of the exercise of a right. That was why he considered that article 34 was out of place in chapter V of the draft, which dealt with circumstances precluding wrongfulness, and that it should form part of a separate chapter and a separate article dealing with self-defence.

18. So far as the language of the draft provision was concerned, he said that the Commission was not expected to explain the notion of self-defence; it should simply refer to Article 51 of the Charter and draft a provision using the terminology of the Charter provision on the following lines:

"Nothing in the present articles shall impair the inherent right of self-defence provided for in Article 51 of the Charter of the United Nations".

It would be most dangerous to try to draft a clause paralleling the Charter provision and to define the rule itself. It should be possible to find documents, treaties or other instruments that offered a usable precedent.

19. He stressed again that the Commission's commentary on the draft article should be extremely short and should refer to the Charter of the United Nations without trying to interpret Article 51 or to prove the existence of an established rule of greater scope.

20. Mr. REUTER said that, to his mind, the notion of self-defence was the reverse of another legal notion: aggression. If the Commission accepted that proposition, it would realize that it was tackling a problem of vast dimensions concerning which it would not be able to take any definitive position. If one looked at article 51 of the Charter, as Mr. Ushakov thought one should, one would realize that that Article dealt only with armed attack, which implied that there might perhaps be other forms of aggression. Yet, even within the United Nations system, opinions had not crystallized on that most intractable issue, for it was no secret to anyone that the crime—the prohibited aggression—went beyond armed attack. Accordingly, he agreed with Mr. Ago that there were some cowardly solutions. The situation in the modern world might indeed cause a great deal of anguish, and draft article 34, like the cloak which was used discreetly to cover Noah, coyly

covered the great problem on which the peace of the world hung.

21. He was convinced that the reference to armed attack alone was not enough. To illustrate his view, he cited the example of a State which sent its fishing vessels into a zone regarded by another State as an exclusive fisheries zone, thus provoking incidents with warships of that other State. He was personally prepared to concede that that was a case of self-defence as between the two States involved, even though it would be going too far in such a case to speak of aggression or crime, for the situation did provoke some acts of violence or coercion. Similarly, if a State launched a satellite which broadcast to the territory of another State radio or television programmes that gave rise to internal disturbances, that other State might try to destroy the satellite and claim that it was acting in self-defence against a cultural or political aggression; he was not sure that in such a case it would be possible to speak of armed attack. Again, if a State blockaded a strait in order to cause prejudice to another State, the action might conceivably be regarded as armed attack, and it would be understandable that the State suffering the blockade should argue that the situation was one in which it could act in self-defence.

22. Self-defence presupposed the existence of an immediate and direct link between the action taken and the action against which it was taken. Self-defence was a self-contained notion distinct from state of necessity and from *force majeure*. He considered that the Commission should do no more than formulate a relatively vague provision concerning self-defence, for the international community had not yet reached a sufficient degree of unity to be able to go beyond a certain stage. Accordingly, the Commission could do no more than refer to the existing general rule.

23. The question had been asked whether reference should be made to the Charter or to some other more general principles. He considered that it would be most desirable to refer to the principles of international law that had been embodied in, among others, the Charter. The use of the words "among others" ("*notamment*") would imply that not all principles concerning self-defence were stated in the Charter. It would be recalled that at the United Nations Conference on the Law of Treaties the question of the retroactive application of the principles of the Charter to situations antedating the Charter had been raised, and that Sir Humphrey Waldock, Special Consultant, had answered that it was not the Commission's function to settle problems of that kind. Likewise, the Commission should admit that the notions of self-defence and aggression antedated its draft articles.

24. He considered that an article on self-defence was needed in the draft. At the same time, he considered that the article should not be one of substance, but should be in the form of a clause laying down a general proviso or saving clause and mentioning self-defence in

the vaguest possible terms. Although not opposed to a reference to the Charter, he would prefer in that case that reference should be made not solely to Article 51 but to the whole of the Charter, by means of a passage drafted on the following lines: "... the general principles of self-defence as embodied, among others, in Article 51 of the Charter of the United Nations".

25. He expected that it would be difficult to write the commentary to the draft article, and thought that the Commission should once again trust Mr. Ago to find appropriate language.

The meeting rose at 11.40 a.m.

1621st MEETING

Friday, 27 June 1980, at 10.20 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Also present: Mr. Ago

State responsibility (*continued*) (A/CN.4/318/Add.5–7, A/CN.4/328 and Add.1–4)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)

ARTICLE 34 (Self-defence)¹ (*continued*)

1. Mr. SCHWEBEL said he endorsed the main thrust of the report (A/CN.4/318/Add.5–7, sect. 6) and agreed in particular with the parts relating to proportionality and collective self-defence. He also agreed that there were questions which the Commission should not attempt to answer within the context of draft article 34 and the commentary thereto, such as the lawfulness of preventive self-defence.

2. On a number of points, however, his views were not entirely in accord with those of Mr. Ago. In the first place, while it was true that the Charter of the United Nations codified the law governing the use of force in international relations, including the use of force in self-defence, Article 51 of the Charter, taken alone, could not be said to do so. The Charter included other provisions of paramount importance, such as Article 2, paragraph 4, which, in its reference to the "threat" as well as to the "use" of force in inter-

¹ For text, see 1619th meeting, para. 1.

national relations, clearly had a bearing on the lawfulness of action taken in preventive self-defence, or again, the provisions of, *inter alia*, Chapters VII and VIII, which established that the use of force could be authorized or required by the Security Council and regional organizations. Hence, it might be necessary to include in the draft an article which, in substance, provided that, where a State used force in a manner that would breach an international obligation were it not for the fact that the State was responding to a requirement or authorization of the United Nations or a regional organization acting pursuant to the Charter of the United Nations, that State did not incur international responsibility.

3. Those considerations led him to conclude that draft article 34 should not specifically mention Article 51 of the Charter but should refer, in more general terms, to international law and to the Charter of the United Nations. He would suggest, for example, some wording along the following lines:

“The wrongfulness of an act of a State not in conformity with an international obligation to another State is precluded if the State committed the act in the exercise of legitimate individual or collective self-defence in accordance with the provisions of the Charter of the United Nations.”

4. Furthermore, it had rightly been said that self-defence was the other side of the coin of aggression, in which connexion he pointed out that, in its Definition of Aggression,² the General Assembly of the United Nations referred not to acts in contravention of Article 51 of the Charter but to acts in contravention of the Charter. Also, the acts of aggression specified in the Definition were not limited to armed attack.

5. Lastly, Mr. Ago had said that a State could act in self-defence only in response to the action of another State and not, for example, in response to attacks by private individuals or organizations. If that meant that State responsibility applied solely to State action or to acts or omissions by a State or imputed to it, he could agree. But if it meant that a State was not entitled to act in self-defence to attacks or threats of attack by other entities, he could not agree. Surely, a State was entitled to act in self-defence against, for instance, attacks by terrorist organizations or individuals? He would be grateful for Mr. Ago's views on that point.

6. Mr. FRANCIS said that draft article 34 had great practical significance for States in view of its relationship to Article 51 of the Charter of the United Nations.

7. In approaching the issue of self-defence in international law, he saw the concept as one which, first of all, set precise limits to the legitimate use of force by a State. He also saw its rationale as deriving from internal law, since self-defence in international law was no more than the sum of the rights to self-help that a

State vested in its people. In other words, self-defence in international law was an extension of that collective right in the face of a common external aggressor. It would, however, be wrong to suggest that self-defence in international law had any more direct analogy with internal law. For instance, whereas some national laws on self-defence imposed a substantive requirement on the person in danger to retreat before exerting any measure of force, there was no such requirement in international law. There could be no retreat from national territory, save possibly as a tactical ploy. On the basis of that fundamental premise, it seemed to him that Article 51 of the Charter of the United Nations should not present any difficulty so far as draft article 34 was concerned.

8. The Commission's problem was rather one of drafting, and in that connexion care should be taken not to include any element that might amend the Charter, directly or indirectly. It should be remembered that self-defence, although a right like *force majeure*, necessity and distress, rested on an entirely different legal basis from the other circumstances that precluded wrongfulness. Indeed, it had been termed imperative, which was tantamount to saying that it had the force of *jus cogens*. How else could it remove the wrongfulness involved in a breach of a peremptory norm? The special nature of the right lay in the fact that it arose only when a wrongful act, within the meaning of Article 51 of the Charter, had been committed by a State. The question then was whether that right fell within the circumstances that precluded wrongfulness or was to be treated as being of an exceptional nature.

9. For the answer to that question, it was necessary to turn to the Charter itself. It seemed to him that Article 51 covered a situation that was different from the one contemplated in Article 2, paragraph 4. In that connexion, Mr. Ago had mentioned at the 1619th meeting the attitude of a country which had felt that the inclusion of a provision on self-defence in the Briand-Kellogg Pact of 1928 would have diminished the impact of the ban on recourse to war; it could perhaps be argued that the same consideration applied in respect of Article 51 of the Charter as it related to Article 2, paragraph 4. For his part, he saw Article 51 as an exception to Article 2, paragraph 4, and therefore considered that self-defence, although differing in its legal character from necessity, *force majeure* and distress, was one of the circumstances which precluded wrongfulness.

10. The next point to decide was whether Mr. Ago's report should be taken as the basis on which the Commission was to prepare its own report to the General Assembly. There were in fact three main aspects to the report, namely, interpretation of the Charter of the United Nations, the historical landmarks in the development of self-defence as a concept of international law, and the conflicting doctrine in that regard. As for the first two aspects, he

² General Assembly resolution 3314 (XXIX), annex.

considered that, within the context of its work, the Commission was required to engage in some interpretation of the Charter, and he saw no harm in summarizing the history of the development of the concept of self-defence, since that would help in understanding the significance of the word "inherent" in Article 51 of the Charter. So far as the third aspect was concerned, he thought it entirely appropriate for the report to refer to doctrine, not only because the Commission was required to do so under its Statute but also because it would be remiss if it failed to take a position on the wealth of doctrine that had built up since the Second World War.

11. In that respect, Mr. Ago had been right to refer to the "*Caroline*" case, since there was clearly a difference between a situation in which a State acted in self-defence to protect its own interests and a situation—involving private individuals—to which the State was not a party and of which it might not even be aware. In the latter case, the issue was whether the State could act within the context of a state of necessity.

12. Subject to those comments, he could accept the report, and he agreed in particular that immediacy of response and proportionality were basic to the concept of self-defence. There was however one point on which he dissented. He noted that in his report Mr. Ago had left open the question of whether certain measures taken in self-defence would be in accordance with Article 51 of the Charter. Therefore, the words which appeared between brackets in the first sentence of paragraph 120 should be deleted wherever they occurred in the report.

13. Mr. ŠAHOVIĆ said that, in the main, he agreed with the conclusions reached by Mr. Ago on the question of self-defence. Those conclusions were consistent with modern general international law and could serve as a basis for the formulation of an article on self-defence as a circumstance that precluded wrongfulness.

14. The debate on draft article 34 had afforded an opportunity to discuss general questions which went beyond the framework of that provision. For example, a parallel had been drawn between the concept of self-protection or self-help embodied in general international law and the concept of self-defence as embodied in Article 51 and other provisions of the Charter of the United Nations. In his opinion, there was no doubt that the content of Article 51 of the Charter clearly reflected the progress made in the development of general international law with regard to the concept of self-defence. That article had been drafted in the light of the prohibition of recourse on the use of force, and it regarded self-defence, whether individual or collective, as an inherent right.

15. In the years following the signing of the Charter, some writers, including Kelsen, had held the view that there was a law of the United Nations but that such

law, based on the multilateral treaty constituted by the Charter, had been applicable only as between the Member States of the Organization. Too much emphasis on the Charter as a foundation of international law was to be avoided. Much time had passed since then, however, and the Commission itself had helped to show, through its work, that the Charter now embodied general international law. That was why he, like Mr. Ago, considered that the question of a relationship between Article 51 of the Charter and customary international law did not arise.

16. With regard to the nature of the concept of self-defence, it could be asked whether it was a right, an excuse or an exception to the general rule banning recourse to the threat or use of force. It was quite apparent from the text of Article 51 of the Charter that self-defence was simply one of the exceptions to the premise that the threat or use of force was prohibited. The reference to armed attack in Article 51 also derived from that premise.

17. Self-defence was to be viewed as an exception and an inherent right because it was bound up with the existence of States as subjects of international law and because it was one of the attributes of their sovereignty. Therefore, one might well ask whether it was essential to formulate an article on self-defence, since self-defence was an inherent part of State sovereignty. But that was not the problem. A definition of aggression based on the prohibition of the use of force already existed and, as an exception to that prohibition, self-defence definitely had a place in chapter V of the draft.

18. He agreed with Mr. Francis in the matter of interpreting the Charter. Admittedly, the Commission was not officially empowered to interpret that instrument, but it had to proceed with the codification and progressive development of international law, a task that permitted it to express its views on the meaning of certain provisions of the Charter. Obviously, in doing so, it was not acting in the same way as bodies composed of representatives of States, but it did have to take account of the preparatory work for the United Nations Conference on International Organization (San Francisco, 1945), the practice of bodies entrusted with the task of implementing the Charter and also the practice of States. In that respect, Mr. Ago could perhaps have engaged in more detailed research. In any event, the Commission should move in that direction so as to carry out its task of promoting the progressive development of international law. In order to formulate the article under consideration, it must also take account of the facts. The application of Article 51 of the Charter had given rise to enormous dispute, and the actual situations in which it had been applied had always been so delicate and had involved so many political interests that it had not been possible to adopt a clear position, something that might be pointed out in the commentary to draft article 34.

19. The wording of the article might be rather more explicit. The article could be drafted in terms that were closer to those of other provisions of the draft, more particularly of chapter V. The words "to defend itself or another State" did not clearly describe the substance of the problem. Again, he had some doubts about the need to refer to Article 51 of the Charter or even to the Charter itself, since up to now the Commission had not referred to them elsewhere in the draft. He for one was not opposed to mentioning the Charter as a source of international law and of the right to self-defence. It was up to the Drafting Committee to find an appropriate formula. Lastly, the phrase "armed attack as provided for in Article 51 of the Charter of the United Nations" was not entirely satisfactory, for the concept of armed attack was found not only in Article 51 of the Charter but also in other texts.

20. Sir Francis VALLAT said that there seemed to be general agreement on the need to include an article on the question of self-defence in the draft. Indeed, omission of such an article could have very serious implications regarding the content of other draft articles that did not contemplate the use of armed force. However, the Commission had neither the means, nor possibly the mandate, to attempt a definition of the concept of self-defence or to take a position as to the interpretation of Article 51 of the Charter of the United Nations. That also appeared to be the view expressed in the report. The question of whether Article 51 of the Charter constituted an exhaustive definition of self-defence was a controversial one. The records of the 1945 San Francisco Conference and the reference in Article 51 to self-defence as an "inherent right" indicated that those who had drafted the Article had not attempted to codify the concept.

21. Moreover, the Commission was not seeking to define the circumstances in which it would be lawful to use armed force. If it did so, it would be endeavouring to accomplish something which had not been attempted by the General Assembly in adopting the Definition of Aggression. The Commission should take account of the views of the General Assembly as reflected in the Definition, which contained no specific reference to Article 51 of the Charter. The fifth preambular paragraph of the Definition described aggression as "the most serious and dangerous form of the illegal use of force", the implication clearly being that there were other uses of armed force which did not necessarily come under the heading of the concept of aggression and hence within the scope of self-defence. The seventh preambular paragraph mentioned "military occupation or ... other measures of force taken ... in contravention of the Charter", again a general reference. Article 2 of the Definition implied that, in some cases, the use of force could be regarded as lawful and wrongfulness was therefore precluded, and Article 4 gave the Security Council great leeway in determining whether or not a particular instance of the

use of armed force constituted an act of aggression. Consequently, the Definition remained very flexible and was dependent on the Charter as a whole rather than on any one particular provision. Accordingly, it would be advisable for the Commission to refrain from expressly mentioning Article 51 of the Charter in draft article 34 and for it to refer to the provisions of the Charter as a whole, using a wording similar to that proposed by Mr. Schwebel. Indeed, a specific reference to Article 51 of the Charter would inevitably imply that the Commission was taking a position on the interpretation of that provision.

22. Another important consideration was the possible effect of draft article 34 in respect of third States. The wording of the draft article should not imply that measures of self-defence precluded wrongfulness in respect of every other State and in all circumstances. That could be avoided by adopting a wording along the lines of draft article 30.³

The meeting rose at 11.50 a.m.

³ See 1613th meeting, foot-note 2.

1622nd MEETING

Monday, 30 June 1980, at 3.20 p.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Diaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yankov.

Visit by a member of the International Court of Justice

1. The CHAIRMAN said he was honoured to have the opportunity of welcoming to the meeting Mr. El-Erian, a former member and Special Rapporteur of the Commission, a distinguished jurist and a judge of the International Court of Justice. He recognized the visit as being particularly significant in that it was one of a series cementing the close relationship between the Commission and the Court.

2. Mr. EL-ERIAN said that it was a pleasure for him to have an opportunity of attending a meeting of the Commission. Members would appreciate the satisfaction he felt at being once more among his former colleagues. He endorsed the views expressed by the President of the International Court of Justice in a recent letter, emphasizing the value which the Court placed on its strong links with the Commission and its wish that those links should endure. The work of the Commission, particularly on codification, was of great significance, and in a very recent case before the Court

two conventions adopted on the basis of draft articles prepared by the Commission had been referred to. That proved once more that the work of the Commission was of the highest importance. It was also significant that nine of the judges of the Court were former members of the Commission.

3. He thanked the members of the Commission for allowing him to be present at their meeting.

Jurisdictional immunities of States and their property (A/CN.4/331 and Add.1)

[Item 5 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

4. The CHAIRMAN invited the Special Rapporteur to introduce his second report on jurisdictional immunities of States and their property (A/CN.4/331 and Add.1) and, in particular, draft articles 1 to 5 (*ibid.*, paras. 14, 33, 48, 54 and 57), which read:

Article 1. Scope of the present articles

The present articles apply to questions relating to jurisdictional immunities accorded or extended by territorial States to foreign States and their property.

Article 2. Use of terms

1. For the purposes of the present articles:

(a) "Immunity" means the privilege of exemption from, or suspension of, or non-amenability to, the exercise of jurisdiction by the competent authorities of a territorial State;

(b) "Jurisdictional immunities" means immunities from the jurisdiction of the judicial or administrative authorities of a territorial State;

(c) "Territorial State" means a State from whose territorial jurisdiction immunities are claimed by a foreign State in respect of itself or its property;

(d) "Foreign State" means a State against which legal proceedings have been initiated within the jurisdiction and under the internal law of a territorial State;

(e) "State property" means property, rights and interests which are owned by a State according to its internal law;

(f) "Trading or commercial activity" means:

- (i) a regular course of commercial conduct, or
- (ii) a particular commercial transaction or act;

(g) "Jurisdiction" means the competence or power of a territorial State to entertain legal proceedings, to settle disputes, or to adjudicate litigations, as well as the power to administer justice in all its aspects.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meaning which may be ascribed to them in the internal law of any State or by the rules of any international organization.

Article 3. Interpretative provisions

1. In the context of the present articles, unless otherwise provided,

(a) The expression "foreign State", as defined in article 2, paragraph 1 (d) above, includes:

- (i) the sovereign or head of State,
- (ii) the central Government and its various organs or departments,
- (iii) political subdivisions of a foreign State in the exercise of its sovereign authority, and
- (iv) agencies or instrumentalities acting as organs of a foreign State in the exercise of its sovereign authority, whether or not endowed with a separate legal personality and whether or not forming part of the operational machinery of the central Government.

(b) The expression "jurisdiction", as defined in article 2, paragraph 1 (g), above, includes:

- (i) the power to adjudicate,
- (ii) the power to determine questions of law and of fact,
- (iii) the power to administer justice and to take appropriate measures at all stages of legal proceedings, and
- (iv) such other administrative and executive powers as are normally exercised by the judicial, or administrative and police authorities of the territorial State.

2. In determining the commercial character of a trading or commercial activity as defined in article 2, paragraph 1 (f) above, reference shall be made to the nature of the course of conduct or particular transaction or act, rather than to its purpose.

Article 4. Jurisdictional immunities not within scope of the present articles

The fact that the present articles do not apply to jurisdictional immunities accorded or extended to

- (i) diplomatic missions under the Vienna Convention on Diplomatic Relations of 1961,
- (ii) consular missions under the Vienna Convention on Consular Relations of 1963,
- (iii) special missions under the Convention on Special Missions of 1969,
- (iv) the representation of States under the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 1975,
- (v) permanent missions or delegations of States to international organizations in general,

shall not affect

(a) the legal status and the extent of jurisdictional immunities recognized and accorded to such missions and representation of States under the above-mentioned conventions;

(b) the application to such missions or representation of States or international organizations of any of the rules set forth in the present articles to which they would also be subject under international law independently of the articles;

(c) the application of any of the rules set forth in the present articles to States and international organizations, non-parties to the articles, in so far as such rules may have the legal force of customary international law independently of the articles.

Article 5. Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which the relations between States would be subject under international law independently of the articles, the present articles apply only to the granting or refusal of jurisdictional immunities to foreign States and their property after the entry into force of the said articles as regards States parties thereto or States having declared themselves bound thereby.

5. Mr. SUCHARITKUL (Special Rapporteur) said that in preparing his report he had attempted to give a panoramic view of the topic. In recent years, some very dramatic changes had occurred in the matter of jurisdictional immunities of States and their

property—particularly as they related to trading activities and private shipping and maritime transport—and the intricacies and complexities of the subject were now becoming clear.

6. After pointing out several corrections that should be made to the text of his report, he said that its preparation had been greatly facilitated by the helpful comments made by members of the Commission when considering his previous report. He had also been greatly assisted by materials made available by Governments concerning the current state of their practice in regard to jurisdictional immunities and by information supplied in response to the questionnaire circulated by the Secretariat to Governments on 2 October 1979. The assistance provided by the Secretariat had also been most valuable.

7. Draft article 1 attempted to define the scope of existing customary rules of international law on the topic. He would be grateful for the Commission's guidance on any other rules to be developed or formulated, in addition to general principles. For purposes of practical convenience, he had employed the terms "territorial State" and "foreign State" to denote the two independent sovereign States whose existence was a prerequisite for jurisdictional immunities.

8. In preparing draft article 2, he had tried to limit the terms defined to those that were essential to the early draft articles. The list was not exhaustive, and the Commission might find it necessary to define further terms later.

9. The report provided some explanation of the term "immunity" as a legal concept, and also of the term "jurisdictional immunities" in order to underline the necessary distinction between jurisdictional immunities and exemption from substantive law.

10. The notion of "State property" had already been classified to some extent by the Commission. The definition provided in the draft articles was of a tentative nature and might require further elaboration. The term should include the property, rights and interests owned by the foreign State, ownership being determined, in the first instance, by the internal law of the owning State. The Commission would have to consider in greater detail the question of the immunity of such property from the jurisdiction of the territorial State.

11. The term "trading or commercial activity" was also of a tentative nature. The Commission might have to decide later whether to adopt the term "trading activity" or "commercial activity". In practice, those terms could cover a whole series of transactions constituting a regular course of commercial conduct.

12. The term "jurisdiction" was used to denote the jurisdiction not only of the judicial power, but also that of all other authorities dealing with the administration of law. If the parties to a convention intended to place

some other connotation on the term, an appropriate exception or reservation would have to be made.

13. Draft article 3 contained interpretative provisions which might be useful as indications of difficult situations in which the definitions would require further explanation. For example, with regard to the expression "foreign State", it would be useful to determine which types of entity could be regarded as forming part of the foreign State. However, if the Commission should conclude that there was no need for such interpretative provisions, or that they should be placed elsewhere in the draft, he would be prepared to reorganize the draft accordingly.

14. There appeared to be a sufficient basis in practice to warrant the inclusion of an interpretative provision making clear the distinction between the public and private capacity of a sovereign or head of State, as part of the definition of the expression "foreign State". Furthermore, not only the central Government itself, but also the various organs of departments forming part of the central machinery of government, could be legitimately recognized as enjoying State immunity in their own right. In paragraph 1 (a) (iii) of draft article 3, he added the words "in the exercise of its sovereign authority" because State practice seemed to suggest that the political subdivisions of a foreign State were not identified with the State itself, since they lacked international personality and hence were not entitled to benefit from State immunities unless they were exercising the sovereign authority of the State. The same applied to paragraph 1 (a) (iv).

15. Referring to paragraph 2 of draft article 3, he said that the criterion used for determining a trade or commercial activity was an objective one, for which a preference had been clearly shown in recent State practice. He was aware that there might be some basis for a different view. The Commission would need to consider the question at length.

16. Draft article 4 was based on similar draft articles considered by the Commission, relating to succession of States in matters other than treaties, and on articles contained in a number of relevant conventions.

17. With regard to draft article 5, it should be noted that, while the rules stated in any articles adopted by the Commission would not have retroactive effect, the provisions of any rules so adopted might reflect existing rules of customary international law, in which case the principle of non-retroactivity would not apply.

18. Mr. TABIBI congratulated the Special Rapporteur on his very useful report and valuable and oral statement on a difficult, but most important, topic. The report before the Commission was very different from that of the previous year dealing with the initial questions,¹ as it covered the basic rules governing the

¹ Reproduced in *Yearbook . . . 1979*, vol. II (Part One), document A/CN.4/323.

subject and defined the limits of immunities, besides covering, as far as possible, the practice universally followed by States Members of the United Nations.

19. The Commission should ask itself what were the real principles of customary rules regarding jurisdictional immunities of States and what the norms should be, taking into account the progressive development of international law. He fully agreed with the Special Rapporteur that of the three main elements—jurisdictional immunity, the territorial State and the foreign State—jurisdictional immunity itself was the basic and most important principle. He also agreed, however, that the topic should not deal with jurisdictional immunity alone, but should encompass all related questions.

20. Commenting on the first five articles, he said that he found article 1 acceptable; it was not exhaustive and did not tie the hands of the Commission. Article 2 was not exhaustive either; it defined the important terms, but remained open-ended, so that it could be supplemented by further terms if necessary. As to the content of article 3, he was not sure whether it should be retained as article 3 or become part of the commentary to article 2. In any case, it was useful, since some terms required further interpretation in respect of their linkage to other notions. With regard to article 4, he agreed with the Special Rapporteur that certain jurisdictional immunities did not fall within the scope of the draft articles and had already been dealt with in the various instruments mentioned in the report. Referring to article 5, he agreed with the Special Rapporteur that the articles should embody rules that could be regarded as codification as well as progressive development of international law; that was in line with the general trend for subjects that were not static.

21. Mr. RIPHAGEN expressed his sincere admiration for the way in which the Special Rapporteur had tackled the intricate problem of State immunity.

22. The prevention of conflict between the conduct of one State and that of another State was the primary object of all international law, including the rules of State immunity in the widest sense. However, the rules of State immunity did not prescribe the internal policies or social systems of States, but simply dealt with the consequences of contacts between freely chosen patterns of their conduct.

23. Unlike other rules designed to prevent situations of conflict from arising, the rules of State immunity did not aim to avoid conflicts or determine rules applicable to conduct; they determined which authority might sit in judgement over the conduct of one State having contact with another State. Consequently, the rules of State immunity had first to determine the types of conduct of States to which they applied and distinguish those activities from other activities; that was to say, they had first to determine for which conduct of State A, State A enjoyed immunity and from which conduct

of State B that immunity was enjoyed. That meant that the rules of State immunity were necessarily rules of international law, even though their historical development from internal law tended to obscure rather than elucidate their present-day function and importance.

24. It was curious to see the constitutional impossibility of impleading a national sovereign before national courts being invoked as a basis for the immunity of a foreign sovereign from the jurisdiction of courts not acting in his name, and that the same basis was even invoked when it was not the foreign sovereign State but its property that was involved in the proceedings. It was equally curious to see immunity based on the ground “that there can be no legal right as against the authority that makes the law on which the right depends”, quoted in paragraph 73 of the report, where there seemed to be some confusion with the doctrine of conflict of laws, since the pronouncement rather referred to the “act of State” doctrine. It was also curious to apply the concept of *acte de gouvernement* (although at least there was a link there, in that relations between Governments were involved) and to note the impact of national legislation permitting suits in national courts against foreigners, particularly as such national legislation was meant to deal with suits of foreigners residing abroad, where an extraordinary extension of the jurisdiction of a State beyond what might be called territorial jurisdiction seemed to have provoked a limitation against foreign States, as distinct from aliens.

25. As the Special Rapporteur had rightly indicated, the vital principle of equality of States as expressed by the maxim *par in parem imperium non habet* remained the best support for the principle of State immunity.

26. With regard to draft articles 1–5, he thought those rules fulfilled the initial task of stating for which conduct a State enjoyed immunity and from which conduct of another State that immunity was enjoyed. Article 1 referred to “jurisdictional immunities accorded or extended by territorial States”, and the notions contained therein were clarified in article 2, paragraph 1 (b), (c), (d) and (g) and article 3, paragraph 1 (b). As a matter of drafting, he had been struck by the fact that the wording of article 1 was descriptive rather than normative, and supposed that the rules were in fact about immunities “to be” accorded and “to be” extended.

27. The term “territorial State”, which had been chosen to indicate the State that was obliged under the articles to abstain from certain conduct, had been further defined in article 2, paragraph 1 (c) as “a State from whose territorial jurisdiction immunities are claimed”, but it was not clear whether the articles would really deal only with the exercise by a State of its territorial jurisdiction, and, if so, why such a limitation was imposed and what exactly was a “territorial” jurisdiction, as distinct from other jurisdictions. However, the third sentence of paragraph 23 of the report seemed to point in another direction,

inasmuch as it defined the "territorial State" as "the State in whose territorial jurisdiction a dispute has arisen". It was surely not meant that, in order to raise questions of State immunity, the actual situation which had given rise to a dispute had to have connecting links with the territory of the State which might wish to exercise its jurisdiction.

28. The term "jurisdictional immunities" employed in article 1 was defined in article 2, paragraphs 1 (a), (b) and (g) and in article 3, paragraph 1 (b), so that it became clear what type of State activity in respect of another State the articles were addressed to, and the Special Rapporteur had rightly chosen to cover a relatively limited type of activity.

29. It had to be stated that there might be immunities under general international law outside the scope of the articles, and that point had, to a certain extent, been dealt with in article 4. But it would not be easy to draft a provision concerning the scope within which there would, presumably, be no immunities other than those provided for. In practice, it might not prove easy to draw a line between the types of activity dealt with in the articles before the Commission and other manifestations of the sovereignty of States, e.g. between legislation and the actual exercise of power outside the realm of the administration of justice.

30. An inherent difficulty encountered in that regard resulted from the intimate connexion between the rule of law, its application in a specific case and the enforcement of its application through the use of physical power. The Special Rapporteur had distinguished between (a) the applicability of the laws of a State within its territory; (b) the power of a tribunal to adjudicate or settle disputes; and (c) execution of the judgements thus rendered. In principle there was no immunity of a foreign State in regard to (a), and even where there was no immunity in regard to (b) there might still be immunity in regard to (c). That distinction was correct in itself, but he wondered whether it always worked in practice, since the three phases of jurisdiction were often telescoped by a State into one act.

31. By way of illustration he indicated a situation in municipal law concerning immovable property and incorporeal property (patents, trade marks, copyrights, etc), where the final application of such law might be dependent upon the activities of administrative authorities. In principle, any such property (immovable or incorporeal) within the territorial State could only be acquired by that State under all the conditions established by the applicable internal law of the territorial State, including such conditions concerning the competence of local judicial and administrative bodies. It was impossible to separate jurisdictional immunity from non-immunity in such a case. However, that difficulty was perhaps peculiar to some types of property only, and might be covered by the substantive articles still to be proposed by the Special Rapporteur. A later consideration of the question

seemed to be foreshadowed in paragraph 26 of the report, which dealt with the notion of State property. But he had doubts about the usefulness of the definition of "State property", since it could obviously only apply to property acquired elsewhere than in a territorial State and brought into the territory by the other State.

32. Paragraphs 71 and 72 of the report discussed the situation in which a foreign State was not technically a party to the proceedings, but the property was merely in the "possession or control" of that foreign State, in which case it seemed clear that such property was not necessarily owned by the State according to any internal law but that its possession or control had to be determined in accordance with some kind of international test.

33. As to the other primary task of the rules of State immunity, article 1 determined a type of activity or conduct for which State immunity was enjoyed by "foreign States and their property"; that was clarified in article 2, paragraphs 1 (d), (e) and (f); article 3, paragraph 1 (a) and paragraph 2; and, to a certain extent, in article 4.

34. With regard to the definition of a "foreign State" in article 2, paragraph 1 (d), he thought it might be dangerous to define any object in terms of a particular situation of that object. In any case, at first sight the term seemed self-evident. The further definition in article 3, paragraph 1 was clearly useful and necessary, and was meant to be without prejudice to the question of enjoyment or non-enjoyment of immunity, as it was a list of "potential recipients of State immunity".

35. In that connexion, it was interesting to note that agencies and instrumentalities acting as organs of a foreign State otherwise than in the exercise of its sovereign authority were *a priori* excluded from the benefits of jurisdictional immunity. Again, he was not sure that it was advisable to define a subject in terms of its conduct. Jurisdictional immunity of a foreign State in modern practice seemed to be functional, relating to conduct, rather than personal, relating to status, and in that respect there was a fundamental difference between the immunity of a foreign State and the immunity of a foreign diplomat. The functional character of modern State immunity opened the way for granting immunity to entities which, under internal law governing status, were legally separate from States as such, e.g. political subdivisions and agencies or instrumentalities. Clearly in those cases such immunity was not personal and could only exist on account of conduct.

36. In regard to the functional concept of State immunity, it seemed only natural that the rules of international law must also make a distinction between the types of activity of States. It was hardly surprising that rules concerning jurisdictional immunity included the concept of trading or commercial activity, involving activities outside the exercise of the State's sovereign authority. However, such rules could only

serve an international purpose if abstraction were made of the motivation and the final objective of the activities. The phenomenon of telescoping might also apply in such a case, and, in practice, it might be difficult to make any realistic abstraction.

37. Article 4 involved a similar phenomenon, namely, that it was not always possible to distinguish between the various aspects of a particular conduct. The relationship between the rules of international law concerning jurisdictional immunities of foreign States and their property and those concerning diplomatic immunities might also give rise to complicated cases, and it might not always be realistic to make a sharp distinction between State immunity and diplomatic immunity.

38. Finally, he would like to know whether the Special Rapporteur would give attention to a problem referred to in paragraphs 46–48 of his own report (A/CN.4/330), concerning State immunity in cases where a foreign State had acted in breach of an international obligation.

The meeting rose at 6 p.m.

1623rd MEETING

Tuesday, 1 July 1980, at 10.15 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Jurisdictional immunities of States and their property (continued) (A/CN.4/331 and Add.1)

[Item 5 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR¹ (continued)

1. Mr. SUCHARITKUL (Special Rapporteur), introducing part II of his report (A/CN.4/331 and Add.1), said that its purpose was to deal with the general principles of jurisdictional immunity of States and their property; principles other than general principles, including possible limitations or exceptions and other subsidiary rules, might be dealt with in a subsequent part.

¹ For the text of articles 1–5 submitted by the Special Rapporteur, see 1622nd meeting, para. 4.

2. The main general principle was stated in draft article 6 (*ibid.*, para. 127), which read as follows:

Article 6. The principle of State immunity

1. A foreign State shall be immune from the jurisdiction of a territorial State in accordance with the provisions of the present articles.

2. The judicial and administrative authorities of the territorial State shall give effect to State immunity recognized in the present articles.

That principle concerned sovereign or State immunity and some of its close relationships with other concepts, such as diplomatic immunities and the immunities of personal sovereigns and foreign Governments.

3. Draft article 7 would be designed to draw a line of distinction between cases in which the question of State immunity arose and other types of case, in which there was no question of immunity because the territorial State lacked jurisdiction or competence under its own internal law and there was a possibility of *renvoi* to the general principles of private international law governing jurisdiction. The double application of public and private international law, and cases in which public international law governed the general application of certain generally recognized rules of private international law, would doubtless have to be re-examined during the discussion on draft article 7.

4. Draft article 8, which would deal with the role of consent, would also be of fundamental importance. It had become clear from the material he had examined that territorial States should not exercise jurisdiction against foreign States without their consent. Article 9 would be concerned with voluntary submission—a matter which was so closely connected with consent that the possibility of combining articles 8 and 9 might be considered, although certain differences had been noted. Article 10 would deal with the question of counter-claims and the extent to which a foreign State would not be accorded immunity where it had itself raised a counter-claim in a suit against it. Lastly, article 11 would deal with waiver of State immunity.

5. Before drafting article 6, on the principle of State immunity, he had attempted to trace the relevant historical and legal developments in both common law and civil law systems, particularly from the nineteenth century onwards. In common law systems, the principle could be traced back to the personal immunity of the sovereign, with subsequent transition of the attributes of the sovereign to the State as such and progressive development from the attribution of equality to the principle of common agreement. The concept of State immunity had then been extended to cover the idea of impleading, and that concept had later been extended beyond the possibility of bringing a suit against a foreign State, to proceedings seeking to detain or attach property which was owned by the State or was in its possession or control. A parallel development had taken place in civil law countries, where the legal basis was less historical and more a

logical consequence of the jurisdiction of judicial authorities. Part II of his report contained a survey of practice in different countries, particularly in western Europe.

6. The historical development showed that there was some connexion between legal reasoning on State immunities and on diplomatic immunities. As Mr. Riphagen had observed at the previous meeting, one of the main problems was that of distinguishing between diplomatic and State immunities, which was sometimes very difficult. In that regard, current practice in the Federal Republic of Germany was interesting: according to the material made available to him, the German courts adhered to the principles of the 1961 Vienna Convention on Diplomatic Relations² for contracts made by members of diplomatic corps in their personal capacity, but made a distinction for contracts concluded on behalf of a foreign State. Thus a limited immunity might be applied without impairing the obligations assumed under the convention.

7. It was clear that once the doctrine of State immunity had been established in certain countries in the nineteenth century, it had also been followed elsewhere, had been adopted as a principle of customary international law and had become current State practice. Even in countries where there had been no decisions on the subject, the general principle of State immunity had not been challenged.

8. Part II of the report went on to describe the part played by branches other than the judiciary, particularly the executive, in influencing certain legal proceedings and formulating legal principles on State immunity. The national legislatures of some countries had adopted special legislation on State immunity, and some national laws covered specific aspects of the subject. The main principles of State immunity were recognized in a number of international conventions, and other international conventions were relevant to particular aspects. There were also regional conventions related to State immunity, in particular the International Convention for the Unification of Certain Rules Relating to the Immunity of State-owned Vessels (Brussels, 1926).³ Lastly, with regard to international adjudication, a historic Judgment had been pronounced by the International Court of Justice on 24 May 1980, in the case concerning *United States diplomatic and consular staff in Tehran*.⁴

9. He thought it could be concluded from the survey of all the sources available that the principles of State immunity had originally been based on the principles of sovereignty. In addition, the relevance of diplomatic immunities could not be dismissed, and in some areas they could almost be identified with State immunities,

since they were related to the State as such and diplomatic representatives were regarded as organs or as agents of the State.

10. While admitting the relevance of the functional theory put forward by Mr. Riphagen as another explanation for difficulties of execution, he feared that at the present time that theory might tend to limit the extent of immunities. It might be that the concept of functions was so inextricably linked with State immunity that it would have to be further examined.

11. Having completed his oral presentation of part II of his report and, specifically, of the text of draft article 6, he suggested that the Commission might wish to concentrate on the scope of the draft articles, as defined in article 1, and the substantive contents of draft article 6, deferring consideration of the draft articles on definitions, interpretative provisions and other matters such as delineation of scope and non-retroactivity until it was in a position to examine the rest of the draft. He believed that some decision on draft articles 1 and 6 might be required at the current session.

12. Sir Francis VALLAT said that there was no doubt about the importance of the question of jurisdictional immunities of States and their property as a legal topic, since problems of State immunity arose with considerable frequency. The changes that had taken place over the past fifty years made it appropriate to attempt to codify the topic, with the necessary element of progressive development.

13. One of those changes had been the shift from the monarchic to the republican form of government. As a result, it was now more appropriate to speak in terms of State immunity than of sovereign immunity—an expression which derived from the concept of the personal immunity of the sovereign.

14. The functions of the State had also changed. Whereas in the 19th century the primary functions of the State had been the maintenance of internal law and order and the defence of the realm, most States now engaged in commercial, social and other economic activities. The involvement of the State in commercial activities that had previously been undertaken by private individuals or corporations inevitably raised the question of the exercise of local jurisdiction in respect of such activities, and it would be unrealistic to apply the old concept of absolute sovereign immunity to the commercial activities of States.

15. The definition of the scope of the topic presented serious difficulties. He noted that the Special Rapporteur took the view that it was necessary to consider the nature, rather than the purpose, of a given activity. In many cases, however, it was difficult to determine whether the activity was of a commercial or non-commercial nature. Consequently, that aspect of the topic called for closer examination, and it might be necessary to qualify the distinction between nature and purpose to some extent. While there was general

² United Nations, *Treaty Series*, vol. 500, p. 95. The convention is hereinafter called "1961 Vienna Convention".

³ See A/CN.4/331 and Add.1, para. 113.

⁴ *Ibid.*, para. 114.

agreement on the basic principle of State immunity, some difficulties might be encountered with regard to recognition and application of the limits of, or exceptions to, that general principle. The basic problem facing the Commission was how to resolve a conflict between two sovereignties. That problem must be seen from the viewpoints of both of the States involved.

16. The Commission should concentrate on defining the scope of the topic before proceeding to draft legal rules and principles. It was concerned with the question of the jurisdictional immunities of States and their property, and should adhere to that definition of the scope of the draft articles. However, clarification of the meaning of the term "jurisdictional immunities" was needed. The term "jurisdiction" could refer to all governmental authority, including executive, legislative and judicial authority. It could also have a territorial significance, and the Commission must decide whether to limit its consideration of the topic to territorial jurisdiction, or to include extra-territorial jurisdiction. The term could also refer to the jurisdiction of the Courts. The scope of the topic must be made absolutely clear in the draft articles. It should also be made clear that by limiting the scope the Commission was not prejudging matters that might arise in relation to other fields. Even with the clarifications provided in draft articles 2 and 3, that point was not made sufficiently clear.

17. As to draft article 1, he wondered whether the wording need be so closely tied to that of the title of the topic. He had some doubts, for example, regarding the use of the term "jurisdictional immunities", which was in itself very complicated, as it embraced two separate concepts. Moreover, if it was to be assumed that States had a customary law duty to grant immunity to foreign States, the term "accorded or extended" might not be appropriate. In addition, the use of the term "territorial State" implied that the draft articles dealt only with territorial jurisdiction. Finally, he had reservations on the use of the term "foreign State". The word "foreign" was usually avoided in conventions and, in any event, it was inappropriate to use it to refer to a State.

18. The draft article might therefore be worded along the following lines:

"The present articles apply to questions relating to the immunity of one State and its property from the jurisdiction of another State."

19. Mr. USHAKOV said that there were various ways of looking at the scope of the subject-matter defined in draft article 1; it could, for example, be said either that it related to State activities or that it related to the status of the State and its property.

20. It was also necessary to define the area in which those activities or that status were envisaged. That area was the one in which the jurisdiction of another State applied, because immunities existed only in the field of application of the power of another State. He thought

the Commission must make it clear that immunities applied in the area subject to the jurisdiction, administration (for example, in the case of a dependent territory) and control of a State (for example, in the case of a territory under military occupation, whether legitimate or not).

21. The concept of jurisdictional immunities was an ambiguous one, which seemed to refer to the power of jurisdictions. The concept of immunity from jurisdiction presented the same difficulty, as was shown by the provisions of article 31 of the 1961 Vienna Convention, which referred simultaneously to immunity from criminal jurisdiction, from civil jurisdiction and from administrative jurisdiction. In the draft articles, however, "jurisdiction" had the general meaning of the exercise of its powers by a State. In that connexion, he pointed out that article 6 of the draft articles on State responsibility referred to "the constituent, legislative, executive, judicial or other power";⁵ in his opinion, that was how the concept of jurisdiction should be understood in the study of immunities, though the list of powers could not be considered as exhaustive. He would therefore prefer the Commission to refer to immunity from any jurisdiction of the other State. It would not be advisable to define "immunity", since a definition would be dangerous in that it might impair other international instruments in which the concept of immunity was used in a way that was perhaps clear, but not defined.

22. At the preliminary stage of its work, the Commission must also specify the activities to which its draft articles would apply. In his opinion, they would apply to the activities of a foreign State in the territory of another State, and the basic problem was to decide whether or not the latter State allowed those activities within its jurisdiction. He would like the draft articles to indicate that they were intended to regulate the status of a State in relation to activities allowed under the internal law of another State or under agreements or rules of international law. He stressed that, once those activities were allowed, the situation thus created had legal consequences, and he would like the Commission to indicate that the activities in question were not only allowed, but were also subject to the laws and regulations of the other State. In that connexion, he referred to article 41 of the 1961 Vienna Convention, and noted that exemption from application of the power of a State did not exempt the beneficiary from the duty to respect the laws of that State. The territorial State was free to allow or to refuse to allow the activities of the foreign State, but once it had allowed them, it must recognize that the situation thus created produced certain consequences.

23. The main consequence was that the foreign State was not subject to the power of the territorial State. It must, of course, respect the laws and regulations of the

⁵ *Yearbook ... 1979*, vol. II (Part Two), pp. 91 *et seq.*, document A/34/10, chap. III, sect. B.1.

territorial State, but it could not be coerced by the power of that State. That was the basic general principle, and it was always an absolute principle, because the consent of the territorial State was presumed; it had agreed to the activities of the foreign State and its agreement automatically produced certain consequences. But the absolute nature of the exemption from coercion did not rule out the possibility of exceptions, since the foreign State could always freely consent to submit to the power, whether administrative or judicial, of the territorial State.

24. That, in his opinion, should be the basis of the draft articles, and those were the reasons why draft article 6 should not refer to the "present articles", but state the principle of immunity as an absolute principle, subject to possible exceptions.

25. With regard to the concept of commercial and other activities, he considered it impossible to distinguish the different aspects of the single phenomenon that was the State. The State had only one face, and although, for the sake of convenience, it was possible to distinguish between its political, economic, cultural and other activities, that did not mean that its economic, cultural and other relations were not in themselves political, for all State activities were political. If the territorial State allowed an activity, it did so with the attendant consequences, which was to say, essentially, the application of the principle of exemption from power, without any need to delimit the different activities of the foreign State. For relations of immunity were based on free acceptance of the situation created.

26. He hoped that his comments could guide the Special Rapporteur in his research. The Drafting Committee should be able to put those basic considerations into appropriate form.

The meeting rose at 12.55 p.m.

1624th MEETING

Wednesday, 2 July 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Jurisdictional immunities of States and their property (continued) (A/CN.4/331 and Add.1)

[Item 5 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR¹ (continued)

1. Mr. CALLE Y CALLE said that the topic of jurisdictional immunities of States and their property was of great importance by reason of the many and diverse problems which arose all over the world concerning the financial, banking, commercial and other activities undertaken by modern States in the territory of other States. The fundamental task of the Commission was to establish clearly the nature and essence of the concept of State immunity itself. The Special Rapporteur had pointed out that the dramatic changes which had taken place over the past fifty years had given rise to different practices regarding the limitations of, and exceptions to, State immunity. It was worth noting that the Convention on private international law,² concluded in 1928, contained a number of provisions on various immunities and special exceptions.

2. The principle of State immunity should be regarded as a right deriving from other basic principles such as the sovereignty, independence, equality and dignity of States. In paragraph 19 of his report (A/CN.4/331 and Add.1), the Special Rapporteur referred to immunity as "a right or a privilege". There was some difference between those two concepts, for whereas a privilege was granted, a right was enjoyed automatically. If State immunity was to be regarded as a right, the Commission's draft articles should reflect that interpretation. The question whether the right was absolute or limited in a given case should be determined according to the nature of the activity concerned, rather than its purpose, which was a less objective criterion.

3. Referring to draft article 1, he said that, if immunity was recognized as a right, the words "accorded or extended" should be replaced by the word "recognized". Similarly, in draft article 2, paragraph 1 (c), it would be preferable to use the term "invoked" rather than "claimed".

4. He had reservations on the use of the term "jurisdictional immunities". If the intention was to cover all aspects of jurisdiction, it would be preferable to separate the two concepts by referring to the immunity of one State from the jurisdiction of another State. While he had no objection to the use of the terms "territorial State" and "foreign State" to distinguish between the States concerned, many of the problems raised by the present wording of draft article 1 could be avoided by adopting a formulation such as that proposed by Sir Francis Vallat (1623rd meeting, para. 18).

¹ For the text of articles 1-6 submitted by the Special Rapporteur, see 1622nd meeting, para. 4, and 1623rd meeting, para. 2.

² League of Nations, *Treaty Series*, vol. LXXXVI p. 111.

5. In draft article 6, the use of the future tense implied that the enjoyment of immunity would be a consequence of the draft articles; it would be more appropriate to use the present tense.

6. It should be borne in mind that if immunity was to be treated as a right, any State which, having failed to recognize the immunity of another State, instituted proceedings against that State and seized its property on the basis of the judgement, would be guilty of a breach of an international obligation entailing liability.

7. Mr. REUTER observed that the Commission was still at the stage of a very general exchange of views, as all the members who had spoken in the debate had referred to matters of principle or even of history. That approach was justified by the difficulty of the subject. The Special Rapporteur had made a laudable effort to stimulate discussion by proposing specific draft articles in order to evoke the reactions of members of the Commission, even if those draft provisions were not, at that stage, susceptible of being put into final form.

8. In his opinion, draft article 4 was entirely acceptable, and it would be quite wrong to rely on diplomatic immunities, which were an entirely separate matter. He also supported draft article 5, on the non-retroactivity of the articles.

9. On the whole, he could accept the definitions of terms proposed in draft article 2, though he had some reservations, in particular on "trading or commercial activity", which, incidentally, was one of the most important points. Personally, he was inclined to think that the form and intrinsic nature of State activities were a better criterion than their object. He would also like the idea of separability to be taken into account, because an activity whose form was unrelated to the exercise of sovereignty could nevertheless be linked with the exercise of State sovereignty. In that connexion, he referred to the example, given by Mr. Riphagen, of repairs to the heating system in an embassy. Another case which he considered to be of prime importance was that of the participation of foreign States in banking operations, through the intermediary of banks established in the territory of a State. It was obvious that an embassy's bank account was closely linked with the embassy's activity. That matter should be studied in depth.

10. The definition of "State property" given in draft article 2, paragraph 1 (e), touched on a fundamental question, and he did not think it was quite true to say that problems concerning the ownership of State property could necessarily be settled simply by a *renvoi* to the law of the State claiming ownership. In his view, certain distinctions had to be made according to the property in question.

11. With regard to the content of draft article 1, he did not think there was a customary rule establishing State immunity. And he could support the text of draft article 6 but not its title, because he did not believe that there was a principle of State immunity. Rather, he

believed that there were State immunities and that, as Mr. Calle y Calle had said, it was necessary to distinguish between immunity from the jurisdiction of courts and immunity from execution of judgements. He even believed that there were different immunities justified by different circumstances. In order really to exist and to be described as universal, a custom had to be based on uniform practice, which was lacking in the present case.

12. With regard to substance, he stressed that the question of State immunities only arose because a State found itself in a situation which involved the internal legal order to another State. That was a crucial point, and the Commission should seek to determine whether there were any international rules concerning the relation between a State and the national legal rules of another State. There were, in fact, very few rules of that kind. One example was the basic rule that a State did not exercise its sovereignty in the territory of another State. Diplomatic representation constituted an exception to that rule, so that certain immunities had to be granted to enable the State to exercise its sovereignty, which would otherwise be impossible. Similarly, an international rule prohibited States from making any "physical projection" into the territory of another State. To break that rule was an internationally wrongful act, and the Commission should study the question of immunities in the event of such an act.

13. At the previous meeting, Mr. Ushakov had raised a basic question when he had asked what was the legal regime governing a foreign State which engaged in activities coming under the internal law of another State. Very little had been written on the subject; the Commission should enquire whether there were any rules of public international law on it and whether a State was bound to agree to the activities of another State in its territory. The question of immunities arose in a wide variety of fields, such as those of succession, companies and contracts. He, for one, would not lay down a rule of public international law in advance. The Commission's object was to state rules which all courts could apply in the same way, so it had to find the points on which it could establish uniform rules of law.

14. Mr. Ushakov had also said that, if a State allowed the activities of a foreign State in its territory, it also necessarily accepted their consequences. He (Mr. Reuter) did not share that opinion. In France, for example, another State could not engage in trade if there was no law authorizing it to do so. Hence, the fact that the French State allowed a foreign State to form a company in its territory did not mean that it also allowed that State to engage in trade. He did not believe that a rule of public international law could impose a derogation from the internal law of States. Although he would not deny that a rule establishing the immunity of States might have existed in international law in former times or might exist in international law in the future, he did not believe that

contemporary public international law contained any such principle.

15. Mr. QUENTIN-BAXTER said that, while he was attracted to the wording of draft article 1 proposed by Sir Francis Vallat, it would be wise to exercise caution in attempting definitions of concepts such as immunity. With regard to the scope of the term "jurisdictional immunities", the Commission would have to consider whether the limits it was to place on that concept were to be natural or self-imposed.

16. He had reservations concerning article 6, because it stated the central principle in a way that left immunities to be defined at a later stage, but he understood why the Special Rapporteur had felt compelled to formulate the draft article in that way until the Commission had gone through the lengthy process of examining the boundaries of the subject.

17. The difficulties facing the Commission in dealing with the topic had already begun to emerge in the judgement of Chief Justice Marshall of the United States Supreme Court in the case of *The Schooner "Exchange" v. McFaddon and others*.³ In that judgement, the doctrine of sovereign immunities had been expressed as an exception rather than a rule. However, the underlying principle had proved so powerful that Chief Justice Marshall had gone on to enunciate a principle which constituted the very essence of relationships between States, namely, that a sovereign was entitled to expect that he would be able to enter the territory of another State on the basis that his immunities would be respected. Nevertheless, he had felt compelled to draw a distinction between the situation of a vessel that visited foreign ports in the course of its normal activities and that of a military detachment whose presence on foreign soil was subject to the express consent of the receiving State. In other cases cited in the report, including *De Haber v. The Queen of Portugal*⁴ and the "*Parlement Belge*",⁵ pronouncements on the principle of sovereign immunities also contained qualifications. Furthermore, on several occasions, the highest English courts had stated that English law had never been committed to the absolute view of sovereign immunity.

18. The essential difficulty in formulating draft article 6, if it was to state the principle concisely, was that it must still be within the limits of Chief Justice Marshall's original concept. State practice throughout the world imposed limits on what was granted by express consent or by necessary implication of consent, and that situation must be reflected in any statement of the principle in article 6. The principle could not be made to apply to every emanation of a foreign sovereignty which chose to find itself in the territory of another

State. Such a provision would detract from the right of a State to exercise full sovereignty in its own territory.

19. Mr. TSURUOKA said it was well to remind the Commission from time to time that its role, which was different from that of a university or a parliament, was to codify international law and promote its progressive development by modernizing and rationalizing it by essentially inductive methods.

20. Although Japan had long remained isolated from the outside world, it nevertheless had quite abundant jurisprudence on the question of State immunities. It had also concluded conventions on that subject, in particular with the Soviet Union and the United States of America, and its practice was relatively well developed.

21. He emphasized that, in formulating its draft articles, the Commission should try not to go too much against State practice and not to attach undue importance to so-called principles of international law as against that practice, for if it did, the future convention it might eventually produce would certainly remain a dead letter.

22. Recent developments in the practice of Japan showed a tendency to distinguish State activities proper—which were sources of immunities—from State trading activities—which did not give rise to immunities. He stressed that, if the Commission's draft took a different direction, Japan would have the greatest difficulty in ratifying it in the form of a convention. He noted that the theoretical principles of international law were only of minor importance to persons conducting international relations.

23. With regard to the draft articles submitted by the Special Rapporteur, he observed that the Commission was only at the preliminary stage of its work, and that before it could put a set of draft articles into final form it had to determine who enjoyed what immunities in what conditions. He thought, moreover, that it might perhaps be preferable to put the draft articles proposed by the Special Rapporteur in a commentary to the introductory chapter.

24. Mr. ŠAHOVIĆ said that his feelings were very similar to those of Mr. Tsuruoka. The study of jurisdictional immunities was still only in its preliminary phase, and the Commission should not be too hasty. At its previous session, it had decided to invite Governments to transmit information on their practice,⁶ and he would like the Special Rapporteur to tell the Commission how many replies had been received.

25. The Special Rapporteur was proposing several draft articles that were based on specific and objective data, but a detailed examination of the texts showed that they were based essentially on historical ideas. He

³ See A/CN.4/331 and Add.1, para. 75.

⁴ *Ibid.*, para. 68.

⁵ *Ibid.*, para. 123.

⁶ See *Yearbook . . . 1979*, vol. II (Part Two), p. 186, document A/34/10, para. 183.

would prefer the Commission to study mainly contemporary practice. Mr. Reuter had said he was not sure that a principle of State immunity existed in contemporary practice; the Commission must prove the existence of such a rule in contemporary international law before trying to formulate it.

26. On the whole, he shared the views expressed by the members of the Commission on draft articles 2 to 5. On the other hand, he considered that draft articles 1 and 6 did not really express the subject-matter of the titles they had been given. Some clarification was therefore required, and it would be particularly desirable to specify, in draft article 6, the content of the notion of jurisdictional immunity, on which the Commission seemed to have a general idea which was, however, difficult to express.

27. The Commission should not be hasty with such a complex subject, and it was in no way bound to study one, not to say two, drafts of articles every year. It might perhaps be preferable to let the study of such a delicate matter ripen slowly.

**Question of treaties concluded between States and international organizations or between two or more international organizations (concluded)*
(A/CN.4/327, A/CN.4/L.312)**

[Item 3 of the agenda]

**DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE**

ARTICLES 61–80 AND ANNEX

28. The CHAIRMAN invited the Chairman of the Drafting Committee to present the results of the Committee's work on the draft articles which the Commission had referred to it at the current session.

29. The results of the Committee's work were presented in document A/CN.4/L.312, which contained the text of articles 61–80 and of the annex concerning article 66, as well as the titles of the parts and corresponding sections of the draft.

30. The texts proposed by the Drafting Committee read:

[PART V

**INVALIDITY, TERMINATION AND SUSPENSION OF
THE OPERATION OF TREATIES**

...
SECTION 3. TERMINATION AND SUSPENSION OF THE OPERATION
OF TREATIES
...]

Article 61. Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Article 62. Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked by a party as a ground for terminating or withdrawing from a treaty between two or more States and one or more international organizations and establishing a boundary.

3. A fundamental change of circumstances may not be invoked by a party as a ground for terminating or withdrawing from a treaty if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

4. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Article 63. Severance of diplomatic or consular relations

The severance of diplomatic or consular relations between States parties to a treaty concluded between two or more States and one or more international organizations does not affect the legal relations established between those States by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Article 64. Emergence of a new peremptory norm of general international law (jus cogens)

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

SECTION 4. PROCEDURE

Article 65. Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which, under the provisions of the present articles, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

* Resumed from the 1596th meeting.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. The notification or objection made by an international organization shall be governed by the relevant rules of that organization.

5. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

6. Without prejudice to article 45, the fact that a State or an international organization has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Article 66. Procedures for judicial settlement, arbitration and conciliation

1. If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised by a State with respect to another State, the following procedures shall be followed:

(a) Any one of the parties to a dispute concerning the application or the interpretation of articles 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

(b) Any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in part V of the present articles may set in motion the procedure specified in the Annex to the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

2. If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised by an international organization with respect to another organization, any one of the parties to a dispute concerning the application or the interpretation of any of the articles in part V of the present articles may, in the absence of any other agreed procedure, set in motion the procedure specified in the Annex to the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

3. If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised by a State with respect to an international organization or by an organization with respect to a State, the procedure provided for in paragraph 2 above may be applied.

Article 67. Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. The notification provided for under article 65, paragraph 1, must be made in writing.

2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument emanating from a State is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers. If the instrument emanates from an international organization, the representative of the organization communicating it shall produce appropriate powers.

Article 68. Revocation of notifications and instruments provided for in articles 65 and 67

A notification or instrument provided for in articles 65 or 67 may be revoked at any time before it takes effect.

SECTION 5. CONSEQUENCES OF THE INVALIDITY, TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY

Article 69. Consequences of the invalidity of a treaty

1. A treaty the invalidity of which is established under the present articles is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of the consent of a particular State or a particular international organization to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State or that organization and the parties to the treaty.

Article 70. Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present articles:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State or an international organization denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State or that organization and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Article 71. Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law

1. In the case of a treaty which is void under article 53 the parties shall:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

(b) bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Article 72. Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present articles:

(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;

(b) does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

PART VI

MISCELLANEOUS PROVISIONS

Article 73. Cases of succession of States, responsibility of a State or of an international organization, outbreak of hostilities, termination of the existence of an organization [and termination of participation in the membership of an organization]

1. The provisions of the present articles shall not prejudice any question that may arise in regard to a treaty between one or more States and one or more international organizations from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States parties to that treaty.

2. The provisions of the present articles shall not prejudice any question that may arise in regard to a treaty from the international responsibility of an international organization, from the termination of the existence of the organization [or from the termination of participation by a State in the membership of the organization].

Article 74. Diplomatic and consular relations and the conclusion of treaties

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between two or more of those States and one or more international organizations. The conclusion of such a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

Article 75. Case of an aggressor State

The provisions of the present articles are without prejudice to any obligation in relation to a treaty between one of more States and one or more international organizations which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

PART VII

DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION

Article 76. Depositaries of treaties

1. The designation of the depositary of a treaty may be made by the negotiating States and the negotiating organizations or, as the case may be, the negotiating organizations, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State or an international organization and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

Article 77. Functions of depositaries

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations or, as the case may be, by the contracting organizations, comprise in particular:

(a) keeping custody of the original text of the treaty, of any full powers and of powers delivered to the depositary;

(b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States and international organizations or, as the case may be, to the organizations entitled to become parties to the treaty;

(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State or organization in question;

(e) informing the parties and the States and organizations or, as the case may be, the organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(f) informing the States and organizations or, as the case may be, the organizations entitled to become parties to the treaty when the number of signatures or of instruments of ratification, formal confirmation, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

(g) registering the treaty with the Secretariat of the United Nations;

(h) performing the functions specified in other provisions of the present articles.

2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) the signatory States and organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and the contracting organizations, or

(b) where appropriate, of the competent organ of the organization concerned.

Article 78. Notifications and communications

Except as the treaty or the present articles otherwise provide, any notification or communication to be made by any State or any international organization under the present articles shall:

(a) if there is no depositary, be transmitted direct to the States and organizations or, as the case may be, to the organizations for which it is intended, or if there is a depositary, to the latter;

(b) be considered as having been made by the State or organization in question only upon its receipt by the State or organization to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(c) if transmitted to a depositary, be considered as received by the State or organization for which it was intended only when the latter State or organization has been informed by the depositary in accordance with article 77, paragraph 1 (e).

Article 79. Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the signatory States and international organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and contracting organizations are agreed that it contains an error, the error shall, unless the said States and organizations or, as the case may be, the said organizations decide upon some other means of correction, be corrected:

(a) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

(b) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or

(c) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and international organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and contracting organizations of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

(a) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a *procès-verbal* of the rectification of the text and communicate a copy of it to the parties and to the States and organizations or, as the case may be, to the organizations entitled to become parties to the treaty;

(b) an objection has been raised, the depositary shall communicate the objection to the signatory States and organizations and to the contracting States and contracting organizations or, as the case may be, to the signatory organizations and contracting organizations.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and international organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and contracting organizations agree should be corrected.

4. The corrected text replaces the defective text *ab initio*, unless the signatory States and international organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and contracting organizations otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a *procès-verbal* specifying the rectification and communicate a copy of it to the signatory States and international organizations and to the contracting States and contracting organizations or, as the case may be, to the signatory organizations and contracting organizations.

Article 80. Registration and publication of treaties

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

ANNEX

Procedures established in application of article 66

I. ESTABLISHMENT OF THE CONCILIATION COMMISSION

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present articles [and any international organization to which the present articles have become applicable] shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph. A copy of the list shall be transmitted to the President of the International Court of Justice.

2. When a request has been made to the Secretary-General under article 66, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

(a) In the case referred to in article 66, paragraph 1, the State or States constituting one of the parties to the dispute shall appoint:

(i) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(ii) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

(b) In the case referred to in article 66, paragraph 2, the international organization or organizations constituting one of the parties to the dispute shall appoint:

(i) one conciliator who may or may not be chosen from the list referred to in paragraph 1; and

(ii) one conciliator chosen from among those included in the list who has not been nominated by that organization or any of those organizations.

The organization or organizations constituting the other party to the dispute shall appoint two conciliators in the same way.

(c) In the case referred to in article 66, paragraph 3,

(i) the State or States constituting one of the parties to the dispute shall appoint two conciliators as provided for in subparagraph (a). The international organization or organizations constituting the other party to the dispute shall appoint two conciliators as provided for in subparagraph (b).

(ii) The State or States and the organization or organizations constituting one of the parties to the dispute shall appoint one conciliator who may or may not be chosen from the list referred to in paragraph 1 and one conciliator chosen from among those included in the list who shall neither be of the nationality of that State or of any of those States nor nominated by that organization or any of those organizations.

(iii) When the provisions of subparagraph (c) (ii) apply, the other party to the dispute shall appoint conciliators as follows:

(1) the State or States constituting the other party to the dispute shall appoint two conciliators as provided for in subparagraph (a);

(2) the organization or organizations constituting the other party to the dispute shall appoint two conciliators as provided for in subparagraph (b);

(3) the State or States and the organization or organizations constituting the other party to the dispute shall appoint two conciliators as provided for in subparagraph (c) (ii).

The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General received the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute. If the United Nations is a party or is included in one of the parties to the dispute, the Secretary-General shall transmit

the above-mentioned request to the President of the International Court of Justice who shall perform the functions conferred upon the Secretary-General under this subparagraph.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

II. FUNCTIONING OF THE CONCILIATION COMMISSION

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

8. The appointment of conciliators by an international organization provided for in paragraphs 1 and 2 shall be governed by the relevant rules of that organization.

31. Mr. VEROSTA (Chairman of the Drafting Committee) said that articles 61 to 80 and the text of the Annex setting out procedures established in application of article 66 completed the first reading of the draft.

32. Commenting on the draft as a whole, he said that the Drafting Committee had been guided by the Commission's intention to maintain, as far as possible, the spirit of the Vienna Convention on the Law of Treaties⁷ with its precision and flexibility in wording, while preserving the specific characteristics of treaties entered into or concluded with the participation of international organizations. The Drafting Committee had kept the same numbering for the articles as in the Vienna Convention, so as to facilitate comparison between the texts. It had also endeavoured to achieve terminological consistency throughout the draft and had therefore included or deleted the word "international" before the word "organization" as appropriate, using the term "international organization" only the first time it appeared in a paragraph, the word "organization" being used alone thereafter in the same paragraph. The only departures from that rule of drafting concerned the use of terms defined in article 2,⁸ such as "negotiating organization" or "contracting organization". The Drafting Committee had also deleted, throughout, the word "concluded", in the phrase "treaties concluded between".

⁷ *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 hereinafter called "Vienna Convention".

⁸ See *Yearbook . . . 1979*, vol. II (Part Two), pp. 138–139, document A/34/10, chap. IV, sect. B.1.

33. A number of articles remained unchanged. In others the Committee had maintained the text originally proposed but added, for the sake of precision, a reference to the type of treaty concerned. Thus in article 62, paragraph 2, the word "several", which had appeared before the word "States", had been changed to "two or more"; in article 63 it had been specified that the treaty concerned was between two or more States and one or more international organizations; in article 74 the same particular had been introduced and article 75 now spoke of a treaty "between one or more States and one or more international organizations". In the drafting of articles 76, 77, 78 and 79, the Drafting Committee had attempted to reflect the distinction between the mixed type of treaty and a treaty between organizations only, by referring, as appropriate to the defined terms "negotiating States" and "negotiating organizations", or "contracting States" and "contracting organizations" or simply referring to "States" and "organizations".

ARTICLE 61⁹ (Supervening impossibility of performance)¹⁰

34. Mr. VEROSTA (Chairman of the Drafting Committee) said that no comment was needed on article 61, as no change had been made.

Article 61 was adopted.

ARTICLE 62¹¹ (Fundamental change of circumstances)¹²

35. Mr. VEROSTA (Chairman of the Drafting Committee) said that in article 62, in addition to the general changes already mentioned, the Drafting Committee had added the words "by a party" after the verb "invoked" in paragraphs 2 and 3, in order to determine clearly who could exercise the right provided for. The phrase "establishing a boundary", in paragraph 2, was taken from the Vienna Convention, it being understood that the Commission was not taking any position on possible interpretations of the rules concerning treaties involving international organizations in the light of developments taking place in the Third United Nations Conference on the Law of the Sea.

36. Mr. TABIBI said he maintained the views he had already expressed concerning article 62, paragraph 2,¹³ and wished to record his objection.

Article 62 was adopted.

⁹ For consideration of the text initially submitted by the Special Rapporteur, see 1585th meeting, paras. 4 *et seq.*, and 1586th meeting, paras. 9–32.

¹⁰ For text, see para. 30 above.

¹¹ For consideration of the text initially submitted by the Special Rapporteur, see 1586th meeting, paras. 33 *et seq.*, and 1587th meeting, paras. 1–39.

¹² For text, see para. 30 above.

¹³ See 1587th meeting, paras. 7–9.

ARTICLE 63¹⁴ (Severance of diplomatic of consular relations)¹⁵

37. Mr. VEROSTA (Chairman of the Drafting Committee) said that, other than his earlier comments concerning drafting changes of a general nature, no comments were necessary.

Article 63 was adopted.

ARTICLE 64¹⁶ (Emergence of a new peremptory norm of general international law (*jus cogens*))¹⁷

38. Mr. VEROSTA (Chairman of the Drafting Committee) said that no comment was needed on article 64, as no change had been made.

Article 64 was adopted.

SECTION 4 (Procedure)

The title of section 4 was adopted.

ARTICLE 65¹⁸ (Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty)¹⁹

39. Mr. VEROSTA (Chairman of the Drafting Committee) said that in article 65 the Drafting Committee had decided to maintain the three-month period provided for in the Vienna Convention as adequately meeting the requirements of treaties to which international organizations were parties. The Committee had added a new paragraph 4 to emphasize that the notification or objection made by an international organization under that article was to be governed by the relevant rules of the organization. That provision followed similar provisions already adopted.

Article 65 was adopted.

40. Mr. VEROSTA (Chairman of the Drafting Committee) said that he intended to introduce article 66 together with the Annex, after the Commission had completed its consideration of the other articles.

ARTICLE 67²⁰ (Instruments for declaring invalid, terminating, withdrawing, from or suspending the operation of a treaty)²¹ *and*

ARTICLE 68²² (Revocation of notifications and instruments provided for in articles 65 and 67)²³

41. Mr. VEROSTA (Chairman of the Drafting Committee) said that Articles 67 and 68 required no comments, as no changes had been made.

Articles 67 and 68 were adopted.

SECTION 5 (Consequences of the invalidity, termination or suspension of the operation of a treaty)

The title of section 5 was adopted.

ARTICLE 69²⁴ (Consequences of the invalidity of a treaty)²⁵

42. Mr. VEROSTA (Chairman of the Drafting Committee) said that in article 69, paragraph 4, the word "particular" had been introduced to qualify the words "State" and "organization", in order to conform with the text of the Vienna Convention.

Article 69 was adopted.

ARTICLE 70²⁶ (Consequences of the termination of a treaty),²⁷

ARTICLE 71²⁸ (Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law,²⁹ *and*

ARTICLE 72³⁰ (Consequences of the suspension of the operation of a treaty)³¹

43. Mr. VEROSTA (Chairman of the Drafting Committee) said that articles 70, 71 and 72 required no comments, as no changes had been made.

Articles 70, 71 and 72 were adopted.

PART VI (Miscellaneous provisions)

The title of part VI was adopted.

ARTICLE 73³² (Cases of succession of States, responsibility of a State or of an international organization, outbreak of hostilities, termination of the

¹⁴ For consideration of the text initially submitted by the Special Rapporteur, see 1587th meeting, paras. 40–54, and 1588th meeting, paras. 1–24.

¹⁵ For text, see para. 30 above.

¹⁶ For consideration of the text initially submitted by the Special Rapporteur, see 1588th meeting, paras. 25–29.

¹⁷ For text, see para. 30 above.

¹⁸ For consideration of the text initially submitted by the Special Rapporteur, see 1588th meeting, paras. 30 *et seq.*

¹⁹ For text, see para. 30 above.

²⁰ For consideration of the text initially submitted by the Special Rapporteur, see 1590th meeting, paras. 29–43.

²¹ For text, see para. 30 above.

²² For consideration of the text initially submitted by the Special Rapporteur, see 1590th meeting, paras. 44 *et seq.*

²³ For text, see para. 30 above.

²⁴ For consideration of the text initially submitted by the Special Rapporteur, see 1591st meeting, paras. 1–8.

²⁵ For text, see para. 30 above.

²⁶ For consideration of the text initially submitted by the Special Rapporteur, see 1591st meeting, paras. 9–12.

²⁷ For text, see para. 30 above.

²⁸ For consideration of the text initially submitted by the Special Rapporteur, see 1591st meeting, paras. 13–18.

²⁹ For text, see para. 30 above.

³⁰ For consideration of the text initially submitted by the Special Rapporteur, see 1591st meeting, paras. 19–21.

³¹ For text, see para. 30 above.

³² For consideration of the text initially submitted by the Special Rapporteur, see 1591st meeting, paras. 22–56, and 1592nd meeting, paras. 1–23.

existence of an organization [and termination of participation in the membership of an organization]³³

44. Mr. VEROSTA (Chairman of the Drafting Committee) said that in article 73, which had formerly contained only one paragraph, the Drafting Committee had found it appropriate to differentiate, in two separate paragraphs, between the situation of States and that of international organizations, because the cases provided for in the article were not necessarily equally applicable to States and to international organizations.

45. Paragraph 1 provided for the cases concerning States and was modelled on the text of the Vienna Convention, with the further specification of the kind of treaty concerned. The phrase “parties to that treaty” had been added at the end of the paragraph merely as a useful particular.

46. Paragraph 2 embodied the rule regarding international organizations. It did not refer to the cases of outbreak of hostilities or succession, but mentioned instead termination of the existence of the organization and termination of participation by States in the membership of that organization. Reference to the last case had been placed in square brackets in the body of the article and in its title, to indicate the difference of opinion among members of the Drafting Committee as to the need for an express reference to that case as being one comparable to succession of States.

47. Mr. USHAKOV said that the words “by a State” in the last phrase of paragraph 2, should be inserted in the corresponding part of the title of the article. Otherwise, it might be thought that the reference was to termination of participation of an organization in the membership of another organization.

48. The words “the outbreak of hostilities between States parties to that treaty”, at the end of paragraph 1, were not entirely satisfactory either. First, there was no need to refer to States when the provision concerned the case of a treaty to which “one or more States” could be parties; and secondly, the hostilities might involve not only “States parties”, but also one or more contracting States, or even one or more organizations. That question could be considered during the second reading of the draft article.

49. Mr. RIPHAGEN said that it was not clear, with the addition of the words “parties to that treaty”, what would happen in the case of an outbreak of hostilities between a State party to a treaty and a State not party to a treaty but a member of an international organization which was a party. He doubted the wisdom of that addition.

50. The CHAIRMAN asked members of the Commission whether they thought it would be possible to remove the square brackets in the title and in

paragraph 2 of article 73 and to explain the difference of opinion they indicated in the commentary.

51. Mr. REUTER (Special Rapporteur) said that the Drafting Committee had added the wording in question at Mr Ushakov’s suggestion. Mr. Ushakov had in mind the case of a treaty between an international organization and a State member of that organization. Mr. Jagota had then pointed out that, drafted in such a way, article 73 could cover other cases, which might lead some members of the Commission, including himself, to raise objections. By way of compromise, the words had then been placed between square brackets. Personally, he saw no objection to deleting the square brackets if an explanation was given in the commentary.

52. Mr. FRANCIS said that the square brackets might be a clearer warning of the difference of opinion than an explanation in the commentary, though he would not press that point.

53. The CHAIRMAN said that, in the absence of further comment, he would take it that article 73—without the square brackets but with a suitable explanation in the commentary and with the addition to the title of the words “by a State” (and the equivalent in the other language versions)—was adopted.

It was so decided.

ARTICLE 74³⁴ (Diplomatic and consular relations and the conclusion of treaties)³⁵

54. Mr. VEROSTA (Chairman of the Drafting Committee) said that in article 74 no changes had been made other than the general drafting clarification he had already mentioned. He had no comments.

Article 74 was adopted.

ARTICLE 75³⁶ (Case of an aggressor State)³⁷

55. Mr. VEROSTA (Chairman of the Drafting Committee) said that in article 75 the Drafting Committee had considered it appropriate to define the kind of treaty concerned, since reference to “a treaty” alone might be interpreted as making the provision applicable to a treaty concluded between international organizations only. It had been agreed that the commentary should make some reference to that interpretation.

Article 75 was adopted.

³⁴ For consideration of the text initially submitted by the Special Rapporteur, see 1592nd meeting, paras. 24–30.

³⁵ For text, see para. 30 above.

³⁶ For consideration of the text initially submitted by the Special Rapporteur, see 1592nd meeting, paras. 31–42.

³⁷ For text, see para. 30 above.

³³ For text, see para. 30 above.

PART VII (Depositaries, notifications, corrections and registration)

The title of part VII was adopted.

ARTICLE 76³⁸ (Depositaries of treaties)³⁹

56. Mr. VEROSTA (Chairman of the Drafting Committee) said that in article 76, in addition to the use of the defined term "negotiating organizations" already referred to in his general comments, the Committee had decided to depart from the text originally proposed by not providing explicitly for the case of more than one organization acting as a depositary, because that was not yet common practice.

Article 76 was adopted.

ARTICLE 77⁴⁰ (Functions of depositaries)⁴¹

57. Mr. VEROSTA (Chairman of the Drafting Committee) said that in article 77, subparagraph 1 (a), a further provision had been introduced by including a reference to "powers", in addition to "full powers", delivered to the depositary. In subparagraph 1 (g), the Committee had considered it more prudent to follow the language of the Vienna Convention, rather than introduce, as had been suggested, further details concerning the registration and publication of treaties. In that connexion, it had been noted that the introductory sentence of paragraph 1 made it clear that the list of functions of a depositary was not meant to be exhaustive. Paragraph 2 had been divided into two subparagraphs for the sake of clarity, but kept as close as possible to the text of the Vienna Convention.

58. Mr. USHAKOV said he had some reservations on paragraph 1 (g), because international organizations were not required to register treaties concluded between themselves with the United Nations Secretariat, and no doubt the Secretariat was not required to register those treaties either. The question might be left over until the second reading of the draft articles.

59. Mr. CALLE Y CALLE said that the words "full powers" and "powers" in subparagraph 1 (a) seemed to indicate that there were two degrees of powers, whereas what was meant was that there were two types of documents from which the powers derived.

60. Mr. REUTER (Special Rapporteur) said that the reason why both "full powers" and "powers" were included in article 77 was that both expressions had already been used in the draft, and that in article 2, paragraph 1 (c) *bis*,⁴² the term "powers" was defined as "a document emanating from the competent organ of an international organization".

³⁸ For consideration of the text initially submitted by the Special Rapporteur, see 1592nd meeting, paras. 43 *et seq.*, and 1593rd meeting, paras. 1-7.

³⁹ For text, see para. 30 above.

⁴⁰ For consideration of the text initially submitted by the Special Rapporteur, see 1593rd meeting, paras. 8-31.

⁴¹ For text, see para. 30 above.

⁴² See foot-note 8 above.

61. Mr. ŠAHOVIĆ said that the words "and transmitting them to the parties and to the States and international organizations or, as the case may be, to the organizations entitled to become parties to the treaty", in paragraph 1 (b), required explanation in the commentary.

Article 77 was adopted.

ARTICLE 78⁴³ (Notifications and communications)⁴⁴
and

ARTICLE 79⁴⁵ (Correction of errors in texts or in certified copies of treaties)⁴⁶

62. Mr. VEROSTA (Chairman of the Drafting Committee) said that articles 78 and 79 called for no comments beyond the general remarks he had made earlier.

Articles 78 and 79 were adopted.

ARTICLE 80⁴⁷ (Registration and publication of treaties)⁴⁸

63. Mr. VEROSTA (Chairman of the Drafting Committee) said that article 80 remained unchanged. It would be noted that the only obligation imposed by the article concerned transmission, the question of determining the manner in which the United Nations would apply article 102 of the Charter being left to the competent organs of the Organization.

64. Mr. USHAKOV said that the use of the word "shall" indicated an obligation to transmit to the Secretariat all treaties, including treaties between international organizations. But the United Nations Charter did not provide that treaties between international organizations had to be transmitted to the Secretariat. The Commission would do well to consider that question during the second reading.

Article 80 was adopted.

ARTICLE 66⁴⁹ (Procedures for judicial settlement, arbitration and conciliation)⁵⁰ *and*

ANNEX⁵¹ (Procedures established in application of article 66)⁵²

65. Mr. VEROSTA (Chairman of the Drafting

⁴³ For consideration of the text initially submitted by the Special Rapporteur, see 1593rd meeting, paras. 32-37.

⁴⁴ For text, see para. 30 above.

⁴⁵ For consideration of the text initially submitted by the Special Rapporteur, see 1593rd meeting, paras. 38-41.

⁴⁶ For text, see para. 30 above.

⁴⁷ For consideration of the text initially submitted by the Special Rapporteur, see 1593rd meeting, paras. 42-57.

⁴⁸ For text, see para. 30 above.

⁴⁹ For consideration of the text initially submitted by the Special Rapporteur, see 1589th meeting, paras. 1-45, and 1590th meeting, paras. 1-28.

⁵⁰ For text, see para. 30 above.

⁵¹ For consideration of the text initially submitted by the Special Rapporteur, see 1593rd meeting, paras. 58 *et seq.*, and 1594th to 1596th meetings.

⁵² For text, see para. 30 above.

Committee) said that in regard to article 66 the Drafting Committee had decided, for the sake of clarity and in order to conform with the structure of other articles, to deal separately in three paragraphs with cases of objections raised by: (a) a State with respect to another State (para. 1); (b) an organization with respect to another organization (para. 2); and (c) a State with respect to an organization or vice versa (para. 3). In reformulating the article, the Committee had attempted to retain as much as possible of the terminology of the corresponding article of the Vienna Convention.

66. The text of paragraph 1 repeated substantially the formula of article 66 of the Vienna Convention and envisaged two different procedures, depending on whether the dispute concerned the application or interpretation of articles 53 or 64, or of the other articles in part V. The Drafting Committee had carefully considered the question of the application of the rule in cases where the objection was raised by, or with respect to, an international organization. It was evident that the procedure in subparagraph (a) could not operate in the case of international organizations, since according to article 34 of the Statute of the International Court of Justice, only States could be parties in cases before the Court. The Committee had decided that, in cases where the objection creating the dispute was raised by, or with respect to, an international organization, the procedure should be that provided for in subparagraph 1 (b). The literal transposition of the rule of subparagraph 1 (b) would have led to the unintended result of making no provision for settlement procedures in disputes involving the application or interpretation of articles 53 or 64, which concerned peremptory norms of general international law. To avoid that result, the Committee had extended the recourse to the conciliation procedure set out in the Annex to all the articles of part V, although in so doing it was not intended to prejudice the possibility of parties having recourse to any other agreed procedure, and specific wording to that effect was included in paragraph 2.

67. In view of the form adopted for article 66, the Annex had been recast to take account of the three cases envisaged in that article. It reproduced the corresponding provisions of the Annex to the Vienna Convention, but for the sake of clarity it separated under two headings the two provisions relating to the establishment and functioning of the Conciliation Commission. Section I contained two paragraphs corresponding to the first two paragraphs of the Annex to the Vienna Convention.

68. Paragraph 1 reproduced paragraph 1 of the Annex to the Convention, with the addition of a clause permitting international organizations to which the articles had become applicable to be invited to nominate two conciliators. That clause had been placed in square brackets to indicate a divergence of

views in the Drafting Committee as to the appropriateness of recognizing such a right in a manner that might be interpreted as prejudicing the question of how the future instrument would become applicable to international organizations. The paragraph also included at the end an additional sentence which was rendered necessary by later provisions involving the President of the International Court of Justice in the conciliation procedure.

69. Paragraph 2 outlined the rules of the Vienna Convention Annex for each of the three cases referred to in article 66. However, the criterion of nationality used in that Annex for the appointment of conciliators by States was not applicable in the case of international organizations, and the comparable criterion adopted by the Drafting Committee was that of the nomination of the conciliators by the organization. Paragraph 2 (a), (b) and (c) covered the cases referred to in article 66, paragraphs 1, 2 and 3 respectively, concerning the appointment of conciliators.

70. The last four undesignated subparagraphs of paragraph 2, which basically reproduced the corresponding passages of the Vienna Convention Annex, were intended to apply to the paragraph as a whole. A specific reference had been added in the penultimate subparagraph to the functions of the President of the International Court of Justice, so that his role in such cases was clearly circumscribed.

71. Section II of the Annex reproduced in paragraphs 3 to 7 the corresponding paragraphs of the Vienna Convention Annex. It included an additional paragraph 8, prompted by provisions already adopted, which referred to the relevant rules of an organization as governing its appointment of conciliators.

72. The CHAIRMAN said that the Commission might wish to consider, in the same spirit of conciliation it had shown previously, the possibility of deleting the square brackets in paragraph 1 of the Annex and including an explanation in the commentary.

73. Mr. USHAKOV said he did not think it possible to delete the square brackets in paragraph 1 of the Annex, since the Commission had not settled the fundamental question of how the articles might become applicable to international organizations.

74. He could not accept the Annex, particularly paragraph 2, in the Commission any more easily than in the Drafting Committee. From paragraph 2 (c) it appeared that States had the obligation, in certain cases, to act together with one or more international organizations. He believed that such an obligation could cause all sorts of difficulties, particularly at the political level. In the Annex to the Vienna Convention there was no objection to providing that States should, where necessary, act together, just as there would be no objection to imposing that obligation on international organizations. But a State should not be obliged to make common cause with one or more

international organizations. It would be better to leave States entirely free in that respect.

75. In its present form, paragraph 2 of the Annex was almost incomprehensible, the rules on the constitution of the Conciliation Commission having been unnecessarily complicated.

76. Mr. RIPHAGEN said he had no objection to deleting the square brackets in the Annex, as suggested. However, he had a comment concerning article 66, paragraph 3, the last part of which read, "the procedure provided for in paragraph 2 above may be applied". Paragraph 2 stated that "any one of the parties to a dispute . . . may . . . set in motion the procedure specified in the Annex". The use of the word "may" seemed to him to be dubious, but he interpreted the text as meaning that paragraph 2 applied.

77. Mr. REUTER (Special Rapporteur) said that Mr. Riphagen was right: the wording of article 66, paragraph 3 should be improved, for example, by replacing the words "may be applied" by "applies".

78. He would try to reflect Mr. Ushakov's objections as faithfully as possible in the commentary. It should be noted that the Drafting Committee did not intend to impose on a State the obligation to act jointly with one or more international organizations. It had only provided for that eventuality so that the other party should not be able to demur and demand parallel procedures for one and the same dispute, arguing that the case was not provided for in the Annex.

79. Lastly, he observed that paragraph 8 of the Annex concerned the appointment of conciliators and that it should be transferred from section II, on the functioning of the Conciliation Commission, to the end of section I, on the establishment of the Commission. To keep the text parallel with the Annex to the Vienna Convention, the paragraph could be numbered 2 *bis*.

80. Mr. USHAKOV said that in article 66, paragraph 3, he was in favour of retaining the words "may be applied", as the verb "may" was used in regard to procedure both in paragraph 1 (*b*) and in paragraph 2.

81. Mr. QUENTIN-BAXTER said that he agreed with Mr. Riphagen. The use of the words "shall apply" in paragraph 3 would preserve the effect of "may" in paragraph 2, and the procedure would still be governed by "may".

82. Mr. TSURUOKA said that he, too, found that the idea of possibility was already contained in paragraph 2.

83. Mr. USHAKOV said that the words "*s'applique*" in French should be rendered by the imperative "shall apply" in English; but there would then be contradiction with paragraph 2.

84. Mr. ŠAHOVIĆ said that the Commission should agree on an interpretation. It could, of course, note in the commentary that members' interpretations had differed, but it could also work out a formula

acceptable to everybody. Personally, he was of the same opinion as Mr. Riphagen.

85. Mr. USHAKOV said that it was not possible to use the word "shall" in the article and explain in the commentary that it meant "may". The Commission could settle the question by repeating in paragraph 3 the wording used in paragraph 2.

86. Mr. RIPHAGEN said he could accept Mr. Ushakov's solution of repeating the text of paragraph 2, from the words "any one of the parties . . ." in paragraph 3.

87. The CHAIRMAN said he took it that article 66 and the Annex were adopted, subject to deleting the words "may be applied" in article 66, paragraph 3 and substituting the relevant wording from paragraph 2, retaining the square brackets in paragraph 1 of the Annex, and transferring paragraph 8 of the Annex to the end of section I, as paragraph 2 *bis*.

It was so decided.

The meeting rose at 1.25 p.m.

1625th MEETING

Thursday, 3 July 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Francis, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/331 and Add.1)

[Item 5 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR¹ (*continued*)

1. Mr. SCHWEBEL said that the reports and proposals submitted by the Special Rapporteur, with the substance of which he agreed, rightly took account of the evolution of the law on the jurisdictional immunities of States and their property, and of the fact that over the last fifty years States had engaged increasingly in such commercial activities as shipping, trade, finance, manufacturing, exploitation of natural resources and, indeed, agriculture. All those activities

¹ For the text of articles 1-6 submitted by the Special Rapporteur, see 1622nd meeting, para. 4, and 1623rd meeting, para 2.

were, however, also carried out by private parties. In the United States, for example, military uniforms were manufactured not by the State, but by private companies under contract. Similarly, while a State could purchase or charter a ship for the carriage of olive oil which it owned and even produced, farmers acting independently could produce olive oil and sell it commercially to a wholesaler who would then arrange for shipment. In other words, the trade in olive oil did not necessarily entail acts that were inherently governmental in nature.

2. Consequently, if a State wished to trade internationally it had to be answerable before the law, as had long been recognized in practice. He understood, for instance, that the Soviet Union had, from the time of its entry into the free market economies, concluded treaties and trade agreements, and engaged in a pattern of practice, under which it did not claim the benefit of State immunities for its commercial activities, and the non-socialist States of Europe had been among the first to provide that, in certain areas of trade, sovereign immunities would not apply. The Anglo-American States, though slower to adjust to the realities of the situation, had, when codifying their law on State immunities, taken full account of the fact that such immunities could not be granted to a State engaging in commercial activities since, if they were, trade would be severely hampered. In his view, that was entirely consistent with international law. It was a matter not of principle, but of practicality since, in the words of one American judge, the life of the law was not logic but experience, and experience showed that when a State entered a free or relatively free market it consented expressly or implicitly to waive any State immunities in regard to its commercial activities.

3. A State which traded with the United States of America, the countries of Western Europe or any other country which had adopted the doctrine of restrictive State immunity, could obviously not invoke the obsolete principle of absolute immunity to claim that it could only waive its immunity by expressly consenting to do so; such a State would be deemed to have notice of the law in the country with which it was trading. If consent was required, which was doubtful, then it was implicit in the fact that a State which had notice that its trading partner applied the doctrine of restrictive immunity none the less continued to trade with that partner. If a State was unwilling to accept international law as construed by that partner and the municipal law of the country with which it was trading, it should trade elsewhere. That reasoning was consonant with the dictum of Chief Justice Marshall in *The Schooner "Exchange"* case to the effect that:

A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.²

² A/CN.4/331 and Add.1, para. 75.

4. In the light of those considerations, he could not agree that the principle of sovereign immunity was absolute, and in his view the Commission would run into considerable difficulty if it were to adopt that principle and then seek to determine exceptions to it. His conclusion was in no way tempered by the argument that everything which a State did was political since, although that was to some extent true, life was always a matter of degree. State practice had shown that, when a State engaged in commercial activities which could also be carried out by private parties, the degree of State involvement did not suffice to attract State immunities. As provided in draft article 3, paragraph 2, and explained in paragraphs 46 and 47 of the report, the criterion should be the objective one of the commercial nature of the activity, as opposed to the subjective one of its purpose.

5. Lastly, referring to the proposed draft articles, he said he had no difficulty with the expressions "jurisdictional immunities" and "accorded or extended" in draft article 1. He was, however, inclined to agree that some more appropriate words than "territorial States" and "foreign States" should be found. So far as draft article 6 was concerned, he considered that paragraph 1 was quite sound; although the restrictive immunity of a foreign State would have to be specified if the draft articles were to receive broad acceptance, it sufficed at that stage to say "in accordance with the provisions of the present articles".

6. Mr. FRANCIS said that, while there was general agreement on the terms of draft article 1, the precise nature of the jurisdictional immunities to be covered by the draft was open to question. His own view was that it would be contrary to the principle of sovereignty, so far as the territorial State was concerned, to accept the premise that one State enjoyed absolute immunity as against another. He believed that the immunities with which the Commission was dealing sprang from the generally accepted notion of reciprocity, but that a measure of forbearance on the part of the State against which immunity was invoked was also involved. In that connexion, he considered that the statement in paragraph 23 of the report could be misleading. Although he understood the underlying intent, it seemed to him that a dispute which arose in the territorial State between two States of equal sovereign status would serve only to pinpoint the stage at which the immunity was brought into focus, whereas it was the element of forbearance that would transform that immunity into a continuing feature, at any rate in certain cases such as those relating to property.

7. He had no particular difficulty with the expression "territorial State" in draft article 1, but he agreed that the expression "foreign State" was not entirely appropriate and considered that the alternative wording proposed by Sir Francis Vallat (1623rd meeting, para. 18) could provide the basis for further negotiation.

8. The general principle stated in draft article 6 had been clearly established in modern State practice and law, but the limit of the exceptions to that principle had yet to be determined. Although certain developing countries had still not provided the Secretariat with reports of relevant decided cases, either because they had had more pressing matters to deal with or because the material required was not available, it could safely be assumed that the newly independent States of Latin America, Asia and Africa, which valued their independence very highly, would be the last to dispute the validity of a principle that had evolved sufficiently to be codified in general terms. The Special Rapporteur should, however, pursue his efforts to secure further information from States through the Secretary-General of the United Nations.

9. The lack of agreement on the exceptions to a widely accepted principle would call for the exercise of patience and perseverance. However, the Commission's task might not prove to be as difficult as expected, since under article 47 of the 1961 Vienna Convention,³ the parties to that Convention could accord a wider measure of immunity than that provided for by the terms of the Convention. Possibly, the Commission could reach agreement on a similar provision.

10. Mr. THIAM said he would make some comments on the nature of the topic, its scope and the Special Rapporteur's approach.

11. The topic was complex because it involved both internal law and public and private international law. For example, reference must be made to internal law for the purpose of defining commercial activity, but private international law governed problems of conflict of laws, whether on procedure or substance. Moreover, the topic was a delicate one, for it introduced notions that were not all legal, some of them being political—such as those of sovereignty and the independence and equality of States, which might form the bases of the principle of immunity—not to mention such moral and subjective notions as the dignity of States. It should also be noted that the topic brought the sovereignty of the territorial State and the sovereignty of the foreign State face to face, and, as Mr. Riphagen had said (1622nd meeting), all “telescoping” must be avoided. The Commission would have to take account of all those difficulties if its codification was to be really effectual and acceptable to States.

12. So far as the scope of the topic was concerned, the Special Rapporteur had been right to exclude diplomatic and consular immunities from his study at the outset, as well as the immunities of special missions. Thus the topic was restricted to the activities carried on by one State in the territory of another.

³ See 1623rd meeting, foot-note 2.

13. The method proposed by the Special Rapporteur did not strike him as entirely convincing. It could hardly be claimed that the sovereignty of the foreign State prevailed over the sovereignty of the territorial State in the latter's territory. He would have preferred draft article 6 to lay down, not the principle of the foreign State's immunity from jurisdiction, but the principle of the sovereignty and jurisdiction of the territorial State, since jurisdictional immunity was regarded as an exception to that principle. In developing the exception, the Commission might be guided by the unilateral decisions of States, conventions or other sources. He thought it important to respect the notion of territorial sovereignty, which was challenged by some, but which was still one of the foundations of international law. Many States, in particular newly independent ones, were very jealous of their sovereignty and would not find it easy to accept the principle of State immunity if it conflicted with the principle of sovereignty. Those States were increasingly carrying on diversified activities like those of the developed countries, and many of them were hardly willing to grant immunities on the basis of a general principle. The Special Rapporteur should therefore reflect on the method he (Mr. Thiam) had proposed. It might be necessary to provide for many exceptions, for States were tending to carry on more and more activities as if they were private persons, but a Government which was prepared to submit to its own country's jurisdiction was not prepared to grant to a foreign State what it denied to itself. The method he proposed would probably be more logical and more consistent with reality than that adopted by the Special Rapporteur.

14. Mr. BARBOZA said that the importance of the topic under consideration had been heightened by the developments which had taken place during the last fifty years, in particular, by the marked increase in the commercial activities of States and the significant change in the attitude of the main trading countries, above all the United Kingdom and the United States of America, to the jurisdictional immunities of States. It was an extremely sensitive issue, involving, as it did, the majesty of States, which both persons and institutions were called upon to respect and which could at times contrast sharply with the requirements of the very activities in which States were engaged. It was also a difficult topic, because the activities of States could not be clearly delineated even when defined by reference to their nature rather than to their purpose. Mr. Ushakov (1623rd meeting) was not alone in considering that the purpose of the State was always political, since the State necessarily had to satisfy the needs of the community, and that again added to the complexity of the problem. In addition, as Mr. Thiam had pointed out, the area was one in which various branches of law—public international law, private international law and internal law—overlapped.

15. The Commission's discussion had raised some serious doubts in his mind. He noted, in particular, that

Mr. Reuter (1624th meeting) doubted whether there was a customary rule of international law establishing the principle of State immunity—a startling statement indeed. Mr. Ushakov had referred to the inseparability of the activities of States and had expressed the view that jurisdictional immunity was an absolute principle. Mr. Calle y Calle (*ibid.*) had taken a firm stand regarding the origins of State immunity under international law. Mr. Tsuruoka (*ibid.*) had recommended an inductive approach and had suggested that the Commission should abide by the rules established by State practice. Mr. Šahović (*ibid.*) had warned against undue haste, recommending that the Commission should proceed on the basis of the replies received from States and the other material placed before it. The Special Rapporteur, for his part, had adopted the entirely correct academic approach of stating a general principle and then considering the exceptions to it, though it would also have been possible to consider general cases without referring to principles.

16. It therefore seemed clear that the Commission was not in agreement on certain basic features of the draft or, possibly, on the method to be adopted. In his view, two courses were open to it: either it could postpone substantive consideration of the draft article and not submit any articles to the General Assembly—in which case the Assembly would undoubtedly take an understanding attitude—or it could seek to reach common ground on draft articles 1 and 6 in the Drafting Committee. While he thought the first course would perhaps be preferable, he was prepared to agree to the second, if that were the wish of the Commission.

17. Mr. USHAKOV stressed that the substance of the matter was that any State was free to allow or not to allow another State to carry on activities in its territory or in the area of its jurisdiction. It followed that international law could not determine what activities a State could carry on in another State. If, however, a State agreed, by virtue of a rule of its internal law or an international agreement, that another State could carry on certain activities in its territory or area of jurisdiction, then the principle of the jurisdictional immunity of States, as it derived from international law, was applicable. Accordingly, the Commission should on no account attempt to define the activities which one State could carry on in the territory of another, or the capacity in which it did so. If a State was not competent under its own internal law to carry on commercial activities, then, naturally, no other State could carry on such activities in its territory.

18. Referring to the practice of his own country, he pointed out that the Soviet Union did not itself carry on foreign trading activities; there were special agencies in the Soviet Union which were empowered to do so, and they were legal persons under private law. Nevertheless, the Soviet Union sometimes guaranteed contracts concluded by those agencies with foreign

legal persons. If a trade mission of the Soviet Union gave a guarantee of that kind, in the absence of a special clause the principle of State immunity was applicable. Other arrangements could also be made, however. For example, there was an agreement between Japan and the Soviet Union concerning the status of the Soviet trade mission which authorized the mission to give guarantees; it was agreed that in case of a dispute, unless otherwise agreed, the Japanese courts were competent. As to enforcement of the judgements of the Japanese courts, it was provided that execution could be levied against any Soviet property situated in Japanese territory, subject to a few exceptions. Thus, the Soviet Union had waived the application of the principle of State immunity. It was open to any State to waive that principle, but in the absence of a waiver the principle remained applicable.

19. The expression “State property”, as defined by the Special Rapporteur, meant property, rights and interests owned by the State according to its internal law. In his opinion that definition should be broadly construed. A State might nationalize property which was situated in its territory but belonged to a foreign private person, and that property might then be transferred to the territory of another State. The territorial State should then consider the property as belonging to the first State according to its internal law. For the sake of completeness, it was also necessary to cover the case of property situated in the territory of one State which was appropriated by another State in accordance with its internal law.

20. The CHAIRMAN, speaking as a member of the Commission, said that while he agreed with the Special Rapporteur regarding the rational basis for the immunity of a State, he did not think that the basis of functional necessity should be dismissed, as it appeared to be in paragraph 125 of the report. The presence of one State within the sphere of competence of another was both necessary and desirable for the proper functioning, and possibly the mutual interest, of both States. States must be considered as maintaining the kind of foreign presence that their interests required in order to enable them to carry out State functions in a proper manner. In view of that functional need, States were understandably prepared to concede to one another the treatment that they, in turn, would subsequently demand, on the basis of reciprocity. It was reasonable, therefore, to perceive a functional basis for the right for a State to immunity from jurisdiction. Moreover, if the principle of State immunity had lacked any such functional aspect it was unlikely that it would have continued to develop as it had done. The fact that recognition of a functional basis might limit the operation of immunity was a quite separate question which would have to be considered further. The judgement in the case of *The Schooner “Exchange” v. McFaddon and others* seemed to contemplate such limits. The limitation of State power implied in the concept that a foreign State was, at least

in certain respects, immune, was based on the consent of the "territorial State".

21. Immunity must necessarily be as absolute as the sovereign jurisdiction into which the foreign State had brought itself. Any derogation from absolute immunity required the consent of the foreign State, which was generally expressed by a waiver of the immunity to which it was entitled. Exceptions recognized within the principle of immunity occurred either because a case fell outside the ambit of the protection of the principle, or because the foreign State's sovereign right had been modified by its own consent. Neither instance was, in any real sense, an exception. If an act was one which the law did not recognize as falling within the scope of the principle of immunity, the fact that immunity was not granted did not constitute an exception. Moreover, it was the sovereign right of a State to modify its freedom of action by consenting to do so. Once that consent had been given, there was no exception to the rule.

22. He agreed that immunity was a right of a foreign State, rather than a mere privilege which could be granted or withheld; that interpretation should be clearly reflected in the draft articles. A more important question, however, was the extent or scope of the right. That question should be settled by reference to the modern practice of States, which corresponded to their contemporary social needs and which could be regarded as customary international law.

23. The Special Rapporteur appeared to have deliberately narrowed the field of his study to that of immunity from legal proceedings, in the widest sense of that term. He had been right to do so, since that was the field likely to be most rich in State practice and therefore most ripe for codification. Furthermore, the Special Rapporteur's use of the term "territorial State", which also tended to narrow the scope of the study, showed commendable caution on his part.

24. While it would be premature to discuss the definitions and interpretative provisions in draft articles 2 and 3, the Special Rapporteur had been right to place those ideas before the Commission. While agreeing broadly with the principles contained in draft articles 4 and 5, he thought that they, too, should be discussed at a later stage in the Commission's work. As to draft articles 1 and 6, an article on the scope of the draft articles to follow, while useful, was difficult to draft at such an early stage in the study.

25. In view of the limitations which the Special Rapporteur himself apparently sought to impose on the study, he had no particular difficulty with the terms "territorial State" and "foreign State". But if the immunity of a State from jurisdiction was to be considered a right, it might be preferable not to refer to immunity as being "accorded or extended", as was done in draft article 1. The term "jurisdictional immunities" did not seem to be the happiest combination of words; he would be inclined to favour a

draft along the lines suggested by Sir Francis Vallat (1623rd meeting, para. 18). He saw no reason for the use of the words "questions relating to" in the first line of draft article 1. It would be helpful if the idea of the right to immunity could be introduced by referring to "the immunity from jurisdiction to which a State is entitled".

26. The Special Rapporteur's use of the term "immunity" appeared to be correct. The term was generally used to mean precisely the kind of insulation from court proceedings that the Special Rapporteur wished to deal with in his study. In the 1961 Vienna Convention, for example, the term "immunities" was used in connexion with criminal, civil and administrative jurisdiction (art. 31). There also seemed to be a tendency to use the term "accord" in respect of "freedoms", "inviolability" and "immunity" from court jurisdiction, and the term "grant" in respect of "exemptions" and "facilities". He wondered whether, in draft article 1, the Special Rapporteur wished to limit immunity to the foreign State and its property and, if so, what he meant by the term "property".

27. He was in general agreement with the principle stated in draft article 6, apart from a few minor drafting considerations.

28. In conclusion, he agreed with the Special Rapporteur that the test for entitlement to State immunity lay in the nature of the activities involved, rather than in their purpose.

The meeting rose at 11.30 a.m.

1626th MEETING

Friday, 4 July 1980, at 10.15 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Jurisdictional immunities of States and their property (continued) (A/CN.4/331 and Add.1)

[Item 5 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR¹ (concluded)

1. Mr. VEROSTA associated himself with the views

¹ For the text of articles 1-6 submitted by the Special Rapporteur, see 1622nd meeting, para. 4, and 1623rd meeting, para. 2.

expressed by Sir Francis Vallat (1623rd meeting) and Mr. Reuter (1624th meeting).

2. In dealing with draft articles 1 and 6, the Drafting Committee would have to proceed on the basis of exceptions to jurisdictional immunities, rather than on the basis of the existence of a right to immunity. With regard to the expressions “foreign State” and “territorial State”, while he was not completely satisfied with those terms, it was difficult to improve on them for the time being.

3. Draft articles 4 and 5 could be referred to the Drafting Committee.

4. Mr. SUCHARITKUL (Special Rapporteur) said that the comments made by members of the Commission would serve as a useful guide for future research. Due account would be taken of the note of caution sounded by many members regarding the difficulties, complexities and urgency of the work. Many approaches were possible, but the instructions of the General Assembly seemed to indicate clearly what the scope of the topic should be.

5. As had been noted by some members of the Commission, he had limited the scope of his report to the jurisdiction of courts and the incidental activities of other authorities responsible for administering the law. The source materials available contained many references to the role played by the executive and legislative authorities in the development of State practice, which was concerned primarily with the decisions of national courts. The report did not cover acts of State, extra-territorial legislation regarding the powers exercised by a foreign State, or the authority of the territorial State to deal with them, as he had not wished to become involved in detailed consideration of the relevant rules of private international law. Such questions could probably be dealt with under draft articles dealing with ground rules, which would remove a case from the context of jurisdictional immunity when no jurisdiction had existed in the first place.

6. Mr. Riphagen (1622nd meeting) had rightly expressed some reservations on the use of the term “territorial jurisdiction”. That term was not intended to be understood in the sense in which it was used in private international law, but simply as the jurisdiction of the territorial State. He apologized for any confusion that the use of the term might have caused. He had thought it preferable to concentrate on exceptions from the jurisdiction of courts rather than from the jurisdiction of executive or legislative powers, since the historical development of the topic as it related to extra-territoriality had been somewhat different.

7. The wording for draft article 1 proposed by Sir Frances Vallat (1623rd meeting, para. 18) would provide a better working basis than the existing draft, without precluding the possibility of extending the scope of the draft articles later. Referring to a comment made by Mr. Pinto (1625th meeting), he said

that the words “questions relating to” have been included in order to broaden the scope of the draft article to some extent; they could, however, be dispensed with.

8. He had been most interested to hear Mr. Ushakov’s view (1623rd meeting) on the consent of the territorial State, to the effect that once a given activity was regarded as admissible, it could be presumed to enjoy the immunities customarily accorded under international law. He had also been interested by the view expressed by Mr. Schwebel (1625th meeting) that certain activities, once regarded as admissible, would be subject to ground rules which could provide for the necessary exceptions. He was also grateful to Mr. Tsuruoka for the information he had provided (1624th meeting) on current trends in the State practice of Japan.

9. Referring to the comments of members of the Commission on the definitions in draft articles 2, 3, 4 and 5, he said that the term “immunity” meant the State of being immune, whereas “immunities” referred to different types of immunity. There might be no need to define the term “immunities”, since it was not defined in existing conventions.

10. On the question of State property, he shared the doubts expressed by Mr. Riphagen and other members, and agreed that further clarification might be needed. The question of property would, however, constitute an important element of the topic and would have to be studied in connexion with immunities from execution and attachment.

11. He had noted all the comments made on the use of the terms “territorial State” and “foreign State”. Nevertheless, there appeared to be no option but to continue to use them until better terms were found.

12. While most members of the Commission seemed to agree in principle with the definition of “trading or commercial activity” in draft article 2, doubts had been expressed as to how absolutely it could be applied. He would take note of those views in his future work. Further consideration should also be given to the extent of the influence of political motivations in certain exceptional cases, such as contracts for the purchase of rice in the event of famine. He was grateful to those members who had suggested that a saving clause be included in the draft articles to preclude any interference with the normal development of customary rules of international law.

13. Referring to Mr. Reuter’s comments (1624th meeting) on the use of the word “principle” in the title of draft article 6, he pointed out that both the Commission and the General Assembly had instructed the Special Rapporteur to look into the general principle of State immunity. He asked the Commission’s indulgence for any over-emphasis that he might have placed on historical precedent. He noted, however, that, apart from their purely historical value, many of the common-law decisions cited still applied. Further-

more, in their replies Governments had cited may cases in which decisions had been subsequently overruled, leading to the conclusion that the principle of immunity was uncontested.

14. The question of exceptions to, or limits on, immunities would be dealt with in greater detail in the third report, in the light of further information provided by Governments. Thus far, twenty-two Governments had provided source materials and seven or eight had replied to the questionnaire. None of them had contested the validity of the principle of State immunity.

15. He suggested that it might be helpful for future consideration of the topic to refer draft articles 1 and 6 to the Drafting Committee. Meanwhile, the Secretariat should be requested to renew its invitation to Governments to provide information and should make the necessary preparations for publication of the replies and source materials already received.

16. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed that draft articles 1 and 6 should be referred to the Drafting Committee and that the Secretariat should be invited to seek further information from Governments and to publish the information already received.

*It was so decided.*²

The meeting rose at 11.10 a.m.

² For consideration of the texts proposed by the Drafting Committee, see 1634th meeting, paras. 42-61, and 1637th meeting, paras. 57-58.

1627th MEETING

Monday, 7 July 1980, at 3.05 p.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Also present: Mr. Ago.

State responsibility (continued)* (A/CN.4/318/Add.5-7, A/CN.4/328 and Add. 1-4)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (continued)

* Resumed from the 1621st meeting.

ARTICLE 34 (Self-defence)¹ (continued)

1. Mr. TSURUOKA said that, by and large, he agreed with draft article 34, but the phrase "if the State committed the act in order to defend itself or another State against armed attack as provided for in Article 51 of the Charter of the United Nations" should be replaced by "if the act constitutes a measure of self-defence under the Charter of the United Nations".

2. In the article under consideration, reference could be made either to international law or to the Charter, and in the latter case, either Article 51 or the Charter as a whole could be mentioned. In his view, the latter course was preferable. By referring simply to international law, the Commission might give the impression that it recognized the existence of a right of self-defence other than that envisaged in the Charter. A reference to Article 51 alone would inevitably give rise to controversy, as the Commission's discussions had shown. Again, the Commission usually refrained from interpreting the Charter. The fact that self-defence was mentioned should on no account induce the Commission to define that concept. Any attempt to do so would be a departure from the Commission's customary method of leaving aside the primary rules. A reference to the Charter as a whole would cover not only Article 51 but also Article 2 and Chapter VII of that instrument.

3. Regarding the commentary to the draft article, and more specifically the passage in paragraph 114 of the report (A/CN.4/318/Add.5-7) in which Mr. Ago stated that learned writers took the view that the principles that had been current in general international law at the time when the Charter was drafted had in no way differed, as to substance, from those laid down in Article 51, that assertion was incorrect so far as Japan was concerned. Japanese writers had emphasized that in formulating Article 51 the authors of the Charter had taken an immense step towards pacifism by taking care to restrict the exercise of the right of self-defence to one clear-cut case. The Japanese writers could not be said to have been unanimous in acknowledging that Article 51 reflected a principle rooted in the legal thinking of the time.

4. Mr. DÍAZ GONZÁLEZ said that underlying the concept of self-defence there was a question of equal or even greater importance, namely, the definition of aggression. It therefore seemed to him that draft article 34 embodied two elements which were unduly restrictive and would make it difficult for the Commission to accept the article as it stood. In the first place, the text referred specifically to an armed attack, whereas it would have been more appropriate to refer to an act of aggression; secondly, the concept of self-defence was limited by the reference to Article 51 of the Charter of the United Nations. That Article was simply a safeguard clause which provided for an exception

¹ For text, see 1619th meeting, para. 1.

based on an inherent right of individual or collective self-defence. The Charter did not, however, define an inherent right nor say what was to be understood by self-defence. It merely spoke of a right of self-defence, from which it could be inferred that the content of that right had to be sought within the rules of *jus cogens* in order to determine when self-defence could be pleaded. Article 2, paragraph 4, of the Charter established a further exception, since it was implicit that any measure other than those it expressly prohibited must, when taken by the threatened State, be regarded as a measure of self-defence. Article 2, paragraph 7, likewise afforded a basis on which measures of self-defence could be applied. Moreover, the right of individual or collective self-defence as enunciated in Article 51 of the Charter was restricted by the second sentence of that Article. Accordingly, it was for the Security Council to determine whether or not an act of aggression had occurred and, as a consequence, measures of self-defence could be applied.

5. In his view, the concept of aggression should not be confined solely to armed attack. As was abundantly clear from the debates held at the United Nations on the definition of aggression, there were other types of aggression which could be far more effective in threatening or destroying a State, such as economic, ideological and cultural aggression. Again, armed attack did not necessarily involve attack by a regular army but could mean an attack by an armed band directly or indirectly supported by another State.

6. In the light of those considerations, it seemed to him that the Commission was not in a position to state categorically when the use of force was lawful and when an act of aggression should be deemed to have taken place. Consequently, it was necessary to define what was meant by an act of aggression that justified measures of self-defence.

7. So far as the American regional system was concerned, the Charter of the Organization of American States² was explicit on that score. The principle of self-defence was expressly stated in article 18, under which the American States undertook not to resort to the use of force in their international relations, save in the case of self-defence, in accordance with the treaties in force. Conversely, article 24 of the Charter of the OAS stipulated that any aggression by a State against the integrity, sovereignty or political independence of an American State was to be deemed to be an act of aggression against the other American States. As a logical consequence, article 25 provided that if the integrity, sovereignty or political independence of an American State was affected, *inter alia*, by an armed attack or by an aggression not involving an armed attack, the American States would take the measures prescribed in the relevant treaties.

8. The most important of those treaties was the Inter-American Treaty of Reciprocal Assistance,³ signed at Rio de Janeiro in 1947. Under article 3 of that treaty, which restated the terms of article 24 of the Charter of the OAS any aggression against an American State was to be deemed an act of aggression against the other American States, and the latter undertook to react accordingly in the exercise of their inherent right of individual and collective self-defence as recognized in Article 51 of the Charter of the United Nations.

9. Lastly, although persuaded by Mr. Ago's excellent report of the need to include a rule on self-defence in the draft on State responsibility, he considered that draft article 34 should be couched in more general terms, to refer to the Charter of the United Nations as a whole rather than to Article 51 alone, and also to the principles of international law. He would therefore favour some wording along the lines proposed by Mr. Tsuruoka.⁴

10. Mr. BARBOZA said that one of the main issues to be decided by the Commission was whether the concept of self-defence should extend to the use of force against the threat of imminent armed attack. In that connexion, the question had been raised of whether Article 51 of the Charter of the United Nations was more restrictive in scope than were the rules of general international law and, if so, whether those rules should be codified. His own view was that Article 51 in fact reflected general international law, although it also incorporated certain additional elements relating to the United Nations system of collective security which were of paramount importance. Article 51 would apply, for example, in cases where a Member of the United Nations had already been attacked and until such time as the Security Council had taken the necessary measures to maintain international peace and security; also, under the terms of the Article, the measures taken by Members in the exercise of their right of self-defence had to be reported to the Security Council immediately.

11. At the same time, it had to be recognized that, despite its importance, Article 51 of the Charter was not a comprehensive statement of international law on the matter. It did not, for example, mention the prerequisite for the exercise of self-defence or the rule of proportionality, both of which derived from international law. His understanding, therefore, was that self-defence related primarily to the use of force and possibly the threat of the use of force.

12. Aggression and self-defence were two sides of the same coin, and hence Mr. Ago had been right to exclude from the concept of self-defence such extraneous matters as self-help. In the international community, as in any national community, the concept

² United Nations. *Treaty Series*, vol. 119, p. 3.

³ *Ibid.*, vol. 21, p. 77.

⁴ Para. 1 above.

of self-defence consisted of three elements: a prohibition on aggression, the legitimacy of the force used in self-defence, and the community's monopoly on the use of force. In the case of the international community, that monopoly was clearly wasted in the United Nations by virtue of Article 2, paragraph 4, Article 51 and the provisions of Chapter VII of the Charter, although the United Nations did not in fact resort to the use of force in the strict sense of the term.

13. Bearing those facts in mind, he did not think that the Commission could seek to modify the United Nations system of collective security, something that could be achieved only by revising the Charter with a view to bringing it up to date. Nor should it seek to introduce the notion of self-help in chapter V of the draft, since that would undermine the concept of self-defence. All it could do was to proceed within the framework laid down by the Charter and treat the existing system of collective security as still being in force. If that was agreed, an article on self-defence would then be required for the purpose of laying down the exceptions to the prohibition on the use of force.

14. Lastly, he agreed that the draft article should be couched in general terms and refer to the Charter of the United Nations as a whole, rather than to Article 51 alone. In that connexion, he had been persuaded more particularly by the arguments of Sir Francis Vallat (1621st meeting), who had questioned whether the Commission had a mandate to interpret Article 51 of the Charter. He also noted that Mr. Ago had warned the Commission in paragraph 116 of his report against seeking to interpret Article 51 and against taking any position on preventive self-defence.

15. Mr. QUENTIN-BAXTER said that Mr. Ago's report was a very rich addition to the literature on one of the most vital issues of modern international law.

16. Chapter V, section 6, of the report rightly explained how the concept of self-defence had come to achieve special significance during the twentieth century with the recognition that recourse to war, save in self-defence, was not only unlawful but was also a breach of a peremptory norm. A difficulty arose because Mr. Ago had also invited the Commission to go a step further and to say that the transition from the old imperfect order had been completed, so that self-defence could be equated with response to an attack within the meaning of Article 51 of the Charter of the United Nations. Self-defence, however, was still not a permanent part of the law of nations. Although States had moved away from the time when might was right, they had not yet reached the millenium they had hoped for when the Charter of the United Nations had been adopted. There was not yet a peaceful world ruled entirely in accordance with law, in which all matters were held in a fair and equal balance by the objective decisions of the principal organs of the United Nations. It was within the context of the interim period through which the world was passing that the concept of self-defence had to be considered. Indeed, if

the Charter regime were fully effective, there would be little or no need for States to resort to self-defence, any more than citizens in a well-ordered society needed to do so—at least for more time than was required for the forces of law and order to arrive. It was mainly because the international community was passing through an interim period that the term “self-defence” had such a vital part to play in the modern conception of law; for that reason, too, the term was necessarily somewhat imperfect and vague, as was the world order itself.

17. Mr. Ago's position was very similar to that adopted by the International Court of Justice in the *Corfu Channel* case,⁵ namely, that the world had entered upon a period in which self-defence and intervention, under whatever guise or provocation, were not acceptable. However, so long as the world order was less than perfect, States would naturally be concerned about attacks on their territory and people. In view of that imperfect situation, he considered that draft article 34 must necessarily provide for a *renvoi* to the Charter as a whole and would therefore favour an amendment to the draft article along the lines proposed by Mr. Tsuruoka.

18. The CHAIRMAN, speaking as a member of the Commission, said that he sympathized with those who considered that draft article 34 should not be included under the heading of “Circumstances precluding wrongfulness” (of an act of a State), since self-defence had implications that went far beyond the preclusion of wrongfulness. However, it was important to remember that Mr. Ago was attempting not to codify the rules on self-defence but rather to place self-defence within a somewhat special schematic presentation of the elements which attracted wrongfulness and of the circumstances which precluded it. Within the context of that systematic exposition, he saw no reason to object to the inclusion of the draft article in chapter V of the draft.

19. With regard to the scope of the draft article, he felt that self-defence was too elemental to be termed a concept. Deriving, as it did, from the basic instinct for self-preservation, it was as old as life itself. Although it might seem expedient, in the light of the politics of any given time, to attempt to place self-defence within a neat set of limits with a view to regulating the abuses to which it could give rise, the chances were that such attempts would not be successful. The narrower the limits, the more likely they were to be overtaken by events.

20. As a legal concept, self-defence had not been introduced by the Charter of the United Nations, but dated back to the origins of the law itself. He had not had time to ascertain whether the authors of the Charter had intended, in Article 51, to define self-defence in its broadest sense or simply to deal with the

⁵ *Corfu Channel, Merits, Judgment, I.C.J. Reports, 1949, p. 4.*

limited case of the action that a Member of the United Nations could take in the event of an armed attack against it or against another Member until such time as the Organization's machinery for the maintenance of peace and security could be activated. Nor was he clear as to the intent behind Article 2, paragraph 4, of the Charter, which, as had rightly been pointed out, might possibly imply that defensive measures could be taken in the event of the threat of force, as opposed to an actual armed attack.

21. What did seem clear to him was that, irrespective of the intent of the Charter and of those who had drafted it, the concept of self-defence, if codified, would extend beyond armed attacks. Such codification might well have to encompass the ways in which a State could defend itself against threats to its economy or to its legitimate interests outside its territory or, indeed, outside the territory of any State; it might have to take account of whether or not such threats involved the use of armed force, in the sense of full-scale military operations, or of some other form of coercion which fell short of military operations, and whether or not there had been overt aggression. It might also have to determine whether defensive measures taken by a State were legitimate in cases where such measures were not in themselves of a warlike nature, but were aimed at warding off an armed attack at some time in the future, rather than an attack that was imminent or was actually taking place.

22. The term "self-defence" connoted the idea not only of forceful resistance or defence, but also of preventive or security measures which could comprise a variety of legitimate external actions. It could be argued, for example, that the notions of zones of peace, nuclear-weapon-free zones and zones of neutrality, together with the measures taken to implement the corresponding regimes, derived from a modern concept of self-defence. It could also be argued that the concept of self-defence must be expanded in direct proportion to the destructive capacity and concentration of modern weaponry. Thus, Article 51 of the Charter of the United Nations, whatever its initial purpose, was now no more than a narrow part of a far broader concept of self-defence. It was therefore not so much a question of interpreting Article 51 of the Charter as interpreting the scope of an inherent right conferred on every State by customary international law.

23. Article 51 of the Charter might be applied with some justification in the case of a State that was militarily strong and ready for combat, since the Article assumed that a defensive military machine, whether of the State under attack or of an allied State, could be effectively mobilized within a very short time to repel an armed attack that was taking place. Even so, some life and property might well have to be sacrificed in order to comply fully with the restraint imposed by Article 51. Given modern weaponry and the size of some modern States, the absurd result might be that a whole State would have to be sacrificed to

satisfy the terms of Article 51. Application of that Article to the majority of States that were not large, had only limited military capability and were not parties to any military alliance, seemed far less reasonable.

24. He mentioned those considerations since draft article 34 in its present wording could reinforce the view that the only type of self-defence that was legitimate, and therefore precluded wrongfulness, was the type provided for under Article 51 of the Charter, namely, the self-defence to which a State could resort when "an armed attack occurs". In his view, it would be advisable not to prejudice the progressive development of the concept or the value of certain widely-held interpretations of it. Moreover, the application of draft article 34 should not be unduly restricted by linking it to Article 51 of the Charter.

25. Consequently, while he supported the idea underlying draft article 34, he proposed that the last part of it, starting with the words "in order to defend itself", should be deleted and replaced by "in defence of itself or of another State in accordance with international law, including the provisions of the Charter of the United Nations". The expression "to defend itself or another State" also seemed to convey a heavy burden of unexplored meaning and some further thought should be given to developing that expression at a later stage.

Succession of States in respect of matters other than treaties (*concluded*)* (A/CN.4/322 and Add.1 and 2,⁶ A/CN.4/333, A/CN.4/L.313)

[Item 1 of the agenda]

**DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE**

ARTICLES C, D, E AND F

26. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the draft articles adopted by the Committee (A/CN.4/L.313).

27. The texts proposed by the Drafting Committee read:

Article C. Transfer of part of the territory of a State

1. When part of the territory of a State is transferred by that State to another State, the passing of State archives of the predecessor State to the successor State is to be settled by agreement between the predecessor and successor States.

2. In the absence of an agreement:

(a) the part of State archives of the predecessor State, which for normal administration of the territory to which the succession of States relates should be at the disposal of the State to which the

* Resumed from the 1606th meeting.

⁶ Reproduced in *Yearbook* . . . 1979, vol. II (Part One).

territory in question is transferred, shall pass to the successor State;

(b) the part of State archives of the predecessor State, other than the part referred to in subparagraph (a), that relates exclusively or principally to the territory to which the succession of States relates, shall pass to the successor State.

3. The predecessor State shall provide the successor State with the best available evidence of documents from the State archives of the predecessor State which bear upon title to the territory of the transferred territory or its boundaries, or which are necessary to clarify the meaning of documents of State archives which pass to the successor State pursuant to other provisions of the present article.

4. (a) The predecessor State shall, at the request and at the expense of the successor State, make available appropriate reproductions of documents of its State archives connected with the interests of the transferred territory.

(b) The successor State shall, at the request and at the expense of the predecessor State, make available appropriate reproductions of documents of State archives which have passed to the successor State in accordance with paragraph 1 or 2.

Article D. Uniting of States

1. When two or more States unite and so form a successor State, the State archives of the predecessor States shall pass to the successor State.

2. Without prejudice to the provision of paragraph 1, the allocation of the State archives of the predecessor States as belonging to the successor State or, as the case may be, to its component parts shall be governed by the internal law of the successor State.

Article E. Separation of part or parts of the territory of a State

1. When part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree:

(a) the part of State archives of the predecessor State, which for normal administration of the territory to which the succession of States relates should be in that territory, shall pass to the successor State;

(b) the part of State archives of the predecessor State, other than the part referred to in subparagraph (a), that relates directly to the territory to which the succession of States relates, shall pass to the successor State.

2. The passing or the appropriate reproduction of parts of the State archives of the predecessor State other than those dealt with in paragraph 1, of interest to the territory to which the succession of States relates, shall be determined by agreement between the predecessor State and the successor State in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives.

3. The predecessor State shall provide the successor State with the best available evidence of documents from the State archives of the predecessor State which bear upon title to the territory of the successor State or its boundaries, or which are necessary to clarify the meaning of documents of State archives which pass to the successor State pursuant to other provisions of the present article.

4. Agreements concluded between the predecessor State and the successor State in regard to State archives of the predecessor State shall not infringe the right of the people to those States to development, to information about their history and to their cultural heritage.

5. The predecessor and successor States shall, at the request and at the expense of one of them, make available appropriate

reproductions of documents of their State archives connected with the interests of their respective territories.

6. The provisions of paragraphs 1 to 5 apply when part of the territory of a State separates from that State and unites with another State.

Article F. Dissolution of a State

1. When a predecessor State dissolves and ceases to exist and the parts of its territory form two or more States, and unless the successor States concerned otherwise agree:

(a) the part of the State archives of the predecessor State, which should be in the territory of a successor State for normal administration of its territory, shall pass to that successor State;

(b) the part of the State archives of the predecessor State, other than the part referred to in subparagraph (a), that relates directly to the territory of a successor State, shall pass to that successor State.

2. The passing of the parts of the State archives of the predecessor State other than those dealt with in paragraph 1, of interest to the respective territories of the successor States, shall be determined by agreement between them in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives.

3. Each successor State shall provide the other successor State or States with the best available evidence of documents from its part of the State archives of the predecessor State which bear upon title to the territories or boundaries of that other successor State or States, or which are necessary to clarify the meaning of documents of State archives which pass to that State or States pursuant to other provisions of the present article.

4. Agreements concluded between the successor States concerned in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage.

5. Each successor State shall make available to any other successor State, at the request and at the expense of that State, appropriate reproductions of documents of its part of the State archives of the predecessor State connected with the interests of the territory of that other successor State.

6. The provisions of paragraphs 1 to 5 shall not prejudice any question that might arise by reason of the preservation of the unity of the State archives of the successor States in their reciprocal interest.

28. Mr. VEROSTA (Chairman of the Drafting Committee) said that the four draft articles before the Commission, as adopted by the Drafting Committee, were part of the series of six articles dealing with the question of succession of States in the matter of State archives.

29. At its thirty-first session, the Commission had adopted the first two articles in that series: draft article A, on the definition of State archives, and article B, on succession to State archives in the case of a newly independent State.⁷ The last four draft articles were article C, originally presented by the Special Rapporteur as article B', with the title "Transfer of a part of the territory of one State to another State",⁸

⁷ For texts, see *Yearbook . . . 1979*, vol. II (Part Two), pp. 79 and 81-82, document A/34/10, chap. II, sect. B.

⁸ For text, see 1602nd meeting, para. 1.

and articles D, E and F.⁹ Since the draft already included A and B, adopted previously by the Commission, the Drafting Committee had decided to renumber draft article B' as article C.

30. Commenting on the four draft articles as a whole, he said that the Drafting Committee had drawn on the wording of the articles already adopted by the Commission. That had been found advisable for the purpose of using the agreed terminology, care having been taken by the Committee to make the appropriate and necessary adjustments in the borrowed phraseology or terminology so as to adopt it to the particular case of succession covered by the draft articles under consideration. In drafting articles C, E and F, the Drafting Committee had used the agreed wording of articles 10, 13 and 14, on State property, and the corresponding articles on State debts (articles 19, 22 and 23), as well as article B.¹⁰ Efforts had also been made to harmonize the wording of draft articles C, E and F, so far as was possible.

31. In the light of the plenary discussion on the twelfth report of the Special Rapporteur (A/CN.4/333), the Drafting Committee had been guided in the preparation of draft articles C, E and F by the basic principle of agreement between the States concerned. In the absence of agreement, those articles enunciated the rule of the passing to the successor State of the part of State archives of the predecessor State that, for normal administration of the territory to which the succession of States related, should be in the territory of the successor State or, in the case of transfer of part of the territory of a State, should be at the disposal of the State to which the territory in question was transferred. In addition, under draft articles C, E and F, the part of State archives of the predecessor State (other than the part already referred to) that related *directly* (or in the case of article C, *exclusively* or *principally*) to the territory to which the succession of States related, also passed to the successor State.

32. With regard to the types of succession envisaged in articles E and F, the passing of the parts of State archives of the predecessor State (other than those already mentioned) that were of interest to the territory or territories to which the succession of States related, was to be determined by agreement between the States concerned (predecessor and successor States or successor States among themselves) in such a manner that each of those States could benefit as widely as possible from those parts of State archives.

33. Furthermore, articles C, E and F enunciated the rule whereby the predecessor State must provide the successor State—or, in the case of dissolution of a State, each successor State must provide the other successor State or States—with the best available

evidence of documents from State archives of the predecessor State which bore upon title to the territory of the successor State or its boundaries or were necessary to clarify the meaning of documents of State archives that passed to the successor State pursuant to other provisions of the article concerned.

34. Similarly, articles C, E and F enunciated, with the adaptations required by each type of succession of States envisaged therein, the rule relating to provision, at the request and at the expense of a successor State, or predecessor State, as the case may be, of appropriate reproductions of documents of State archives connected with the interests of the territory of the requesting State. In the case of article C, given the characteristics proper to the transfer of part of the territory of a State, the rule was to the effect that the predecessor State was entitled to be furnished with appropriate reproductions of documents of State archives that had passed to the successor State.

35. Both article E and article F included the safeguard clause found in article B regarding the right of the peoples of the States concerned to development, to information about their history and to their cultural heritage.

36. The Drafting Committee suggested that, in its commentary to the draft, the Commission should bring to the attention of Governments the question of whether the articles on succession to State archives should be contained in a separate part or included as a separate chapter in part II of the draft, dealing with succession to State property. Views had already been expressed on that question by Member States in the Sixth Committee during the thirty-fourth session of the General Assembly, and had been aptly summarized by the Special Rapporteur in presenting his twelfth report to the Commission (1602nd meeting).

ARTICLE C¹¹ (Transfer of part of the territory of a State)¹²

37. Mr. VEROSTA (Chairman of the Drafting Committee) said that, in draft article C (formerly article B'), the wording of paragraph 1 had been aligned with that of article 13. In recasting the entire article in four paragraphs instead of the three presented in the Special Rapporteur's version, the Drafting Committee had, where appropriate, borrowed from the language of article B. For example, the Committee had abandoned the phrase "State archives connected with the administration and history of the territory" used in the Special Rapporteur's draft, and adopted instead the phrase "State archives . . . for normal administration of the territory" contained in paragraph 1 (b) of article B. Paragraph 3, which was a new addition by the

⁹ For the texts submitted by the Special Rapporteur, see 1603rd meeting, para. 28, and 1604th meeting, para. 26.

¹⁰ See foot-note 7 above.

¹¹ For consideration of the text initially submitted by the Special Rapporteur (art. B'), see 1602nd meeting and 1603rd meeting, paras. 1–27.

¹² For text, see para. 27 above.

Drafting Committee, was modelled on paragraph 3 of article B, which covered the same question. The Committee had also redrafted paragraph 3 of the original article B', and in its present version, as paragraph 4 of article C, it consisted of two subparagraphs deemed necessary to state the rules in a clearer fashion: the first set forth the obligation of the predecessor State to make available at the request and expense of the successor State, appropriate reproductions of documents of its State archives connected with the interests of the transferred territory; the second set forth the same obligation on the part of the successor State vis-à-vis the predecessor State in the same terms.

38. Mr. QUENTIN-BAXTER said that, as he recalled, a problem of terminology had arisen during the drafting in connexion with the notion of part of the territory of a State, for it meant two different things: a physical piece of territory, as in article C, and a territory in the sense of something having a personality of its own, although not at the level of international law, as in articles E and F. He had understood it to be the Commission's policy to state, as was the case in draft article C, "When part of the territory . . .", and to say "When a part or parts of the territory . . ." at the beginning of article E, as if the Commission wished to make a clear distinction. Regarding article C, paragraph 3, the phrase "upon title to the territory of the transferred territory or its boundaries" seemed to be rather clumsy, and he wondered if there was any reason for not using a phrase such as "upon title to the territory to which the succession of States relates or its boundaries".

39. Mr. VEROSTA (Chairman of the Drafting Committee) said that the Drafting Committee had decided on the expression "part of the territory" because it was already contained in articles 13 and 19. However, he had no objection to the wording suggested by Mr. Quentin-Baxter.

40. Mr. DÍAZ GONZÁLEZ said that when the matter had been discussed in the Drafting Committee the notion had been quite clear. The French text had been taken as the point of departure, and the Spanish version corresponded exactly to the French text. Perhaps the matter could be solved by bringing the English version closer to the French text.

41. Mr. SUCHARITKUL said that the third line of paragraph 3 might be clearer, yet keep the same meaning, if the words "the territory of" were deleted.

42. Mr. TSURUOKA said that there was no reason to alter the French text of paragraph 3, which was the original text, and that it was enough to change the English version.

43. Sir Francis VALLAT said that he agreed with Mr. Tsuruoka. It was not simply a drafting matter, but the meaning of the paragraph in its present form was quite clear and it would be wiser to leave the text as it was until the second reading.

44. Mr. QUENTIN-BAXTER said that he was satisfied with the comments that had been made. In his opinion, the main point to note was that the text had been drafted originally in French and was apparently satisfactory in that language. He therefore agreed that the question could be left for the second reading.

45. Sir Francis VALLAT said that, to his mind, the relationship between articles C and E should be taken into account. Once note was taken of the title and of paragraph 6 of article E, the balance between the two articles became quite clear.

46. Mr. USHAKOV proposed that the text of article C, paragraph 4, should be replaced by the following:

"4. (a) The predecessor State shall make available to the successor State, at the request and at the expense of that State, appropriate reproductions of documents of its State archives connected with the interests of the transferred territory.

(b) The successor State shall make available to the predecessor State, at the request and at the expense of that State, appropriate reproductions of documents of State archives which have passed to the successor State in accordance with paragraph 1 or 2."

47. Mr. VEROSTA (Chairman of the Drafting Committee) supported the proposal by Mr. Ushakov.

48. The CHAIRMAN suggested that the Commission should adopt article C in the form proposed by the Drafting Committee, with the exception of paragraph 4, which would be replaced by the text proposed by Mr. Ushakov.

It was so decided.

ARTICLE D¹³ (Uniting of States)¹⁴

49. Mr. VEROSTA (Chairman of the Drafting Committee) said that so far as article D was concerned, there had been no difficulty in accepting the Special Rapporteur's text, which reproduced, with the necessary adaptations, that of article 12 on the passing of State property, the corresponding article on the passing of State debts being article 21. The Drafting Committee, however, had made one small drafting change by replacing the phrase "and thus form a successor State" with the phrase "and so form a successor State", already used in article 12.

Article D was adopted.

ARTICLE E¹⁵ (Separation of part or parts of the territory of a State)¹⁶

50. Mr. VEROSTA (Chairman of the Drafting

¹³ For consideration of the text initially submitted by the Special Rapporteur, see 1603rd meeting, paras. 28 *et seq.*, and 1604th meeting, paras. 3-25.

¹⁴ For text, see para. 27 above.

¹⁵ For consideration of the text initially submitted by the Special Rapporteur, see 1604th meeting, paras. 26 *et seq.*, and 1605th meeting.

¹⁶ For text, see para. 27 above.

Committee) said that the text of article E had been harmonized with that of the articles already adopted. For example, the wording of paragraph 1 had been brought into line with that of paragraph 1 of article 13. The phrase “archives . . . connected with the activity of the predecessor State” used in the original text of article E submitted by the Special Rapporteur had been replaced by the familiar phrase “archives . . . for normal administration of the territory to which the succession of States relates”. Paragraph 2, on the question of the passing or appropriate reproduction of State archives, paragraph 3, on supplying the best available evidence of documents from State archives bearing upon title to the territory or boundaries, and paragraph 5, on making available appropriate reproductions of documents of State archives, had all been redrafted to cover those three cases in a clearer manner and in harmony with the corresponding provisions elsewhere, more particularly in article B. The new paragraph 4 added to article E was likewise modelled on the corresponding paragraph of article B (paragraph 6).

51. Mr. USHAKOV pointed out that, when the draft articles were considered on second reading, the wording of paragraph 5 should be brought into line with that of article C, paragraph 4.

52. Sir Francis VALLAT said that the drafting point raised by Mr. Ushakov was rather important. Attention should be drawn to it in the commentary so that there was no risk of overlooking the matter on second reading.

53. Mr. ŠAHOVIĆ asked why article E, paragraph 1 (b), referred to the part of State archives of the predecessor State that related “directly” to the territory, while article C, paragraph 2 (b), referred to the part of State archives of the predecessor State that related “exclusively or principally” to the territory.

54. Mr. VEROSTA (Chairman of the Drafting Committee) said that the Drafting Committee had retained that difference, which was to be found in the report of the Special Rapporteur.

55. Sir Francis VALLAT said that, in his opinion, the explanation lay partly in a matter of substance and related back to Mr. Quentin-Baxter’s point that the wording of article C, paragraph 2 (b), was believed to be narrower than the wording of article E, paragraph 1 (b). The distinction was intentional. Article C dealt with an actual transfer that could be settled by agreement between the two States, whereas article E contemplated the case of a breaking away. The distinction was therefore understandable and defensible, and he was convinced that the Special Rapporteur would explain it in his commentary.

Article E was adopted.

ARTICLE F¹⁷ (Dissolution of a State)¹⁸

56. Mr. VEROSTA (Chairman of the Drafting Committee) said that the wording of paragraph 1 of article F had been made consistent with that of paragraph 1 of article 14. By dividing article F into six paragraphs, the Drafting Committee had, as far as possible, attempted to align the wording with that of the corresponding paragraphs of article E. The use of similar phraseology in the first five paragraphs of articles F and E, taking into account the substantive differences between the issues involved, had made for the necessary uniformity of terminology.

57. Paragraph 6 of article F safeguarded the unity of State archives in the application of the substantive rules regarding the passing of State archives set forth in paragraphs 1 to 5 of the article. It reflected the principle of the indivisibility of archives, which was enunciated in paragraph 2 (b) of the article as originally proposed by the Special Rapporteur, and was particularly relevant in the case of dissolution of a State, where a problem might arise regarding the fate of the central archives of the State that had disappeared.

Article F was adopted.

The meeting rose at 5.05 p.m.

¹⁷ For consideration of the text initially submitted by the Special Rapporteur, see 1604th meeting, paras. 26 *et seq.*, and 1605th meeting.

¹⁸ For text, see para. 27 above.

1628th MEETING

Tuesday, 8 July 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Boutros Ghali, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Also present: Mr. Ago.

State responsibility (continued) (A/CN.4/318/Add.5–7, A/CN.4/328 and Add.1–4)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (continued)

ARTICLE 34 (Self-defence)¹ (continued)

1. Mr. VEROSTA said that he wished to rectify

¹ For text, see 1619th meeting, para. 1.

some aspects of the historical review of the concept of self-defence contained in section 6 of document A/CN.4/318/Add.5-7, for the conclusions reached in that review and the proposed text for draft article 34 were, to his mind, based on an historical cliché that was not consistent with the history of public international law.

2. According to Mr. Ago, in the second half of the nineteenth century there had been a rule of law that had allowed States to start a war without any justification. In fact, in 1815, well before the adoption of the Covenant of the League of Nations and the Briand-Kellogg Pact after the First World War, the Congress of Vienna had outlawed all wars of conquest, and the Concert of Europe, the predecessor of the League of Nations, had maintained peace and stability in Europe until 1856. Thus, when Tsarist Russia had sought to seize the European part of the Ottoman Empire in 1853, a coalition consisting of Great Britain, France and Piedmont had opposed it, and in 1856 the Congress of Paris had restored peace and the *status quo* in Europe. At that time, there had been lawful wars and unlawful wars, according to public international law.

3. Between 1859 and 1870, European wars had destroyed the political system established by the Congress of Vienna because two pillars of the system—the British Empire in the West and Russia in the East—had refrained from intervening in the conflicts between European States, confining themselves to weak protests and accepting the outcome of those wars on the grounds that the unification of Italy and that of Germany were inevitable and irreversible processes. Furthermore, Piedmont had attempted to justify its conquests by holding plebiscites after it had taken over the various States of the peninsula. The Papacy had never recognized the annexation of the Papal States, and not until some sixty years later did Italy recognize under the Lateran Treaty the unlawfulness of the annexation of 1870 and its own international responsibility by paying the Holy See a considerable sum of compensation.

4. Bismarck himself, who had pleaded the need for unification of the German nation in a single State and affirmed his will to cement Prusso-German unity “by blood and iron”, had attempted after 1871 to present himself as a champion of peace in the face of Russian ambitions, particularly at the Congress of Berlin in 1878.

5. As pointed out by Heinrich Lammasch, the famous Austrian internationalist, the practice of States in the second half of the nineteenth century had proved far less terrible than the writings of certain jurists who, particularly in Germany and Italy, had endeavoured *a posteriori* to justify unlawful actions and wars whose results had already been accepted by the Great Powers. Statesmen themselves had always sought to justify the use of force for political ends, even during the so-called

“imperialist” period. By doing so, however, they had implicitly recognized the existence of a rule of public international law prohibiting wars of aggression and of naked conquest. That was why, in the treaties of alliance of the period, an attack by a third State upon an ally constituted a *casus foederis*.

6. State practice in that respect had been confirmed by public opinion. For example, the Boer War had outraged international opinion, which had judged it unjustified and unlawful, and had isolated Great Britain. Not for nothing had the British Government used the services of a professor of such repute as Westlake to publish articles in journals of international law demonstrating that it had been Boer imperialism that had forced Great Britain to make war upon the Boers. Mark Twain, the American humorist, had echoed that public repudiation when he had introduced the young Winston Churchill to an American audience in 1903 and said that England had “sinned” by waging a war which it could have avoided in South Africa, just as his own country had “sinned” by waging a similar war against Spain in the Philippines—thus recognizing that the two countries had waged unlawful wars.

7. When presenting the rules on the commencement of hostilities at the Second International Peace Conference (The Hague, 1907), the French delegation had stated that:

In the first place, it is not thought necessary to consider the supposition of a war undertaken without some serious and apparent reason, or without some incident having arisen susceptible of giving rise to a discussion. An aggressive attack in time of ordinary peace and without any plausible motive is no longer compatible with the public sentiment in the nations of the civilized world which we are representing here.

The war will then have for its cause some fact at least possessing a certain gravity and capable of producing an exchange of explanations. Then will ordinarily commence a period of diplomatic negotiations, during the course of which each Power will seek to induce the other to agree to such terms as may be required to satisfy its interests.

...

We also believe that the reasons for the declaration of war must be stated. It is thought that this condition should be readily accepted because the Powers, having resolved to resort to fighting only when they are convinced that they are in the right, ought not to hesitate to publicly proclaim their reasons. Furthermore, it is particularly desirable that the causes of the war should be communicated to the States not involved in the conflict but who are bound to suffer from its consequences and who have a right to know why they suffer. And finally, these same States, if they are informed as to the causes of the war, may be more disposed to tender their good offices while observing respect towards the interests in question.²

8. At the time of the First World War, the unlawful nature of the war started by Germany and the Austro-Hungarian Monarchy was immediately pointed

² J. B. Scott, *The Proceedings of the Hague Peace Conferences, The Conference of 1907* (New York, Oxford University Press, 1921), vol. III, pp. 162-163.

out not only by their adversaries but also by their two allies. Italy and Romania had promptly declared that they would remain neutral, on the grounds that the obligations stemming from their alliance with Germany and Austria-Hungary did not come into play because those two Powers had not been attacked and had started an unjustified war of aggression. Following the military defeat, the Paris treaties had established the unlawfulness of the war of aggression started by Germany and Austria-Hungary, as well as their international responsibility, with the ensuing consequences regarding reparations.

9. The Covenant of the League of Nations, by emphasizing respect for the territorial integrity and the political independence of the Member States and of States in general, had merely reaffirmed and codified a long-standing rule of public international law—the essential basis for any society composed of sovereign States. The new element in the Covenant had been the provision whereby any attack upon a Member State was to be deemed an attack upon all of the Member States, which were required to take collective measures against the aggressor. The failure of the League of Nations system had stemmed from the fact that the Member States, particularly Great Britain and France, had not fulfilled their obligations under the Covenant and from 1931 onwards had made concessions in the face of the thirst for domination of the Axis Powers.

10. Self-defence was a right recognized and now codified in the Charter of the United Nations and, hence, lawful exercise of that right could not constitute a wrongful act. In his opinion, only excessive exercise of that right could be wrongful. It would therefore be inappropriate to include self-defence among the circumstances precluding wrongfulness. It was an illusion to believe that the right of self-defence would disappear in an international society that had an effective central authority. Even in a world State, the desirability of which was questionable, the right of self-defence would still exist.

11. The present international order was based on the plurality of sovereign States, which, in principle, defended themselves against any attack until other States—or since 1945, the United Nations—came to their assistance. The right of self-defence of every sovereign State was expressly confirmed by Article 51 of the Charter.

12. Furthermore, there was a category of States for which self-defence was not merely a right but a duty under international law: namely, the permanently neutral States, which had an abiding duty to exercise their right of self-defence, for their international status obliged them to defend their territorial integrity and political independence by all the means available to them. Failure to live up to that duty would on their part constitute a breach of an international obligation

that, under draft article 30,³ required them to adopt a particular course of conduct. Accordingly, for a neutral State the right and the duty of self-defence could not be a circumstance that precluded wrongfulness.

13. The concept of self-defence was, moreover, bound up with the concept of aggression. The Definition of Aggression adopted by the General Assembly in 1974⁴ established several categories of aggression according to their gravity, as he (Mr. Verosta) had shown in his statement before the Sixth Committee at its 1472nd meeting, during the twenty-ninth session of the General Assembly⁵—yet the Assembly had not established rules on self-defence for any of those categories, nor had it given the Commission a mandate to do so.

14. As Mr. Riphagen had pointed out (1620th meeting), the Commission could, in the circumstances, choose from three possibilities: accept article 34 as proposed by Mr. Ago, which he (Mr. Verosta) found unacceptable in its present form; adopt a safeguard clause stating that nothing in the present articles impaired the right of self-defence and include a reference to general international law and the Charter of the United Nations; or make no mention of self-defence at all, and wait until such time as the General Assembly might request the Commission to codify the concept.

15. Mr. TABIBI said he believed that article 34 was particularly significant for two reasons: firstly, the right of self-defence emerging from the great body of customary and conventional rules as a general principle of international law was a right exercised by man throughout his history and a law of nature; secondly, the right of self-defence against any coercive measures, whether military, economic, political or psychological, was an inherent right that must be respected by the community of nations. In the modern world that right was all the more indispensable in that it was not always certain whether the Security Council, dominated by great military powers, was able and ready to repel armed attacks, which were usually directed against the weaker nations for whose protection the Charter of the United Nations had come into being. The rights of self-defence and of self-determination were what made the Charter more valuable than the Covenant of the League of Nations.

16. Historically, the peace treaties that had followed every war had attempted to arrive at some rules of conduct which States would regard as binding in their international relations. In that respect, in 1625, Grotius, in *De jure belli ac pacis*, had advocated the acceptance of specific rules of conduct. The principle

³ See 1613th meeting, foot-note 2.

⁴ General Assembly resolution 3314 (XXIX), annex.

⁵ *Official Records of the General Assembly, Twenty-Ninth Session, Sixth Committee, 1472nd meeting, paras. 31–33.*

of such rules of conduct had assumed greater value with the rise of the oppressed peoples of Asia, Africa and Latin America and the protection, by people of conscience all over the world, of human rights and of mankind against tyranny. War became a crime against humanity when it was not waged to uphold international law, a concept that was all the more vital as warfare became more destructive.

17. The First World War, a flagrant violation of international law, had focused attention on the inadequacies of the existing laws and machinery. The Covenant of the League of Nations, subsequent treaties (such as the Geneva Protocol of 1924 and the Briand-Kellogg Pact of 1938) and the Charter of the United Nations were instruments that, for the first time, had required all member States to refrain from the threat or use of force against the territorial integrity or political independence of any State. The Charter also recognized, in Article 51, the inherent right of individual or collective self-defence against armed attack until the Security Council had taken measures necessary to maintain international peace and security. The inherent right of self-defence took on more importance to victims of armed aggression when the Security Council proved incapable of fulfilling its obligations.

18. Like Mr. Ago, he believed that it was far more interesting to look at the opinions of the many writers who had discerned a logically indispensable connexion between the progress made in their times by the trend in favour of the prohibition of the use of armed force and the concurrent acceptance in international law of the concept of self-defence as a necessary limitation of that prohibition. He also agreed with Mr. Ago that the conviction that there existed in customary general international law a principle specifically removing the wrongfulness normally attaching to an action involving the use of armed force if the action in question was taken in self-defence had become part and parcel of the thinking of publicists when the principle of such wrongfulness had itself moved from international treaty law to customary general international law.

19. Modern international law was quite different from traditional international law, since traditional laws had been evolved primarily to meet the needs of Europe, with the emphasis on the interest of the States concerned rather than of the community of nations. Nowadays, the rules were not merely for the benefit of a few States, even if those States were powerful from the military point of view, but for the protection of the community of nations and the right of each nation to exist.

20. In the period since the Charter had come into being, the community of nations had experienced rapid changes that were reflected in international law by the many instruments adopted. The inescapable question at the present time was what value could be placed on the rules of international law, both customary and conventional, if they could be broken at the will of one

or a few major Powers. In its early years, the Commission had, in the preamble and in article 14 of the Draft Declaration on Rights and Duties of States,⁶ drawn the attention of the world to the importance of the supremacy of international law over national interests.

21. The Charter of the United Nations was an indivisible whole aimed at maintaining international peace and security, saving succeeding generations from the scourge of war and acknowledging the inherent right of self-defence and all the other values held dear by mankind. The provisions of the Charter, like all other principles of general and customary international law, were for the good of mankind, and their usefulness mirrored the needs of society and the changes that took place in society. In that context, article 34 in its present form did not meet all the requirements of the principle of self-defence in the case of aggression and armed attack, and those requirements could not be covered by the narrow meaning of Article 51 of the Charter. He therefore agreed with the comments of previous speakers with regard to the question of the scope of the article and its place in the draft. As to the latter point, the principle was so crucial that it should not appear among the articles precluding wrongfulness and it should have a special place. As to its scope, the article should be extended to encompass all the relevant matters, such as self-defence against economic, political, psychological and other coercive measures. For those reasons, he supported Mr. Tsuruoka's proposed amendment to article 34 (1627th meeting, para. 1) and trusted that the Drafting Committee would submit an expanded text to the Commission.

22. Mr. SUCHARITKUL said he did not think that the Commission should consider draft article 34 as exhausting the list of circumstances precluding the wrongfulness of an act of a State. In his view, except where there was consent or agreement between the parties concerned, state of necessity, as covered by draft article 33,⁷ was simply an attenuating circumstance. It could, in certain cases, diminish the seriousness of the injurious consequences of an internationally wrongful act, but it was not a circumstance that precluded wrongfulness. Hence, as a circumstance precluding the wrongfulness of an act, state of necessity must be strictly limited in scope.

23. With regard to self-defence, he was in favour of Mr. Ago's proposed wording for draft article 34, which did not set out to codify the concept of self-defence or to define it with any degree of precision. The concept had always existed in every legal system, whether international, regional or national.

⁶ See *Yearbook . . . 1949*, p. 287.

⁷ For text, see 1612th meeting, para. 35.

24. As a concept in municipal law, self-defence did not have the same significance in every country, for it depended on certain sociological factors. Under Thai penal law, for example, the concept covered not only a person's right to defend himself but also the right to defend his family and property and the reputation of his family. It was almost a religious conception of self-defence, and the lawfulness of the right depended on the way in which it was exercised.

25. In international law, the concept of self-defence had evolved progressively as war or the use of force had come to be considered less and less lawful and it had become increasingly easy to identify acts of aggression. Article 51 of the Charter confirmed the existence of the inherent right of self-defence without actually defining it and associated it closely with the role played by the Security Council as the organ responsible for the maintenance of international peace and security. As past United Nations history showed, however, the Security Council was not the only body to deal with issues related to the maintenance of peace, and other principal and subsidiary organs within the United Nations system were from time to time called upon to play a decisive role in that area, more particularly the General Assembly, and also the International Court of Justice, which had delivered judgements on the scope of the right of self-defence in a number of cases. Other bodies, too, such as committees of inquiry, conciliation commissions and good offices missions, could be required to define the lawfulness of the exercise of that right by the State. Accordingly, in order to define the scope of the right of self-defence as embodied in Article 51 of the Charter, reference should be made to general international law, which was developing, and also to the United Nations system, without defining the concept of self-defence, even for the purposes of article 34 alone.

26. Inevitably, the exercise of the right of self-defence raised a number of delicate issues in the practice of States. In what circumstances was a State entitled to defend another State, for instance? Against whom or what could a State invoke the right of self-defence in the name of another State? Did the existence of a mutual military assistance clause in a co-operation agreement between two States entitle one of them to invoke the right of self-defence on behalf of the other? Did a clause of that nature mean that the weaker State renounced its right to defend itself and delegated that right to the stronger State? Since the concept of self-defence permitted the State itself, or a group of States to which it belonged, to exercise that inherent right, the question was how to ascertain the genuineness of the weaker State's consent to be defended against an external threat. There was also a risk that a self-defence clause in a mutual friendship and assistance treaty might be used to intervene in a neighbouring State that was a party to the treaty, not to defend it against an external armed attack but to put down an indigenous national liberation movement or political opposition movement.

27. As far as all those matters were concerned, international law was by no means pinpointed in the practice of States. He therefore considered that the time was not ripe to attempt to codify the right of self-defence in general, and that it was sufficient to include a reference to international law and to the Charter of the United Nations. Moreover, the exercise of self-defence must not be confined to the use of armed force. A State that was under attack could resort to other diplomatic, economic, cultural and even political measures to repel an armed attack that posed a threat to its political independence or territorial integrity.

28. In conclusion, he expressed the hope that draft article 34 would be brought more into line with the text proposed by Mr. Tsuruoka, for it had the support of several members of the Commission.

Co-operation with other bodies (continued)*

[Item 10 of the agenda]

STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

29. The CHAIRMAN invited Mr. Harremoës, Observer for the European Committee on Legal Co-operation, to address the Commission.

30. Mr. HARREMOES (Observer for the European Committee on Legal Co-operation) said that the Council of Europe attached great importance to close collaboration with the International Law Commission and he wished to assure the Commission that he would do everything possible to pursue his predecessor's policy in that regard. At its session in November 1979, the European Committee on Legal Co-operation had been pleased to receive a visit from Mr. Riphagen, who had reported on the Commission's work; he trusted that the Commission would also be represented at the Committee's session in November 1980.

31. During the previous year, the Council of Europe had prepared a number of conventions and draft conventions. The first of those conventions, which had been opened for signature at Berne on 19 September 1979, related to the conservation of European wildlife and natural habitats, one of its objectives being to promote co-operation among States. Under the terms of the convention, the contracting parties undertook to promote national conservation policies, with particular regard to conservation in regional planning policies and to pollution abatement. Since many of the problems encountered could not be solved within the territorial context of the Council of Europe, the convention had been drafted with a view to enabling the greatest possible number of States that were not members of the Council of Europe to become

* Resumed from the 1611th meeting.

contracting parties. Thus, Finland had been permitted to sign the convention as soon as it had been opened for signature—the first time that such an opportunity had been made available before the entry into force of a convention. The convention had also been signed by a member of the Commission of the European Communities and by the Chairman of the Council of Ministers of the European Communities. In addition, the Committee of Ministers of the Council of Europe had invited Yugoslavia to sign the convention, although Yugoslavia had not participated in the preparation of it. For internal constitutional reasons, Yugoslavia had not been able to sign the convention in Berne, but he trusted that it would do so in the near future. The Committee of Ministers could likewise invite non-member States to accede to the convention after its entry into force, for which five ratifications were required. Eighteen of the 21 member States of the Council of Europe had signed the convention on the day it had been opened for signature; only Cyprus, Iceland and Malta had not done so.

32. Another convention concluded during the previous year was the Convention on recognition and enforcement of decisions concerning custody and on restoration of custody of children, which had been opened for signature on 20 May 1980. The purpose of the convention was twofold: recognition and enforcement of decisions concerning custody of and access to children; and restoration of custody in the event of the removal of the child to the territory of another Contracting Party. Specifically, the Convention provided that, in the event of improper removal of a child, in cases where both parents and the child were citizens exclusively of the State in which the decision regarding custody was delivered and the child was normally resident in that same State, custody should be restored forthwith if an application was made within six months of the child's removal. In cases where the requirements regarding nationality and residence were not met, the convention provided for restoration of custody, but listed a limited number of grounds of refusal that related in the main to rights of defence and to other decisions on custody already delivered in the requested State. In cases where a request was submitted after the six-month period had expired, the Convention provided for more numerous grounds of refusal, since the child might already have been integrated into the surroundings to which he or she had been removed. The convention had been immediately signed by all member States of the Council of Europe except for the four Scandinavian countries, Malta and Turkey.

33. At its latest session, the European Committee on Legal Co-operation had finalized the draft convention for the protection of individuals with regard to automatic processing of personal data. The text was to be submitted to the Committee of Ministers in the autumn of 1980, and it was hoped that it would be approved before the end of the year and opened for signature early in 1981. The draft convention aimed at

reconciling respect for privacy with freedom of information, regardless of frontiers. It covered personal data held on files in the private and public sectors, irrespective of whether such data were processed within one country or transferred internationally. Under the convention, contracting States would undertake to apply in their municipal law certain principles that were, or should be, common to all countries, such as accuracy of data, prevention of misuse, security of storage and access by the data subject. A certain degree of harmonization of substantive legal rules was therefore involved. Special restrictions designed to protect citizens against infringement of their rights as a result of data flow across frontiers were not allowed, since the controls were meant to be common to all countries and such restrictions were therefore unnecessary. Special machinery would be provided to assist a person in one country to defend his rights when a data file containing information about him was stored in another country. That rule was particularly relevant to multinational corporations, which could store information at places that were convenient for them but not for the data subject.

34. The preparation of the draft convention, which was to be an "open" convention, had taken place in consultation with the OECD and the ECE and in the presence of observers from Australia, Canada, Finland, Japan and the United States of America. It was hoped that, in view of their importance in the field of data processing, some of the non-European countries would eventually become contracting parties to the convention.

35. The European Outline Convention on trans-frontier co-operation between territorial communities or authorities had been opened for signature in May 1980 and had been signed by eight member States of the Council of Europe. That Convention laid down the conditions for international co-operation between local authorities, and set forth in its appendices a number of model agreements.

36. No further ratification of the European Convention on State Immunity (and Additional) Protocol (1972) had been received since the Commission's thirty-first session. The Convention was in force as between Austria, Belgium, Cyprus and the United Kingdom, but the Protocol was not yet in force because only three of the requisite five ratifications had been deposited with the Secretary-General of the Council of Europe.

37. The 1957 European Convention on the Peaceful Settlement of Disputes had been ratified by 13 of the 21 member States of the Council of Europe, but only seven of those countries had accepted the Convention in its entirety. The Assembly, wishing to encourage States to make more frequent use of the Convention, had proposed that it should be re-examined with a view to replacing the competence of the International Court of Justice by that of the European Court of Human Rights and to vesting the latter with competence for

arbitration in extrajudicial disputes. Those proposals, however, had not met with the unanimous approval of the European Committee on Legal Co-operation. Some delegations had been reluctant to accept any pre-arranged compulsory settlement system that went beyond the terms of the convention, although they had favoured *ad hoc* machinery for the settlement of existing disputes. Other delegations had considered that the existing systems, and in particular those which vested competence in the International Court of Justice, were perfectly satisfactory, and had seen no justifiable reason for establishing yet more international tribunals.

38. Those views had been communicated to the Committee of Ministers, which had decided to request the European Committee on Legal Co-operation for a further opinion regarding the action that the Committee of Ministers might take on the Consultative Assembly's recommendation. The relevant Steering Committee was to discuss the matter in November 1980, but it was highly doubtful whether it would recommend any revision of the Convention.

39. As to the role of the Council of Europe in the wider context of the legal activities of the United Nations, he said that the work of the two bodies must necessarily be complementary. It was clear that a regional organization such as the Council of Europe, which had relatively few members, could more easily find an acceptable common denominator than could an international organization that had many members; it was equally clear that the regional similarity in political traditions and social structures could make such common denominators more significant in practical terms. Regional organizations, taking a lead from the United Nations, could therefore transform into reality what might otherwise remain a dead letter.

40. Again, regional organizations could act as laboratories for new ideas that were not ripe for discussion at the wider geographical level, and for new projects that could be tested critically with a view to proving or disproving their value. If the ideas and projects could be made to work in one part of the world, it was perhaps easier to apply them progressively in the rest of the world.

41. A third function of organizations such as the Council of Europe was to facilitate contacts between their member States and to ensure that, in activities being carried out at the world level, due regard was paid to regional traditions and interests. The Council of Europe would appear to be the ideal forum for such work and for making a significant contribution to the activities undertaken in New York and Geneva. For example, in September 1979 it had organized a meeting on the most-favoured-nation clause and national experts had exchanged views on aspects of the Commission's work, with a view to preparing the written comments that the Secretary-General of the United Nations had invited Governments to submit. The exchange of views, which had been conducted in

an open and constructive spirit, would undoubtedly help to advance the cause of international law.

42. Lastly, with regard to the Council of Europe's future activities in regard to legal matters, the European Committee on Legal Co-operation and the European Committee on Crime Problems were currently reviewing their programmes in order to identify priority activities in the second medium-term plan, which was to take effect at the end of 1980. He hoped that operation would confirm the leading role in the field of European co-operation that the Conference of European Ministers of Justice had assigned in 1973 to the Council of Europe. Furthermore, he was confident that the proposals made would lead to a realistic programme and enable the Council of Europe to continue to make an essential contribution to the development of international law. The programme would emphasize three main types of activities: first, harmonization of substantive law and promotion of inter-State co-operation especially with regard to family law, administrative law and criminal law, and in such new areas as the law governing the use of computers in society, labour law, medical law and the law governing the urban habitat; secondly, exchange of views and information among member States regarding their legislative activities, aimed particularly at preventing further discrepancies between national legal systems; and, thirdly, encouragement of the study of comparative law.

43. All those activities were to be viewed in the light of the Council of Europe's continuing concern for the protection of human rights. That concern, reflected in every instrument prepared by the Council, was the link between all the activities undertaken in the work programme and the medium-term plan, including those in the legal sector.

44. It was his conviction that the Council of Europe's achievements justified and would continue to justify its aspiration to remain the principal organization for legal co-operation in Europe.

45. Mr. CALLE Y CALLE, speaking on behalf of the Latin American members of the Commission, said that the presence of the Observer for the European Committee on Legal Co-operation at the present and at previous sessions of the Commission attested to the importance of the collaboration between the two bodies.

46. In his account of the Committee's activities, Mr. Harremoes had referred to three conventions which had been concluded since the Commission's thirty-first session. The first, relating to conservation of European wildlife and natural habitats, was particularly important in the modern world, where the predatory activities of man and the harmful consequences of industrial development imperilled the natural heritage; for that reason, close co-operation among States was essential. The second convention, relating to custody of children, was designed to cater for a situation which

arose largely because marriage as an institution no longer rested on such firm foundations and divorce often involved spouses of different nationalities or places of residence. Complex issues of that kind could only be settled by conventional means. The third convention, concerning protection of persons in the automatic processing of personal data, was highly relevant at a time when computerization and data processing could affect such rights of the individual as the right to privacy. Those rights should therefore be protected both at the national and at the international level.

47. He thanked Mr. Harremoes for the interesting information with which he had supplied the Commission, and expressed his best wishes for the future work of the European Committee on Legal Co-operation.

48. Mr. THIAM, speaking on behalf of the African members of the Commission, said how much they appreciated the annual account of the activities of the European Committee on Legal Co-operation. Europe and Africa were linked not only by their history but also by the economic and cultural co-operation that had grown up between them. The African members of the Commission therefore took a keen interest in developments in the law in Europe, for it had had a strong impact in Africa. Family law was, of course, still peculiar to that continent but, for the rest, the French-speaking countries had been profoundly influenced by Roman law and the English-speaking countries by common law. Since relations between Europe and Africa were constantly developing, it was important for African jurists to keep abreast of legal developments in Europe and to draw on them so far as was necessary. With regard to the protection of minors, for example, the presence of numerous Europeans in Africa and Africans in Europe inevitably raised all kinds of problems. In conclusion, he expressed the hope that African circles would one day have the opportunity to inform European bodies of matters pertaining to law in Africa.

49. Mr. TSURUOKA, speaking on behalf of the Asian members of the Commission, congratulated the Observer for the European Committee on Legal Co-operation on his interesting statement and remarked that he had been struck by the fact that many of the Committee's concerns had much in common with those of the Commission and of the Asian-African Legal Consultative Committee. The three conventions to which Mr. Harremoes had referred were of the utmost relevance both to Europe and to Asia. The work of the Committee was unquestionably a valuable source of inspiration for the countries of Asia. Co-operation between the Committee and the Commission was proving to be increasingly fruitful, and must certainly be developed further.

50. Mr. USHAKOV said that the Commission felt honoured by the presence of Mr. Harremoes. He drew attention to the progress made by the Council of Europe in the particularly important and serious

matter of environmental protection: the drafting of a convention on the subject showed the path which all States should follow in order to protect the human environment. The Committee was also to be congratulated on its work in the field of private international law, one with which the Commission was not directly concerned but was of obvious relevance to some of its activities, for instance in the topic of the jurisdictional immunities of States and their property. The Committee's activities were of benefit not to the European countries alone but to the whole of mankind, and it was to be hoped that relations between the Committee and the Commission would continue to prosper.

51. Mr. REUTER, speaking on behalf of the European members of the Commission, said that they fully appreciated the work of the Council of Europe. Admittedly, it was a Europe being built up slowly step by step—by means of small practical achievements such as the drafting of conventions—but it was done quite openly. Mr. Harremoes had clearly demonstrated that the European Communities were opening their doors increasingly wide to the European States. True, Europe's geographical limits were uncertain, but the tendency neither to exclude nor yet to annex any country was to be welcomed.

52. Turning to the problems that the Committee was seeking to resolve, he observed that some issues, such as the protection of nature, did not concern Europe alone, whereas others were more specifically European. As to family law, each region naturally had its own particular features, but in the case of the custody of children, for instance, some problems unquestionably went beyond national frontiers. The Commission might do well one day to turn its attention to certain topics, such as family law, which it had for the time being left to one side. In that way, the work being done by the European Committee in that field might prove to be the foundation stone of an entire edifice to be built up later.

53. In speaking of the draft convention for the protection of individuals with regard to automatic processing of personal data, the Observer for the European Committee had mentioned the problem of multinational corporations, yet there were also a number of international organizations that kept personal data and had sufficient financial resources to use electronic equipment for that purpose. Depending on the State in whose territory they were located, those organizations might well find themselves confronted with delicate legal problems regarding their rights and duties. The work carried out by the European Committee in that domain was of very definite interest to the Commission.

54. Lastly, he wished to point out that, in ascertaining laws and the practice of States in respect of the topics with which it was concerned, the Commission made abundant use of the documentation supplied by

regional groups such as the European Community on Legal Co-operation.

55. The CHAIRMAN thanked the Observer for the European Committee on Legal Co-operation, on behalf of the Commission, for his interesting account of the Committee's work. Europe occupied a very special place so far as all forms of law and social organization were concerned, since much of the world lived by the social precepts that had been systematized and propagated by European countries. Possibly Europe's greatest gift to the world was that of a system, whether economic, legal or political, which helped to give life a minimum degree of predictability and hence increased the likelihood of survival.

56. The European Committee on Legal Co-operation was to be congratulated on its many achievements. It was in the vanguard of the move to develop systems to promote social progress, for it was concerned not only with environmental protection and family law but also—possibly most important of all—with protection of the individual against encroachment by the apparatus of the State and other concentrations of power, such as the transnational corporations, on life, liberty and privacy.

57. The Commission, which greatly valued its links with the Committee, would make every effort to send an observer to the Committee's session in November 1980.

58. He requested Mr. Harremoes to convey to the Secretary-General of the Council of Europe the Commission's highest esteem and the hope that the links between the two bodies would be strengthened in the future.

59. Mr. HARREMOES (Observer for the European Committee on Legal Co-operation) thanked the Chairman and members of the Commission for their kind and encouraging words.

The meeting rose at 12.40 p.m.

1629th MEETING

Wednesday, 9 July 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Boutros Ghali, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Also present: Mr. Ago

Visit of a member of the International Court of Justice

1. The CHAIRMAN welcomed Mr. Sette Câmara,

Judge at the International Court of Justice and former member of the Commission.

State responsibility (*continued*) (A/CN.4/318/Add.5-7, A/CN.4/328 and Add.1-4)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*concluded*)

ARTICLE 34 (Self-defence)¹ (*concluded*)

2. The CHAIRMAN invited Mr. Ago to reply to the questions raised in the course of the discussion of draft article 34.

3. Mr. AGO said that he wished first of all to remind the Commission of a number of considerations to which they had subscribed on more than one occasion, and particularly those that appeared in the report of the Commission on the work of its thirty-first session.

4. With regard to Chapter V (Circumstances precluding wrongfulness), the Commission had stated that the chapter was

intended to define those cases in which, despite the apparent fulfilment of the two conditions for the existence of an internationally wrongful act, its existence cannot be inferred owing to the presence of a circumstance which stands in the way of such an inference. The circumstances usually considered to have this effect are consent, countermeasures in respect of an internationally wrongful act, *force majeure* and fortuitous event, distress, state of emergency [necessity] and self-defence. It is with each of these separate circumstances precluding wrongfulness that chapter V is concerned.²

The Commission had then stated that, in its commentary to draft article 2 (Possibility that every State may be held to have committed an internationally wrongful act), it had said that:

the existence of circumstances which might exclude wrongfulness . . . did not affect the principle stated in article 2 and could not be deemed to constitute an exception to that principle. When a State engages in certain conduct in circumstances such as self-defence, *force majeure*, or the legitimate application of a sanction, its conduct does not constitute an internationally wrongful act because, in those circumstances, the State is not required to comply with the international obligation which it would normally have to respect, so that there cannot be a breach of that obligation.³

The Commission had thus shown that the existence of one of the circumstances contemplated in chapter V had the effect of suspending or doing away altogether with the duty of complying with an international obligation.

5. In the same passage in its report, the Commission had also referred to the replies given by certain Governments to the Preparatory Committee for the

¹ For text, see 1619th meeting, para. 1.

² *Yearbook . . . 1979*, vol. II (Part Two), p. 106, document A/34/10, chap. III, sect. B.2, para. (1) of the commentary to chapter V.

³ *Ibid.*, pp. 106-107, para. (2) of the commentary.

Conference for the Codification of International Law (The Hague, 1930), concerning "circumstances in which a State is entitled to disclaim international responsibility". Among the States that had spoken of self-defence, mention should be made of the United Kingdom Government, which had stated that: "... self-defence may justify action on the part of a State which would otherwise have been improper."⁴ On a more general level, the Commission had further stated the following:

The act of the State in question cannot be characterized as wrongful for the good reason that, because of the presence of a certain circumstance, the State committing the act was not under an international obligation, *in that case*, to act otherwise. In other words, there is no wrongfulness when one of the circumstances referred to is present, because by reason of its presence the objective element of the internationally wrongful act, namely, the breach of an international obligation, is lacking. For instance, in the case of the circumstance known as "consent", the reason why the State incurs no responsibility even though it has engaged in conduct not in conformity with what is normally required by an international obligation binding it to another State is that, in that particular instance, the obligation in question is rendered inoperative by mutual consent. There can have been no breach of that obligation, no wrongful act can have occurred, and hence there can be no question of international responsibility. The same applies to "countermeasures in respect of an internationally wrongful act"; the reason why there is no responsibility is that the international obligation to refrain from certain conduct towards another State does not apply when that conduct is a legitimate reaction to an internationally wrongful act committed by the State against which the conduct is adopted. Here again, the conduct does not violate any international obligation incumbent on the State in that case and hence does not constitute, from the objective standpoint, an internationally wrongful act. Similar arguments apply to the other circumstances discussed in this chapter.⁵

6. It was of the utmost importance to bear all those considerations in mind when embarking on the examination of the various circumstances precluding wrongfulness which the Commission promised the General Assembly it would deal with in chapter V.

7. In the course of the discussion of draft article 34, Mr. Riphagen (1620th meeting) had first reviewed, but with the clear intention of excluding them, a certain number of circumstances which might theoretically have been studied in chapter V. What Mr. Riphagen had particularly stressed was the need not to leave any gaps in the draft. He had wondered if it was necessary to specify that the circumstances enumerated in chapter V were the only ones recognized by the Commission as precluding wrongfulness, and he had alerted the Commission to the risk of making an assertion of that kind in a draft article. In that connexion, he (Mr. Ago) wished to observe that, in its report on the work of its previous session, the Commission had referred to the circumstances dealt with in chapter V as "circumstances usually con-

sidered to have this effect",⁶ without intimating that there could absolutely not be others. He himself had no intention of proposing a provision which would establish the exhaustive nature of the series of circumstances set forth in chapter V, although he was convinced that at present there were no other circumstances precluding wrongfulness—but he was too conscious of the evolutionary nature of law to believe that a circumstance which did not today preclude wrongfulness might not do so tomorrow. Since the Commission's work of codification must be made to last, the door should not be shut upon such a possibility.

8. In Mr. Riphagen's opinion, the Commission might still take into consideration the hypothesis in which a state of necessity was created by the State that suffered the consequences of the act dictated by the necessity. In fact, two cases could arise according to whether or not the situation of danger had been created by the victim State in breach of one of its international obligations. If the action which lay at the origin of the state of necessity did not constitute the breach of an international obligation, it was self-evident that the state of necessity could be invoked. In the contrary case—namely, if the State that was a victim had created the situation of necessity affecting another State by committing an internationally wrongful act—it would be more often the case that the wrongfulness of the action of that other State was already precluded because of other circumstances, such as the application of countermeasures. The situation mentioned by Mr. Riphagen certainly did not seem to him to constitute a separate circumstance precluding wrongfulness.

9. With regard to proportionality, Mr. Riphagen shared his (Mr. Ago's) opinion. Proportionality was an essential condition in the case of reprisals and countermeasures; in the case of a state of necessity, the notion arose in another form, which was to require that the interest sacrificed for reasons of necessity was less than the interest to be protected. On the other hand, when it came to self-defence, the assessment of the proportionality varied considerably from one case of self-defence to another. It was not impossible that the action taken in defence against an armed attack might be, and had to be, out of proportion to that attack. That was why he had emphasized that there must be proportionality in its purpose: the action taken in self-defence must aim at preventing the attack, and not at objectives going beyond that limit. Needless to say, the rule of proportionality in self-defence, however flexible that rule might be, would be breached if a State profited from an armed attack by another State to react not only by repulsing the attack, but also by annexing the territory of the attacker.

10. With regard to collective self-defence, Mr. Riphagen seemed initially to have expressed doubts as to

⁴ *Ibid.*, pp. 107–108, para. (6) of the commentary.

⁵ *Ibid.*, pp. 108–109, para. (9) of the commentary.

⁶ *Ibid.*, p. 106, para. (1) of the commentary.

whether it existed, even though it was mentioned in Article 51 of the United Nations Charter; he had then suggested the possibility that a conventional instrument might enlarge the *casus belli*, and he had mentioned the Rhine Pact. There could be no doubt that the Pact made provision for collective self-defence. In the event of aggression along the Rhine frontier, it was provided that England and Italy could act in self-defence on the side of the victim State.

11. Mr. Riphagen had also been concerned about the situation of third States. It was clear that action taken in self-defence against State A might injure the interests of State C, and on that point he (Mr. Ago) endorsed the views expressed by the Commission in the commentary to article 30, relating to countermeasures. In one case as in the other, a third State might be injured, but its rights should certainly be fully safeguarded. In relation to countermeasures, the Commission had stated the following:

... there remains the question as to what happens if, in the application of legitimate countermeasures against a State which has previously committed an internationally wrongful act against another State, these countermeasures have the effect of infringing the rights of a third State towards which application of such a measure is in no way justified. This is by no means a theoretical case. It happens frequently in international relations that the action of a State which applies a legitimate countermeasure against another State, that is aimed directly at that State, nevertheless causes injury to a third State. In situations of this kind, the State that has taken the action sometimes invokes as justification vis-à-vis the third State whose rights have been unduly infringed the fact that in the circumstances it would have been difficult, if not physically impossible, for it to inflict the necessary reactive measure or sanction on the State that had committed the internationally wrongful act without at the same time injuring the third State. It has been argued, for example, that during the bombardment of a town or port of an aggressor State by way of reprisal it was not always possible to avoid injury to aliens or their property. It has also been argued that the aircraft of the State which were detailed to apply the sanction might, in the circumstances, find themselves in practice forced to cross the airspace of a third State, in violation of its sovereignty, in order to reach the targets of the punitive action in the territory of the State which was the subject of the sanction. It is hardly necessary to add that these cases of what might be called indirect infringement of a right of a third State may just as easily occur in cases of application of countermeasures involving no use of armed force ...

Consequently, the legitimate application of a sanction against a given State can in no event constitute *per se* a circumstance precluding the wrongfulness of an infringement of a subjective international right of a third State against which no sanction was justified.⁷

In his view, that conclusion might be applied as it stood to the case in which the rights of a third State were injured by action taken in self-defence.

12. Lastly, Mr. Riphagen had considered that draft article 34 could serve as a working basis, but that its text should be corrected on a number of points and

that the reference to Article 51 of the Charter was too restrictive.

13. Mr. Ushakov (1620th meeting) had made an appeal for caution. Although not disputing the validity of the commentary to the articles under consideration, he believed that the Commission should cast it in a shorter form. In particular, he did not see the need for an exposition of the origin of the two-fold rule of the prohibition of the use of force and the lawfulness of action taken in self-defence against the use of force. He (Mr. Ago), however, believed that the origin was important. It was interesting to note that the notion of self-defence had long been defined in internal law because, since time immemorial, individuals had been forbidden to protect their rights and interests by recourse to force; also, self-defence was recognized in internal law only in very precise cases where an individual was permitted, in order to defend his rights and interests, to act in the place of the bodies that had the monopoly of the use of force. The situation in international law was always different.

14. Another reason for caution, according to Mr. Ushakov, lay in the fact that, unlike self-defence, the other circumstances enumerated in chapter V had not already been codified in a provision such as Article 51 of the Charter. Admittedly, the Charter had codified the principle of self-defence, although, in his (Mr. Ago's) opinion, there was no difference in that regard between unwritten international law and the written law of the Charter. Nevertheless, not all writers recognized that, and some of them represented States in the General Assembly, where they put forward not their personal ideas but those of States. Consequently, the Commission should not fail to indicate that, in the view of some, international law contained a notion of self-defence broader than that in Article 51, which would simply give one example of self-defence.

15. For the rest, he supported Mr. Ushakov's appeals for caution. In regard to preventive self-defence, he (Mr. Ago) had resisted the temptation to refer to everything which divided States and writers. He had not given an account of the discussions on that question which had taken place in a number of United Nations bodies and from which two schools of thought emerged, each of which drew attention to a risk: the risk that self-defence might lead to abuse and the risk that a State might have to allow itself to be destroyed before being entitled to act in self-defence. The United Nations organs had come up against practical difficulties because of that. Those organs should therefore be allowed to retain their freedom of judgement. The Commission should limit itself to working from the premise that, if it was established that a State had acted in self-defence, the unlawfulness of its conduct was precluded. There was no need to define or codify self-defence, any more than the Commission had done with regard to consent, countermeasures and sanctions.

⁷ *Ibid.*, p. 120, paras. (17) and (18) of the commentary to article 30.

16. There was no reason to suggest, as Mr. Ushakov had done, that the notion of self-defence was broader than that of a circumstance precluding wrongfulness. The Commission should take as a starting-point the fact that such a circumstance existed and draw from it a conclusion as to the non-existence of the objective element of a wrongful act in that specific case. Its task was solely to codify the rules relating to State responsibility.

17. Lastly, Mr. Ushakov had emphasized that self-defence differed somewhat from other circumstances precluding wrongfulness because the action taken in self-defence was lawful *ab initio*. The same was true of all the other circumstances precluding wrongfulness. For example, if a State occupied the territory of another State with the latter's consent, that consent constituted a prior suspension of the obligation which prohibited such an act, so that the occupation was lawful *ab initio*.

18. Mr. Reuter (*ibid.*), for his part, had referred to cases where there might be self-defence in the absence of armed attack. However, the example he had given of fishing vessels that entered a zone regarded by another State as an exclusive fisheries zone, thus provoking incidents with warships of that other State, did not come under the heading of self-defence. The other State confined itself to taking lawful measures against individuals who were acting in breach of internal law. In his own view, it was important to limit the notion of self-defence to the reaction which a State might have to an act of aggression by another State.

19. While concerned that the Charter should be respected, Mr. Reuter did not believe that international law was born with the Charter. He (Mr. Ago) also considered that the two-fold rule relating to self-defence antedated the Charter, although he would not make it go as far back as Mr. Verosta had done (1628th meeting). There was no doubt, however, that at the United Nations Conference on International Organization (San Francisco, 1945) States had merely given written form to an already existing principle. Mr. Reuter preferred that the article under consideration refer to the Charter as a whole rather than to Article 51.

20. Mr. Schwebel (1621st meeting), for his part, had suggested that it might be going too far to consider self-defence as being more or less the only exception to the prohibition of the use of force as laid down in Article 2, paragraph (4) of the Charter. But he (Mr. Ago) had never gone as far as that; he recognized that the use of force was permitted in other cases, particularly in that of countermeasures and sanctions as provided for in Chapter VII of the Charter. Moreover, Article 106 of the Charter, which was a transitional provision, also permitted the use of armed force. None the less, in all those cases, the use of force did not come within the realm of self-defence, which should be distinguished from the legitimate application of a sanction. The two notions were similar, but not at

all identical. The application of a sanction might be undertaken in respect of a wrongful act other than an aggression. Furthermore, because of its aim and *raison d'être*, self-defence was concerned with the commission of a wrongful act: a State that acted in a state of self-defence wanted to prevent an armed attack by another State from succeeding. Sanctions, however, were part of the phase of implementation (*mise en oeuvre*) of responsibility. The aim of self-defence was to prevent the adversary from acting, whereas a sanction might take the form of a penalty or compensation, or aim at preventing the repetition of the act condemned.

21. Moreover, Mr. Schwebel had wondered whether the article under consideration meant that a State did not have the right to act in self-defence in the event of attack by terrorists or terrorist organizations. In his own view, it was indeed lawful to react against such attacks, but on grounds other than self-defence, which had to be preceded by an armed attack by another State.

22. Mr. Francis (*ibid.*), for his part, had warmly welcomed draft article 34 and had insisted on the need to include it in chapter V. He had expressed the hope that the text of article 34 would not give the impression of constituting an amendment to the Charter. He (Mr. Ago) shared that point of view and saw in it one more reason that the article on self-defence should appear in chapter V, because if a separate chapter was to be devoted to the notion of self-defence that might be seen as an attempt to rewrite or to interpret the Charter.

23. Mr. Šahović (*ibid.*) had taken a courageous and at times almost audacious stand. He had pointed out that Article 51 of the Charter was at present the expression of general international law and had examined the meaning of the term "self-defence". He (Mr. Ago) found the term extremely clear in French. Mr. Šahović had also pointed out that, just as self-defence was in the forefront of circumstances precluding wrongfulness in internal law, it should be in the forefront of the circumstances enumerated in chapter V of the draft articles. He had even regretted that Mr. Ago had not gone further than had been the case in the positions he had adopted on some points of interpretation of the Charter. Actually, as the draftsman of a set of articles, he (Mr. Ago) had deliberately—although regretfully—shown the greatest caution in that respect. Lastly, Mr. Šahović had expressed his preference for a reference to the Charter as a whole rather than to Article 51 alone.

24. A suggestion to that effect had also been made by Sir Francis Vallat (*ibid.*), who had recognized the need to round off chapter V of the draft articles with a provision on self-defence. He had pointed out, however, that the use of force might be lawful in cases other than self-defence. He (Mr. Ago) shared that point of view, yet the Commission's task was not to indicate when force might be used but to establish the rule that the use of force in self-defence was a

circumstance precluding wrongfulness. Moreover, the Commission must definitely express that rule without having to interpret the Charter. Finally, Sir Francis had rightly recommended that draft article 30 should be the basis for the wording of the article under consideration.

25. Mr. Tsuruoka (1627th meeting) was another member of the Commission who favoured a reference to the Charter as a whole rather than to Article 51 alone. He had stressed that the task of the Commission was not to define self-defence and that it should take a primary rule on the subject as a basis for such conclusions as were applicable in the field of State responsibility.

26. The existence of unarmed aggression had been brought out by Mr. Díaz González (*ibid.*). Ideological, economic or political forms of aggression might admittedly exist, but even if their existence were recognized and they were condemned, it could not be concluded that in such cases a State was authorized to resort to armed force in self-defence. Under the United Nations Charter, self-defence was reduced to one hypothesis, namely, that of resorting to force in order to resist an armed attack, leaving all other possible means, including legitimate countermeasures, available for reacting against any other form of aggression which breached an international obligation.

27. Mr. Barboza (*ibid.*) had stressed the difference between self-defence as conceived in general international law and self-defence as defined in Article 51 of the United Nations Charter. He had noted that it should be remembered that internal law normally required the fulfilment of two conditions for there to be self-defence: on the one hand, the use of force had generally to be prohibited and, on the other, the defence of the individual had to be reserved for a centralized organ of the State. The first of those two conditions existed under international law, since Article 2, paragraph 4, of the Charter required Members to “refrain . . . from the threat or use of force”. Yet Chapter VII of the Charter provided for collective action by the Security Council in order to defend a State from an act of aggression. As envisaged in the Charter, therefore, the sphere of application of self-defence was limited in time, since it could be exercised only prior to intervention by the Security Council. But experience had shown the inadequacies of the collective system of action instituted by the Charter, since the Security Council rarely intervened to uphold the rights of States which were victims of an aggression. The scope of self-defence was therefore, in reality, broader in present general international law than under Article 51 of the Charter. Consequently, it might be contended that the notion of self-defence was not yet firmly fixed in international law and that it would not take its final shape until all the prerequisites for its existence in internal law were met in international law.

28. Mr. Pinto (*ibid.*) had advocated the inclusion of an article on self-defence in chapter V of the draft, also rightly pointing out that it was not a matter of codifying the rules relating to self-defence, but of providing for their consequences in regard to State responsibility. Like Mr. Barboza, Mr. Pinto felt that reference should be made to the Charter as a whole rather than to Article 51, which was perhaps too limited. Personally, although he had no objection to that, he (Mr. Ago) did not think the Charter contained any other provision relating to self-defence as such.

29. Mr. Verosta (1628th meeting) believed that the concept of self-defence had already existed in the nineteenth century, since international law had distinguished between just wars and unjust wars. Yet the notion of self-defence was something other than the consequence of distinguishing between just wars and unjust wars. The notion of just war—even admitting its “judicial” nature—is much broader than that of a defensive war. Self-defence consisted in permitting the use of force only in cases where a State was the victim of an armed attack and had to defend itself immediately to preserve its independence and territorial integrity. That concept had not emerged in international law until after the First World War, with the Covenant of the League of Nations and other instruments that had followed it. The main difference between the Covenant and the United Nations Charter was that the authors of the Covenant had above all, largely out of a concern for justice, sought a means for equitably settling disputes between States, whereas the authors of the Charter, with the experience of the League of Nations behind them, had above all laid emphasis on the need to preserve peace by avoiding any resort to force.

30. The fact that in the nineteenth century States had generally sought to justify their wars in no way meant that they were acting in self-defence; to them, war had been, for instance, the means of vindicating a right or vital interest which they considered to have been injured. Italy, for example, had been able to justify its war against Austria in 1866 on the grounds that it wished to retrieve Venice from Austria in order to complete its national unity, but it had not been able to claim that it was acting thus in self-defence.

31. Mr. Verosta would have been right to oppose the inclusion of article 34 in chapter V of the draft if the article had been an attempt in itself to define the rules concerning self-defence, but there was absolutely no question of that in the draft article; it was limited to presuming the existence of a general rule relating to self-defence and drawing the proper conclusions from it with regard to State responsibility. Self-defence was the circumstance *par excellence* which precluded wrongfulness, so it simply could not go unmentioned in chapter V of the draft, as Mr. Verosta suggested.

32. Mr. Tabibi (*ibid.*) was obviously right in pointing out that aggression need not necessarily be armed, and could also be economic or even political. Those other

forms of aggression were not, however, germane to the topic under discussion, since resort to force could be lawful only to resist an armed attack.

33. Mr. Sucharitkul (*ibid.*) had also rightly said that the Commission's task was not to define the notion of self-defence, which, moreover, might vary even in internal law from one legal system to another. That was why he had proposed keeping to the definition of self-defence given in general international law and in the Charter and drawing the necessary conclusions in regard to State responsibility.

34. Mr. Quentin-Baxter (1627th meeting) had shown that the notion of self-defence, which had once existed only in internal law, had become one of general international law. As he had quite correctly pointed out, the notion of self-defence in international law was not yet exactly the same as in internal law because, although international law had already taken the decisive step of prohibiting the use of force except in self-defence, it had not yet taken the other step of entrusting the monopoly of the use of force to an institution of the international community, as envisaged in the United Nations Charter.

35. In conclusion, the Commission was in agreement on the point that it did not have to define self-defence and its conditions, nor amend, interpret or restate the Charter on that point. It should, however, base itself on the Charter in stating that, when a State had committed an act which would otherwise have been wrongful because it involved the use of armed force, the wrongfulness of the act was precluded if the State had acted in a state of self-defence.

36. He also thought that the Commission should base itself on article 30 in formulating the principle set out in article 34. He recognized, however, that there was some difference between those two articles because, as Mr. Ushakov had pointed out, countermeasures were not always lawful, whereas there was no doubt about precluding the wrongfulness of an act committed in a state of self-defence—or, if preferred, in exercising its "right" of self-defence.

37. He agreed about the insertion in the article of a reference to the Charter as a whole, rather than to Article 51 alone, although he still considered that the question of self-defence as such was dealt with only in Article 51 itself. There were, admittedly, other cases in which the Charter contemplated a lawful use of armed force; they were, however, cases not of self-defence but of countermeasures or sanctions taken against internationally wrongful acts and decided on by a competent body of the United Nations, and entrusted for enforcement to a State or group of States. If there was to be any reference to the Charter as a whole, therefore, the commentary to article 34 would have to indicate that the other cases in which the Charter allowed recourse to armed force concerned different notions and not self-defence as such.

38. Nor could he see any difficulty in the article

containing a reference to general international law, in so far as the Charter had merely codified a principle already embodied in general international law. He considered that his task had been completed with draft article 34.

39. The CHAIRMAN, speaking on behalf of the members of the Commission, thanked Mr. Ago for the admirable work he had accomplished. He said that, if there were no objections, he would take it that the Commission decided to refer draft article 34 to the Drafting Committee.

*It was so decided.*⁸

40. Mr. SETTE CÂMARA (Judge, International Court of Justice) said he was glad to have been able to attend the present meeting of the Commission, at which Mr. Ago had concluded the presentation of his report on State responsibility, a report which represented such an important contribution to the Commission's work. He was also happy to have been able to appreciate at first hand the Commission's search for the best solutions in the codification and progressive development of international law. It was a source of great satisfaction to him and to all friends of the Commission to note the prestige and respect commanded by its work and to inform the Commission that its draft articles and deliberations were being used and quoted, particularly at the International Court of Justice. He wished the Commission a successful conclusion to the work of its present session.

The meeting rose at 1.05 p.m.

⁸ For consideration of the text proposed by the Drafting Committee, see 1635th meeting, paras. 53–61.

1630th MEETING

Thursday, 10 July 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Boutros Ghali, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/334 and Add.1 and 2)

[Item 7 of the agenda]

PRELIMINARY REPORT BY THE SPECIAL RAPPORTEUR

1. Mr. QUENTIN-BAXTER (Special Rapporteur)

said that before introducing his preliminary report (A/CN.4/334 and Add.1 and 2) he wished to express his view that it was important for the Commission's future that financial and other means should be made available, when necessary, for a special rapporteur to spend some time in consultation with the Secretariat. Otherwise the Commission might come to be regarded as too dependent on Governments or, at the other extreme, on the skills of the Secretariat, to which it left a great deal of its work.

2. Introducing his report, he said it was important that members of the Commission should take the warnings and disclaimers of the first two paragraphs seriously. He had not attempted in his preliminary report to marshal doctrine on the very wide topic before the Commission, although the extensive writings on it had been repeatedly consulted. The topic remained rather formless at that early stage, and a preliminary report must therefore aim at modest goals and be fairly compact.

3. He had considered that a broad outline of the topic belonged only to a first report, after there had been an opportunity for some feedback from members of the Commission. Hence his observations in the preliminary report related to a reduction of the size of the topic, rather than an enlargement of its treatment. He had been invited by the title of the topic to discuss the nature of a number of subjects that might be grouped under it. He believed that to seek a shortened form of heading would entail the immediate risk of falling into jargon, and although he had suggested at the end of the report (*ibid.*, para. 65) that the topic might be further limited and more concretely named, that was not to say that he disagreed in any way with the existing title. Indeed, the balance of that carefully established title was in itself very useful in trying to deal with the problems involved.

4. As to the nature of those problems, he pointed out that in the nineteenth century there had been hardly any areas in which the exercise of the rights of a State had tended to be in frequent conflict with the exercise of the rights of other States. The way in which States behaved had seldom involved a clash of rights, even though it might involve clashes of another kind, in the form of warfare. It was perhaps no accident that the principles with which the Commission was concerned in the topic under discussion had been articulated in relation to the law of neutrality, as appeared most clearly from the "*Alabama*" arbitration.¹ Other elements were perhaps also to be found in various aspects of the law relating to the treatment of aliens.

5. Municipal law had greatly changed, as had national societies at the beginning of the nineteenth century, when the task of government had increased

until it no longer consisted merely in maintaining law and order and the State had begun to assume a more paternalistic regard for the individual citizen. International society had, of course, not yet reached that state of integration where there was a real parallel with the change in national societies. Nevertheless, as international organizations increased in number and the representatives of States brought to the negotiating table their lifelong experience of principles applied in their own societies, that experience was beginning to be imperceptibly applied on an international scale. The process was taking place at a stage in the development of science and technology that exposed mankind to new dangers, increased the awareness of existing dangers and multiplied the choices available, while at every point setting a price on those choices. The complexity of the situation was very great; it required a balance between social, economic and cultural aspects and an awareness of the risk of exposing States at one level of development to principles which might not be applicable or acceptable to them, having been elaborated by States at a different level of development.

6. It had only been within the last twenty years that lawyers had begun intensively to discuss the principles needed to protect national and individual interests in a shrinking world, whose natural resources had become subject to enormous pressures, and in which it was not impossible that man-made dangers might become infinitely more serious than the disturbances of nature. Mankind was living in an era in which it had become possible to pollute the seas beyond redemption, to pollute the air to a point at which it caused serious human ailments and to heat up the planet by affecting the ozone layer with exhausts from industrial processes. There were two converging pressures at the scientific level and the level of government awareness, namely, the physical circumstances and the growth of international organization, which inevitably caused even lawyers accustomed to think of matters in an adversary context to pay increasing attention to the goals of interdependence. Even before a state of interdependence had been reached, States were considering how to order their bilateral and multilateral relationships in vastly more complicated areas. From that process there came lines of legal advance. Of particular interest in that respect were the works of C. Wilfred Jenks, in focusing international attention on ultra-hazardous regimes, and those of L. F. E. Goldie, in stressing that human experience in national societies had developed differing mechanisms which could be applied on an international scale to meet dangers which were for the first time being perceived as transnational dangers.

7. There were those who inevitably tended to part company with the traditionalists and saw in law no easy means of responding to the more complicated factual situation; they believed that reliance must be placed on voluntary efforts in the sphere of policy, and that only thereafter could the law guide and circumscribe the new developments. The question then arose

¹ See. J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington, D.C., 1898), vol. I, pp. 653 *et seq.*

what part lawyers should play in regard to the formation of policy. Some believed that what they had to place at the disposal of the international community was not so much inherited doctrine as the techniques of their profession and their ability to work with social and physical scientists and other experts. He believed, however, that the question went much deeper and demanded a blending process, since the dividing line was not sharply drawn between matters of law and matters of policy. Even at the time of the first United Nations Conference on the Law of the Sea (1958), for which the Commission had been a major initial source, there had been the beginnings of that newer technique in which lawyers and biologists had worked together on formulas to meet legal and policy needs.

8. It was often difficult for lawyers deeply engaged in working with policy-makers to feel an attachment to inherited doctrine equal to theirs, whereas lawyers who believed that international law must always depend on a perceived line of advance from classical doctrine had difficulty in moving into a different world. In regard to such a topic as that under study, it was often said that State practice had not developed to a point where rules could be extrapolated from practice—a point of view which seemed to him to be rather forlorn and to condemn lawyers perpetually to follow rather than lead. The essence of the topic under consideration had to do with that conundrum.

9. On the relationship between those two extremes, a great deal of guidance was to be had from the rules of State responsibility. He believed that it had not yet begun to be appreciated in the larger legal community how great a contribution the distinctions made in those rules could offer in helping to clarify thoughts about the new problems. For the Commission, however, distinguishing between primary and secondary rules had become a matter of habit, even though the terms were not used in any dogmatic sense and it was recognized that they were abstractions.

10. The question was often asked whether injurious consequences were a necessary ingredient of a wrongful act, and even the most basic distinction between liability in lawful acts and in wrongful acts was somewhat clouded. In the view of many international lawyers, injurious consequences were a necessary ingredient in both cases. He believed, however, that wrongfulness itself supplied the element of injurious consequences, so that it was the primary rule, the rule of obligation, that must prescribe an element of injury. If there was a liability that arose without wrongfulness, it could arise only because legal obligation attached such a liability to the consequences of a particular act. By that approach to the subject the Commission had discovered a key which the majority of writers had not yet found, and the subject of liability arising without wrongfulness tended to be thought of as an alternative system of responsibility.

11. In 1973, when defining the boundaries of his topic,² Mr. Ago had been careful not to prejudice such future developments. But many international lawyers had been, and continued to be, rather frightened by the notion that while the world was for the first time constructing the essence of responsibility, there might be a completely different set of rules which did not conform to any of the norms being developed. They had the feeling of moving away from everything that had been slowly established and having nothing to put in its place but the acceptance of new policies. But on the basis of the distinction between primary and secondary rules made in the Commission's work, the device making it possible to put these matters into proportion became clear. A responsibility arose in international law through wrongfulness, and secondary rules were then applicable, or arose out of primary obligations. That distinction made it possible to leave behind the doctrinal difficulty of the notion that traditional secondary rules of responsibility had to be stretched and distorted.

12. There remained, however, other difficulties that were equally serious, including the notion that responsibility for lawful acts was in itself a kind of paradox. The idea that if something was not permitted by law it was wrongful to do it, and that if it was permitted, one was accountable only to oneself, was so basic that it caused many international lawyers to be sceptical about the title of the topic under consideration. There were those who feared that such a line of thought might tend to cheapen the concept of wrongfulness and make it easier for States to disregard their obligations by maintaining that those obligations arose without the intervention of wrongfulness. In fact, the opposite was true, and the areas in which obligation arose out of lawful acts were areas in which the only alternative would have been prohibition. The scheme of liability in respect of lawful acts was above all a scheme which, so far as possible, allowed States to pursue a diversity of rights and to reconcile those rights with the minimum resort to prohibition. In the circumstances of the modern world, it was almost self-evident that such a process must continue, in order to avoid prohibitions becoming so onerous that respect for the law might be weakened.

13. It seemed fairly clear that the topic of liability for acts not prohibited by international law was something that belonged to the current era, and if lawyers were not to restrict themselves to the job of describing what other people had ordained, they must look beyond the regime of right and wrong to the regime of lawful acts.

14. The question had to be asked, what limits there were to that process. Should it be said that in every circumstance every injury might give rise, at the international level, to a new legal relationship between

² *Yearbook ... 1973*, vol. I, pp. 5–6, 1204th meeting, paras. 6–10.

States, or were there automatic limits that could be applied? It was the tendency of doctrine to suggest that there was really no distinction to be made in terms of exceptional and ordinary risks, although it was, of course, true that in all activities of a State that were in some degree harmful, the harm might extend beyond the international borders of the State. The *Lake Lanoux* arbitration (see A/CN.4/334 and Add.1-2, para. 50) had shown that a distinction could be made between a normal user and an abnormal user of land, and that situation might well be regarded in terms of what was tacitly accepted by States in their mutual relations. There was clearly no one point at which a State could tell its neighbour that damage had reached the stage where it must stop. It was only where dangers reached the point at which they were perceived to require special action that new principles could be brought into play.

15. The Commission would recall that when dealing with the question of exhaustion of local remedies in relation to State responsibility, Mr. Ago had been unwilling to say that the rule applied only to cases arising within the territory of States. It might well be that if damage was caused transnationally in some accidental way that might normally occur within a State, there might be nothing wrong in leaving the injured person to the resources of the law of the country in which the injury was caused, and raising the matter to the level of discussion between States only if that law proved inadequate in its application to the case.

16. However, the situation with which the Commission was concerned was that in which activity inside a State, or activity by its ships, aircraft or expeditions, caused damage in areas beyond its national jurisdiction. In some instances it was useful, for practical purposes, to distinguish cases in which national controls were complete, and resort to rules of the kind being considered was not needed—as for instance in the case of the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw, 1929). But the Commission's concern was with the opposite case—that in which loss or injury was suffered in a country having no control over the action which had caused that loss or injury. The principle there was surely one of the most fundamental principles in international law, namely, that when a State used its own advantages or resources it should at the same time take care not to hurt the resources of another State.

17. In the modern age, there was no automatic way of determining what constituted harm or of applying the principles of the law to practical situations. That, in a sense, was precisely the question with which the Commission was concerned. The characteristic response of States was to deal with such matters without resorting to the concept of wrongfulness. In the archetypal case of space objects, for example, some States had reached a stage of technological develop-

ment at which they were able to engage in an activity which was not particularly dangerous, and was undoubtedly for the general good of humanity in terms of the advancement of scientific knowledge, but which nonetheless involved the possibility of loss. In such cases, standards of care were not really in question, since it was in the nature of the activity concerned that the utmost care would be exercised. But it was not unreasonable to hold that the duty of care incumbent on States undertaking such an activity required them, in consultation with the other members of the international community, to establish a regime to regulate such situations. In that area, the duty of due diligence was of a higher standard than was normally required; there was nothing extraordinary in that, for in certain respects the duty of care for one's neighbour must involve absolute liability.

18. What did add to the complexities of the situation was the multiformity which operated within a single legal rule. In that connexion, he had referred in paragraphs 34 *et seq.* of his report to the "*Lotus*", *Corfu Channel*, *Fisheries* and *North Sea Continental Shelf* cases, all of which indicated an awareness of the new and practical problem of drawing a dividing line between the duty owed to other States and the freedom of a State within its own territory. Those cases also showed that the emphasis on sovereignty, which was still jealously guarded by the law, had never been relaxed, although the principle *sic utere tuo ut alienum non laedas* was the necessary corollary to sovereignty. Great principles of law, such as the rule of the mean low-water mark, had had to be referred to other, more general criteria in their application to particular cases; and rules had had to take account of social and economic considerations and of the realities of the modern world. It was not so strange, therefore, that the principle *sic utere tuo* had been applied to serve the functions of the modern community.

19. It was of the essence of his thesis that while the problems should be considered primarily in the light of developments in the use of the physical environment, the principles involved, far from being new, were old and established principles to be found throughout the law. In that connexion, he had noted in foot-note 127 of his report that M. Sørensen, in his Hague lectures in 1960, had drawn a parallel between the law relating to treatment of aliens and that relating to good neighbourliness. He had also noted, from the Commission's debates on State responsibility and the preclusion of wrongfulness, that it believed that the preclusion of wrongfulness did not extinguish the responsibility or liability that could arise out of a new legal relationship created as a result of action taken by a State even under the stress of *force majeure*, fortuitous event, distress or state of necessity. The notion of care had thus developed far beyond the point when it had been viewed solely in terms of an action and its consequences. Rather, it sprang from a sense of community or interdependence, so that if the action of one State seriously affected another, even uninten-

tionally, a form of legal relationship was created between that State and its innocent victim. There were rights and obligations distinct from the question of wrongfulness that arose out of a primary rule and had to be regulated.

20. The conclusion to be drawn was that it was both necessary and possible, having regard to doctrine and existing State practice, to draw up general rules for a regime of responsibility or liability for lawful acts. Although it could not be said that the regime was self-limiting to the case of the physical environment, there were good practical reasons for applying such a limitation once the basic principles were clear and some preliminary conclusions had been reached about the nature of the regime.

21. Another way of stating the nature of the regime was to recognize that States had a duty not only to observe the rules regarding wrongfulness, but also to act in such a way that they did not run the risk of acting wrongfully. The regime of responsibility or liability for lawful acts stemmed from a duty to avoid wrongfulness, and not necessarily from a duty to agree with all the other parties concerned on the exact point at which wrongfulness occurred. He was always reminded in that context of Judge Lauterpacht's dictum that, if States were not careful, they might cross the imperceptible line between arbitrariness and wrongdoing. That was undoubtedly how lawyers would see events throughout the contemporary world.

22. A high-level meeting in 1979 of all European countries, the United States of America and Canada, organized by the ECE, on the protection of the environment had stressed the need to take concerted measures to deal with the consequences of long-range trans-boundary air pollution, and had recognized that only an increased standard of vigilance would suffice (A/CN.4/334 and Add.1 and 2, para. 5). It had thus gone some way towards raising the standard of care, which was a function of the primary obligations to which secondary rules could not set limits. The meeting had, however, avoided the question of liability, which was perfectly natural in the face of the complexities involved. No State wanted to commit itself in advance to some doctrinaire rule that could produce totally unforeseen results. Generally, however, it was not so much a matter of refusing to deal with the question of liability as of a feeling that it should be dealt with elsewhere, and preferably not in a specific context. Even an organization such as UNEP, which was so active and well supported by the international community, found that it was not well placed to discuss the issue since its activities were not centred round legal issues and it did not report to the Sixth Committee of the General Assembly.

23. Referring specifically to the report, he said that chapter I dealt with general considerations, including the growth of environmental pressures and the difficulty experienced by States in approaching the question of liability. As noted in the report, that

question would have to be dealt with eventually on the basis of the concordant practice of States, and it was clearly the Commission's task to assist States in that regard.

24. In the second part of chapter I, he had dealt with the use of terms, paying special attention to the distinction between "liability" and "responsibility" (which applied only in English). In his view, those terms would only be acceptable if it was made perfectly clear that no distinction was being created which was not reflected in the other working languages.

25. In chapter II, he had traced the relationship between the regime of lawful acts and the regime of wrongfulness. Since every obligation could be broken, every regime of obligations had, in the final analysis, to be referred to the regime of State responsibility for wrongful acts. But a regime which laid down detailed rules that could be easily observed, and whose observance could be easily determined, would constitute a major step forward in differentiating the principle *sic utere tuo*.

26. In chapter III he had dealt with the topic in terms of the limitation of sovereignty, in order to show the modern tendency to give full weight to the sovereignty of independent States but at the same time to balance that principle, as in the Corfu Channel case, against the principle *sic utere tuo*.

27. In chapter IV, he had endeavoured to show that much of the hesitancy of States had nothing to do with doctrine, but derived from their concern that commitment in advance to any scheme of legal principle would prejudice the legal outcome. At the same time, the Commission might reasonably be expected to take account of multiformity within a regime of liability for lawful acts, to give every encouragement to States to draw up their own regimes for particular situations, and to stress the obligation of States to their neighbours, and indeed to the whole international community, when their actions within their own territory affected those neighbours or that community. States should not be able to shield themselves from a finding of wrongfulness merely by taking no action at all and by asserting that the rules of State responsibility were not wide enough to extend to their case. They had a duty to foresee problems and to recognize the legitimate interests of other States. They also had a duty to seek to reach agreed solutions, as the *Lake Lanoux* case suggested, although they were not required to sacrifice their right to make final determinations about matters falling within the control of their own country.

28. Mr. RIPHAGEN said that, like the Special Rapporteur, he had been struck by the inherent paradox in the title to the subject. He was even inclined to ask why a State should be held liable to make good the injurious consequences of its conduct if it was not obliged to abstain from such conduct in the first place. It might seem that the magic word "equity" supplied

the answer, but the use of that word by a lawyer was, in a certain sense, a *testimonium paupertatis*. Since the distribution of natural, human and technological resources throughout the world was far from equitable, the introduction of that notion lacked conviction. The concept of equity as a basis for liability resulted in a somewhat half-hearted approach, since the rules neither prohibited nor permitted a certain line of conduct, but, in effect, combined such conduct with a mandatory obligation to make reparation for any injurious consequences.

29. It seemed to him that the law's intermediate position had its origin in two phenomena. First, so far as nature itself was concerned, territorial frontiers between States were determined in a very arbitrary manner. Secondly—and again the forces of nature were involved—there might well be an element of hazard in the chain of causation linking the conduct of or in one State with the effects for or in another State, for which hazard none of the States concerned could be blamed. Indeed, without the active intervention of that element of hazard, there would be no reason for not prohibiting the conduct in question at the outset.

30. In cases where those two phenomena were both present, it would seem that a duty should be imposed to consult and negotiate on preventive measures, with a view to limiting the risk, as well as on equitable risk allocation in the event that damage occurred. As was clear from State practice, States were often willing to consult and reach agreement on preventive measures, but generally did not wish to accept liability for the consequences when the agreed measures had not been taken. Nor were States willing to accept that, where such measures had been taken, any degree of liability was excluded. In other words, they were not normally willing to accept an absolute link between agreed preventive measures and liability. The same applied in municipal law, where legislation frequently provided that prior authorization was required for certain activities, but neither that legislation nor the authorizations given or refused under it were deemed conclusive for the purpose of establishing liability under civil or common law.

31. In his view, liability, or even a degree of liability, for the injurious consequences with which the Commission was concerned was no more than the counterpart of what he would term the "internalization" duty, namely the duty of each State to take care that the activities within its frontiers did not, as a result of the irresistible forces of nature, adversely affect another country's interests.

32. The forces of nature, of course, likewise operated within the territory of a State, a fact often recognized in municipal law. Consequently, there were other intermediate solutions under international law which fell short of either total prohibition or total freedom of conduct, and those solutions were reflected in State practice. For instance, there were certain international rules relating to matters dealt with under

municipal law that imposed an obligation on the State to frame and apply its municipal law in such a way that equal protection was accorded to the interests situated in the territory of that State and to similar interests situated in another State. Other international rules went a step further and provided that the procedural protection guaranteed under municipal law to persons whose interests were threatened by the conduct of another should also be extended to "foreign" persons; that was known as the principle of equal access. That rule was sometimes even applied to remedies available under municipal law, such as compensation.

33. In that connexion, it was clear that, to the extent that municipal law accepted the "polluter pays" principle, the effect of the extension of its application to foreign interests and foreign persons would be very similar to the consequences of liability for injurious consequences. Indeed, that principle was the counterpart of the "internalization" duty.

34. He therefore felt very strongly that the topic should be limited to the type of situation he had described. He also considered it necessary to explore the question of degrees of liability and risk allocation, and to give some thought to the other intermediate solutions ranging between freedom and prohibition.

35. He had not at that stage formed any clear idea about the general rules that could be drafted, even in the limited field of the physical environment, but no doubt the Special Rapporteur would provide the Commission with the necessary guidance. He considered that some overlap with Mr. Schwebel's topic (the law of the non-navigational uses of international watercourses) was unavoidable, but he was not concerned about any overlap with his own topic (State responsibility), since the central idea of sharing resources and liability fell outside its scope.

The meeting rose at 11.55 a.m.

1631st MEETING

Friday, 11 July 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr Barboza, Mr. Boutros Ghali, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/334 and Add.1 and 2)

[Item 7 of the agenda]

PRELIMINARY REPORT BY THE SPECIAL RAPPORTEUR (continued)

1. Mr. SUCHARITKUL said that the Special Rapporteur's presentation at the 1630th meeting of his preliminary report (A/CN.4/334 and Add.1 and 2) had been most illuminating for the members of the Commission, especially as the scope of the topic had not yet been clearly defined and the line of distinction between lawful and unlawful acts of a State was still blurred.

2. In response to the Special Rapporteur's request for comments by members of the Commission, he said he was inclined to agree with the conclusion expressed in paragraph 13 of the Working Group's report,¹ that, as a minimum, the scope of the topic under consideration should be limited to the way in which States used, or managed the use of, their physical environment, either within their own territories or in areas beyond their territories, whether or not those areas were subject to the sovereignty of any State. Indeed, it was quite possible for a State to use, or manage the use of, the physical environment in the territory of another State, particularly that of a neighbour. An example that came to mind was when a State induced rainfall by artificial means and adversely affected the physical environment of another State.

3. Although the title of the topic was long and difficult to remember, it gave a very clear indication of the content of the subject under discussion. Whether that content should be expanded was, however, a question for further discussion. He also agreed with the Special Rapporteur's view that using the term "liability", rather than the term "responsibility", would be a convenient way of distinguishing between the scope of the topic under consideration and that of the topic of State responsibility.

4. With regard to the attribution of liability to a State, he noted that, in its discussions on State responsibility, the Commission had already decided that an act of a State could be a link or bridge to its responsibility. In the present context, a solution to the problem of the attribution of liability might fill the gap between State responsibility and international liability, which existed because international law was never quite able to keep up with acts entailing injurious consequences or harm. In discussing the question of attribution, which was of crucial importance, the Commission would have to decide whether or not it wanted to go beyond the normal criteria for attribu-

ting liability to a State. If it did, it would have to consider such matters as the differences in the level of technological and legal advancement of different countries. It might need to take account of the fact that, although the laws of developed countries on the establishment of factories often contained provisions relating to the prevention of pollution, the same was not always true of the laws on the same subject in developing countries, where the state of the law was not so far advanced.

5. The Commission should also bear in mind that a law prohibiting the establishment of a certain type of factory in a developed country might say nothing about the establishment of such a factory outside its territory—for example, in a developing country. It was his view that, in such a case, the developed country had a moral responsibility to prevent its nationals from engaging in activities that might have injurious consequences for a developing country.

6. Another matter of interest at the preliminary stage in the Commission's work was that of the duty and standard of care, in connexion with which it should be clearly recognized that a State could be liable even for acts that were perfectly lawful but could, in the event of injurious consequences, entail liability. In cases where liability was most likely to be incurred as a result of the slightest negligence, the highest standard of care was obviously called for. The Special Rapporteur had also rightly referred to the question of risk, and to examples in which the State created an unnecessary risk and thus incurred liability regardless of whether it had been negligent or had exercised the necessary care.

7. Lastly, he noted that the example of the hydrogen bomb tests referred to by the Special Rapporteur in foot-note 66 of his report illustrated the fact that the rules of international law relating to the distinction between lawfulness and unlawfulness were constantly changing and developing. Indeed, what might have been lawful in the past might be unlawful at present. Thus, although the scope of the topic under consideration might be narrowed down by the progressive development of international law, it might also be broadened as a result of scientific advances. In trying to delimit the scope of the topic, the Special Rapporteur might therefore find himself in a kind of twilight zone between darkness and light for some time to come.

8. Mr. CALLE Y CALLE said that the topic under consideration was of particular relevance at the present time. For in the past, the activities of States within their own borders had rarely had the same devastating and irreversible consequences, in the territories of other States, as the activities now carried on by States which possessed advanced technology. States had, however, always had a general obligation to provide compensation for the injuries they caused, and that obligation remained.

¹ See *Yearbook* . . . 1978, vol. II (Part Two), pp. 150–151, document A/33/10, chap. VIII, sect. C, annex.

9. The scope and nature of the topic had been outlined in the report of the Working Group. Its title, which was long and difficult to remember, but descriptive and comprehensive, was composed of four elements, namely, liability, "internationality", injurious consequences and acts not prohibited by international law. In his view, the fourth element included all acts and activities of States except those specifically prohibited by a customary or conventional rule of international law. International law was thus both permissive and restrictive, in that it allowed States to act according to their wishes except in areas where a prohibition existed. It could therefore be said that permissiveness stopped at a State's border and that international liability was incurred as a result of acts that were quite lawful, but involved risks.

10. It had been said that the sole source of international liability was treaty law, or, in other words, that international liability could be incurred only when a specific convention governed a particular subject-matter. He believed, however, that international liability could also be incurred as a result of conduct not regulated by a specific convention. In matters relating to the environment, the peaceful uses of atomic energy and outer space, for example, it was generally agreed that States could incur liability for injurious consequences whether or not they were parties to conventions relating to those matters. It would be all too easy for States to deny liability if that were not the case.

11. As to injurious consequences, he believed that injury must be regarded as a basic element of liability because, without it, no liability existed. Account must also be taken of the second element he had mentioned, namely, the international nature of the injurious consequences of the act. Those consequences had to be felt in the territory of another State, and they imposed on the State which produced them an obligation to provide compensation. It should, moreover, be borne in mind that, in cases of expropriation, for example, the amount of compensation to be provided should be determined by internal, municipal law, not according to the wishes of the injured party, because the damage done was sometimes much less than the great profits of the foreign enterprise or transnational firm, claimant for compensation.

12. With regard to chapter II of the Special Rapporteur's report, although he agreed with him that the Commission should base its study of the topic on primary rules of general international law, he was not certain that a conventional regime was necessary, because the secondary rules governing international liability would merely provide a conceptual framework containing empty space to be filled by the effect of the primary rules. Lastly, he thought that chapter IV of the report would provide the Commission with a very sound basis for its future work on defining the scope of the topic.

13. Mr. ŠAHOVIĆ said he agreed with most of the views expressed by the two previous speakers. The task entrusted to the Special Rapporteur was not easy, and much remained to be done before the subject was sufficiently well delimited for the Commission to proceed to the formulation of draft articles. For the subject was indeed a complex one and certain points still needed to be clarified, so that it was too early to take a decision on the nature of the future draft.

14. In drafting his report, the Special Rapporteur had rightly been guided by the report of the Working Group, which had been approved by the Commission as the basis for the work to be done on the subject, and he had successively taken up the arguments advanced in that report.

15. In paragraphs 62 to 65 of his report, the Special Rapporteur had reached conclusions which seemed rather too negative. He gave the impression of not being sure of the direction to give to his work in the light of the decisions taken by the Commission. In that connexion, it should be noted that, in dealing with the question of State responsibility for an internationally wrongful act, the Commission had more than once taken the view that it would be possible to formulate articles on the subject under study with its existing title. But the Special Rapporteur said in his report that the title of the topic was "abstract and of unlimited generality" (para. 62), and that the Commission and the General Assembly might perhaps agree expressly "to limit the topic" (para. 65). He then went on to suggest that the topic might be "renamed, more modestly and concretely, to reflect the ambit of its actual concern" (para. 65). In his (Mr. Šahović's) opinion, it would be premature to try to change the title of the topic when there seemed to be no obstacle to further research in the direction so far indicated by the Commission.

16. It was not the first time that in studying one of the major topics of international law the Commission had found it necessary to postpone the study of certain aspects. Within the general framework of the codification of diplomatic law, the Commission had reserved a separate place for special missions. Similarly, within the general framework of the law of treaties, it had reserved separate places for treaties to which international organizations were parties and for the most-favoured-nation clause.

17. The subject under study should be tackled by the method generally followed by Special Rapporteurs, which had proved its worth. In accordance with that method, the Special Rapporteur had enquired what were the bases of the liability he was required to study and what were the relations between primary and secondary rules in that sphere; he had referred to the existing case law and had emphasized principles based on international law. The subject-matter did not seem to require the Commission to be entirely innovative. Legal rules could be derived, on the one hand, from traditional international law and, on the other hand,

from the practice of States and the many conventions mentioned in the report, which stemmed from the technological revolution.

18. No State appeared to be opposed to the idea of the codification and progressive development of the law related to international liability for acts not prohibited by international law, but it was important to stress the practical aspects of the undertaking. Like other topics on the Commission's programme of work, the topic under consideration required reflection, and the Commission should take care not to make hasty decisions. Above all, it must have material which would enable it to reach conclusions on which to base the subsequent formulation of draft articles. It might perhaps reach the conclusion that a set of draft articles was not justified or, on the contrary, that the draft articles should not be confined to liability, or again, that the draft should contain primary rules rather than secondary rules. All those questions arose, but it was as yet too soon to decide what responses they required.

19. The CHAIRMAN, speaking as a member of the Commission, said that he agreed with comments of the previous speakers. The topic seemed to be generally understood in terms of obligations arising out of damage not wrongfully caused. Breach of prohibition attracted wrongfulness, except where wrongfulness was precluded, which implied that where there was no prohibition there was no wrongfulness. It was to that aspect that the Commission had to direct its attention.

20. With regard to the use of the word "acts" in the title, he wondered whether it should be understood to include "omissions". Failure to act, when action was not required by international law, was not wrongful; but the question arose whether such failure attracted liability for the damage that might result.

21. In his opinion, the topic under consideration was one of the most important to have come before the Commission, and its study would significantly contribute to the development of new dimensions of the international legal order in its function of reflecting an emerging international economic and social order. The Special Rapporteur had approached his subject with caution and, because of its newness, had sought to support his several tentative theses with as much State practice as possible. But the real and essential support for those theses would be the facts of life in a changing world.

22. There were two paragraphs in the report that were of crucial importance: the philosophical outline contained in paragraph 31 and the tentative, though bold, themes condensed into paragraph 60. There were also many essential elements outside those two paragraphs, including the roots of liability in the principle of equality of rights and obligations of States; the derived primary rule embodied in the maxim *sic utere tuo ut alienum non laedas*; recognition of the interdependence of interests of all States; and what the

Special Rapporteur had referred to as "the variable concept of harm".

23. In an article published in 1943 entitled "A Survey of Special Interests",² R. Pound had identified a variety of social interests and suggested a hierarchical order for them. Two of those interests might be adopted as a means of placing the current topic in its essential social context. The first was "the claim or want or demand . . . to be secure against those forms of action and courses of conduct which threaten [society's] existence"; that was the "paramount social interest", which was described not as one, but several interests, such as general safety, public health, peace and order, the security of transactions and the security of acquisitions. The second social interest was "the claim . . . involved in social life in civilized society, that the development of human powers and of human control over nature for the satisfaction of human wants go forward; the demand that social engineering be increasingly and continuously improved; as it were, the self-assertion of the social group toward higher and more complete development of human powers." That was the social interest in the general progress, which meant, in effect, economic progress and, by necessary implication, scientific and technological progress. It was at the point where those two great social interests, which should go hand in hand, actually collided at the international level that it was necessary to recognize rules of law that would redress any imbalance which might occur and effect reconciliation.

24. Pound had gone on to recognize four major policies involved in the social interest in economic progress: the policy of freedom of property from restrictions on sale or use; the policy of free trade and against monopolies; the policy of free industry; and the policy of encouraging invention by the grant of exclusive patent rights. Those were, in effect, the classic identification marks of an industrial society and a free-market economy. Few would deny that mankind's recent tremendous advances in science and technology owed much to the individual initiative and drive fostered by the system of free private enterprise in the industrialized States, or that those States had set the pace in modern progress, which was inextricably linked with scientific and technological advancement. But in areas where the free-market system prevailed, the State only created conditions for the competitive advance of science and technology; it rarely participated directly in the process. Such participation was a function of private companies; which determined to keep their competitive advantage, undertook research and development programmes, thus creating new processes and often, at the same time, new risks.

25. The State apparatus, committed to the policy freedom of the market economy, based on competition and profit, had been slow to act restrictively at

² *Harvard Law Review* (Cambridge, Mass.), vol. LVII, No. 1 (October 1943), pp. 1 *et seq.*

home and even slower to act restrictively in regard to external consequences. But when those external consequences involved damage in another State, the State within which the activity took place or whose nationals had initiated the activity should be called to account. Generally, it was that State which was likely to have profited, directly or indirectly, by the commercial or economic activity which had caused the damage. The activity might be an intrinsically lawful one, but the social interest which the State perceived in its protection of the freedom to practise that activity had come up against the social interest of another State and its general security. In such a case, where did the loss fall, and how were interests to be reconciled?

26. As the Special Rapporteur had pointed out in his report, the nature of the "harm" might be relevant. He understood that in its widest sense, as encompassing both the nature of the damage and the attitude of the injured State, and as taking into account the nature of the relationship between the States concerned. If, for example, two States were engaged in advanced activities in space, were collaborating with each other and had an intimate knowledge of each other's safety procedures, which they believed to be reasonable, damage caused by a space object of one of the States to the property of the other might well be dealt with differently than in a case where the damage was caused to an economically backward country with no interest in space activities. For the latter case there was no shared interest in the particular form of progress in the pursuit of which the damage had been caused. But even assuming that harm must be assessed in different ways, difficult cases could occur. For example, if a pharmaceutical factory was manufacturing a cure for cancer in one country and caused damage in another country, there were two aspects to consider. Certainly, all States must share the view that the elimination of cancer represented a form of progress, but there was no particular reason why the injured State should bear the cost of the endeavour or any part of it. In general, whoever profited most should pay most, and those who profited not at all, or to a negligible extent, should pay nothing or very little. Those who risked a great deal in order to profit a great deal ought to pay a large amount in the event of damage being caused to States not parties in the interest, for, as William Penn had written, "To hazard much to get much has more of avarice than wisdom."

27. With regard to the interdependence of rights of States, a relationship of interdependence must be recognized to exist among States for their mutual economic survival. Whereas in the past loss could lie where it fell or where a powerful State made it fall, and no principle called for redress of the balance of interests, it had today become more clearly understood that even for a highly industrialized country to maintain economic health there must be those who had the money to purchase what it produced. Furthermore, without the natural resources of some countries, others might not be able to produce at all. The essence

of that idea was contained in the formulation adopted by the General Assembly at its Sixth Special Session, as part of the Declaration on the Establishment of a New International Economic Order.³ The theme had been elaborated in articles 3, 24 and 30 of the Charter of Economic Rights and Duties of States.⁴ In that context, the variable concept of harm to which the Special Rapporteur had referred should be borne in mind. It might be seen as calling for a softening of a rigid or absolute principle of equality of State rights by the concept of mutuality. If basic inequality was to be redressed, it was not possible to insist on absolute equality of gains.

28. In conclusion, there were clear trends in the current practice of States that would support the first tentative propositions which the Special Rapporteur had placed before the Commission, particularly in paragraph 60 of his report. A rule of international law was emerging which entailed responsibility for the results of an activity where there was no wrongfulness within the usual legal meaning of the term.

29. He agreed with the Special Rapporteur that the study of the topic under consideration should remain within the terms of reference outlined by the Commission's Working Group in 1978, since those terms were sufficiently broad to accommodate all activities which Governments would wish to consider at the present time.

30. Sir Francis VALLAT said that he shared the views already expressed on the topic in general, and only wished to make a few additional preliminary observations.

31. He agreed that the title well expressed the scope of the topic. Moreover, while he trusted that the scope would not be unduly limited by too much caution, he shared the sense of care shown by the Special Rapporteur in his approach.

32. On the question of limitations, he agreed that it would be wise to focus attention on what might be described as environment in its broad meaning, and not to become involved in economic and social questions for the time being. He hesitated over the use of the term "environment", however, because in its narrow sense it had become connected with the expression "environmental law" and the concerns of ecology. It must be made clear that what the Commission was concerned with in the topic under consideration was acts having physical consequences and therefore connected with the environment in the broader sense.

33. As to the question of primary and secondary rules, he agreed with the Special Rapporteur's approach, as he understood it, of moving from secondary to primary rules, since he believed that

³ General Assembly resolution 3201 (S-VI).

⁴ General Assembly resolution 3281 (XXIX).

primary rules were the foundation of the work before the Commission. As he saw it, the Commission was no longer dealing with secondary rules, which would be to repeat the work already done on State responsibility, but were about to explore a field in which, by reason of the rules of international law, there were obligations that led to the liability of States—and that liability, it seemed to him, was mainly a liability to pay compensation.

34. He had sensed in the Special Rapporteur's oral presentation a tendency to focus, at that preliminary stage, on what was referred to in English law as "negligence" and to leave somewhat aside liability for risk. He hoped, however, that when it came to examining draft articles they would deal with both those major aspects of the topic. In many cases, the interest in liability for risk was greater than the interest in liability for the consequences of negligent acts. He believed that it was generally instinctively assumed that a State was liable for the consequences of a negligent act at the international level, but the legal position was not so clear where damage was caused through no apparent fault of the State.

35. In paragraph 46 of his report, the Special Rapporteur stated that "the duty to have regard to all interests that may be affected can be seen as arising directly from the obligation to take reasonable care", and that was a proposition with which there was general agreement. But he then went on to speak of "an adequate and accepted regime of compensation", which in his (Sir Francis's) opinion was not necessarily limited to cases where there had been negligence. For example, if a rocket was launched, and then went off course and landed on a house, it seemed to him that if there had been a defect in the mechanism which should have been corrected by the State before launching, the State had acted negligently and had a duty to compensate. But in other circumstances, where an accident which the State could not have foreseen caused the rocket to land in the territory of another State, the question arose whether liability should be excluded or not.

36. The matter could be framed as an obligation which, while permitting an activity to be undertaken, was an obligation to undertake it without causing damage to another State. In that case, it was not difficult to frame the so-called absolute liability in the form of a primary obligation. But it would then be necessary to consider what relationship existed between the primary obligation and the secondary rule, as contained in article 31 of the articles on State responsibility, concerning the preclusion of wrongfulness on the basis of *force majeure*.⁵ He thought that that and other points would necessarily involve a study

of the relationship between the new articles to be drafted and those already adopted on State responsibility.

37. With regard to Mr. Sucharitkul's remarks, he thought that, bearing in mind the different kinds of activity undertaken by a State, the Commission would have to consider carefully the question of the various standards of care required on the part of a State. In the field of common law, to take an analogy, once the standard of reasonable care was taken away, it became very difficult in practice to say what was slight negligence, ordinary negligence or gross negligence.

38. The question of attribution was an important one, which might well have to be tackled at an early stage of the Commission's work. The basic question would be how far the Commission could rely on the articles already drafted on State responsibility and how far it might be necessary to have some supplementary rules. He hoped that the Commission would not have to construct another series of articles governing attribution in the present field. If it was correct to consider that there could be no liability unless there was a basic rule giving rise to an obligation under international law, it would be possible, in general, to rely on the secondary rules evolved for the subject of State responsibility. For example, if it were agreed that at the basis of every liability to pay compensation there must be the breach of an obligation at least not to do something, article 3 on State responsibility⁶ would clearly have considerable relevance to the topic under consideration. It seemed to him that, as a matter of jurisprudence, there could be no liability without an underlying obligation.

39. Mr. USHAKOV observed that international liability for injurious consequences arising out of acts not prohibited by international law was not presumed, whereas responsibility for internationally wrongful acts was presumed in international law, as in internal law. Consequently, liability for injurious consequences of lawful activities existed only in the cases defined by international law. Hence the Commission should start by specifying the cases in which such liability existed. It should also fix the limits of that liability, in order to avoid disputes between States. Those were its two main tasks.

40. Furthermore, the activities whose injurious consequences involved international liability of the State were not activities conducted by the State in its own territory but activities conducted within the framework of its international relations. Consequently it was the question of responsibility for an internationally wrongful act that arose, for there was violation of the principle of international law that a State must not cause damage to the territory of another State. However, it was not the Commission's

⁵ See *Yearbook . . . 1979*, vol. II (Part Two), pp. 122, document A/34/10, chap. III, sect. B.2.

⁶ *Ibid.*, p. 91, document A/34/10, chap. III, sect. B.1.

task to codify that principle, which was a primary rule of international law, but to define the consequences of its breach. The Commission's third task was therefore to specify the types of international activity which might have more or less foreseeable injurious consequences.

The meeting rose at 12.45 p.m.

1632nd MEETING

Monday, 14 July 1980, at 3.10 p.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/334 and Add.1 and 2)

[Item 7 of the agenda]

PRELIMINARY REPORT BY THE SPECIAL RAPPORTEUR (continued)

1. Mr. BARBOZA said that the Special Rapporteur, in paragraph 20 of his report (A/CN.4/334 and Add.1 and 2), had quite rightly pointed out that obligations were the product of particular primary rules, whereas responsibility for breaches of obligations derived from secondary rules. Primary obligations such as that provided for in article 2 of the 1971 Convention on International Liability for Damage caused by Space Objects (*ibid.*, para. 21) were subject to the regime of the Vienna Convention on the Law of Treaties and did not fall within the purview of the topic before the Commission. The Special Rapporteur also had stated that the term "liability" was not used to mean only the consequences of an obligation, but rather the obligation itself (*ibid.*, para. 12). That usage did not seem to maintain the distinction between primary and secondary rules, which the Commission had been at pains to establish in the past.

2. In approaching the topic, it might be helpful to consider State activities by type, rather than individually. First, there were activities which were always damaging, such as those causing atmospheric or river pollution. The *Trail Smelter* arbitration, mentioned in paragraph 33 of the report, appeared to state a general rule of customary international law prohibiting such

activities: consequently, any damage caused as a result of them constituted an internationally wrongful act and did not fall within the scope of the topic. Secondly, there were "ultra hazardous" activities which were more likely than others to cause damage, but which could not be prohibited because vital economic or other interests were at stake. States conducting such activities were required to pay compensation for any consequent damage suffered by another State. Thirdly, there were activities which, while normally not damaging, could cause damage as a result of *force majeure* or a fortuitous event. In such cases, too, there would appear to be an obligation to compensate for any damage caused.

3. In the case of activities that were always harmful, failure on the part of a State to fulfil all the requirements of due care would constitute an internationally wrongful act entailing responsibility. In the case of hazardous activities, however, the element of due care would seem to play a less fundamental role.

4. A thorough study of the topic was called for, with a view to excluding acts entailing responsibility and delimiting the concept of hazardous activities.

5. Mr. VEROSTA said that, while he agreed fully with the Special Rapporteur's analysis of the topic, he was unable to accept a number of the conclusions contained in the report. While the title was somewhat heavy, and any amendment of it to describe the topic more succinctly would be welcome, the generality of the topic itself could not be invoked as an objection to the undertaking of the study.

6. The scope of the topic could not be limited to environmental questions. The principle *sic utere tuo ut alienum non laedas* had been recognized in Roman law and, because of its fundamental importance, had been applied in international law long before States had become conscious of environmental hazards. In order to establish the general validity of that principle, it was necessary to analyse State practice in the traditional way.

7. The report contained a number of examples relating to matters other than environmental questions in which the injurious consequences of a lawful act of a State, while not rendering that act wrongful, entailed liability and called for compensation. One such matter was the treatment of aliens. The fourth of the Sørensen principles quoted in paragraph 29 of the report was still valid in positive international law; it was the basis of dozens of treaties concluded between States whose citizens had been expropriated since the Second World War, and it had been applied by many of the socialist States of Eastern Europe. That principle could be described, not only as the expression of an international standard, but as a rule of international law.

8. Other areas of international law in which the basic principle was applied were referred to in paragraph 30 of the report. To the circumstances listed, he would add reprisals and self-defence. While the excessive

application of reprisals or self-defence constituted a wrongful act entailing international responsibility, there were also cases in which its lawful application could have injurious consequences entailing compensation. Research into State practice in those matters was required.

9. He agreed with the Special Rapporteur that any general study of the topic would have to include the navigational and non-navigational uses of international watercourses. In order to reduce the immense burden of research and delicate analysis that such an undertaking would involve, use could be made of the research done by the Special Rapporteur on the non-navigational uses of international watercourses.

10. Another area relevant to the study of the topic was that of State servitudes. That term had been accepted by writers of international law and by State practice and adjudication, for example, in the *North Atlantic Fisheries* case of 1910. A more adequate term at the present time might be "restrictions on sovereignty". In the case of servitudes under internal civil law and international law, the maxim *sic utere tuo ut alienum non laedas* found its application in the corollary *servitus civiliter est exercenda*, which required a State to exercise its right under an international servitude in a civil way, without harming the interests of the State charged with the servitude or the interests of third States. State practice might furnish examples in which the use of a servitude by a State, while lawful, had produced injurious consequences entailing liability.

11. Mr. SCHWEBEL congratulated the Special Rapporteur on the insight and lucidity with which he had drafted his preliminary report. He was largely in agreement with the Special Rapporteur's approach, and had been struck by the extent to which he had dealt with the principle *sic utere tuo ut alienum non laedas*, the draft UNEP principles on shared natural resources (*ibid.*, para. 5), the *Lake Lanoux* arbitration, the *North Sea Continental Shelf* cases and the *Corfu Channel* case, all of which were sources he himself had referred to in addressing the law of the non-navigational uses of international watercourses. Although his own topic was to be distinguished from the topic under consideration in that it contained some prescriptions the violation of which constituted acts prohibited by international law, the prescriptions of international watercourses might turn out to be very close to being a particular, detailed segment of the very broad field of the topic assigned to Mr. Quentin-Baxter.

12. He believed that that topic might be unduly confined if, at the outset, the Special Rapporteur were to narrow it to environmental, physical questions. By way of illustration he suggested a hypothetical example which was not limited to physical environment, but might arguably be pertinent. State A, a large developed country, had considerable room for growth in terms of population and otherwise, partly because it

had promoted family planning measures. Its immediate neighbours, States B and C, had achieved considerable development which, however, had been outpaced by excessive population growth, family planning not being generally pursued for religious and other reasons. As a result of that situation, persistent and massive movements of population took place from States B and C into State A. That movement was illegal under the municipal law of State A, which had the right, under international law, to limit the entry of aliens. But State A was a dynamic democracy of liberal tradition and was not disposed to use force to prevent immigration which violated its law. As matters stood at present, States B and C were not violating international law by permitting their populations to explode, nor was it certain that they were acting unlawfully in not preventing millions of their nationals from leaving their territory for that of State A. It might therefore be argued that such a case, although not an environmental case in the normal usage of that term, raised questions of international liability for injurious consequences arising out of acts not prohibited by international law.

13. Paragraph 37 of the report referred to an *ex gratia* payment made by the United States of America to certain Japanese fishermen who had suffered as a result of a nuclear test—an illustration related to the Special Rapporteur's environmental themes. But *ex gratia* payments had also been made by States to foreign nationals or to foreign States in other than environmental contexts, and it might therefore be wise to look carefully into such cases to see what States might have regarded as their international liability for injurious consequences arising out of acts not prohibited by international law.

14. An illustration was provided by the war claims of the inhabitants of a former Japanese-mandated territory of the South Pacific islands. Claims for compensation had been made for death, physical injury and property losses caused by war-time acts, but the United States had admitted no measure of international responsibility for those injurious consequences of acts not prohibited by international law, as it took the view that it had acted lawfully in repelling aggression against it and, in doing so, attacking Japanese bases and troop concentrations which Japan, in violation of its mandatory obligations, had located in those islands. That civilian inhabitants of the islands had incidentally suffered was considered highly regrettable, but under the law of war there was no liability on the part of the United States. Nevertheless, in order to dispose of the problem in what it regarded as an equitable fashion, the United States had joined with Japan in an *ex gratia* payment designed to meet the claims and had set up a claims commission to process the claims and award payments.

15. The topic under consideration, like that of international watercourses, was not an East-West topic or a North-South topic; nor did the fact that

most technological advances over the last few centuries had sprung from private ingenuity and free enterprise suggest that international liability for injurious consequences arising out of acts not prohibited by international law was to be imposed especially on the developed States of the West. Not only was it far from clear that the topic should be restricted to the impact of technology on the environment, but advances in technology, and uses and abuses of technology, were not the monopoly of Western forms of social and economic organization. After all, it was the Soviet Union that had launched the first *sputnik*. It was a developing State that was responsible for the most extensive oil spill in history. Consideration should be given to the question whether States that laid claim to the transfer of technology which they had not created should not perhaps share the burden, risk and costs of that technology. It must also be remembered that States that had not created a technology might benefit from it, quite apart from its transfer. The Special Rapporteur might wish to consider—or reconsider—such fundamental equitable aspects of the topic.

16. Those reflections were not intended to depreciate the principle that the innocent victims of an activity involving some danger should not be left to bear their loss, even if the actor's conduct was not wrongful. However, his remarks might be relevant to the essential definition of innocence, and they suggested that the actors in question were to be found the world over.

17. Referring to paragraph 33 of the report, in which the Special Rapporteur had stated that the United States had not explicitly abandoned the Harmon doctrine until 1960, he informed the Commission that that doctrine had been expressly repudiated by authorized spokesmen of the United States Government in 1945, at hearings before the Committee on Foreign Relations on a treaty with Mexico relating to the utilization of the waters of certain rivers.

18. Lastly, he subscribed to the Special Rapporteur's description of the nub of his perceptions, as it appeared in paragraph 60 of the report.

19. Mr. THIAM congratulated the Special Rapporteur on his very full report, which combined the search for legal rules for the settlement of possible disputes with a constant determination to situate the topic within the realities of contemporary life. The report was also animated by a desire not to hamper beneficial activities, while ensuring that any damage they might cause could be compensated.

20. He had no suggestion to offer regarding the title. It was certainly very long, but it would be difficult to reduce to a simple formula. It had been suggested that it might perhaps be better not to mention acts, since there were cases in which a State could be liable by omission. But where that was the case—for example, if a State did not control or regulate private activities in its territory which caused damage to a third State—it

was rather a matter of responsibility for an internationally wrongful act.

21. The question arose, what was the basis of the liability under study: was it an absolute liability of the State in all cases, in virtue of which it was required to make reparation for any damage caused, or was it some other form of liability based, for example, on lack of due care? In his view, liability arising from lack of care, or a fault in conduct, did not fall within the scope of the topic under consideration, but within that of responsibility for a wrongful act. If a State was free to engage in dangerous activities, it had a corresponding obligation to compensate for any damage caused by such activities. Hence there was an absolute liability, since the obligation to compensate arose in all the cases, even those based on lack of care. The Special Rapporteur himself had said that when liability was based on lack of care, a different basis, such as equity, was sought for the obligation to compensate. There was a question, therefore, as to what the extent of compensation might be and to what extent the topic under consideration might overlap with that of responsibility for a wrongful act.

22. He did not think it was necessary to seek a formula to absolve developing countries from any liability they might incur for injurious acts, as Mr. Sucharitkul had suggested (1631st meeting). He wondered, indeed, how far a State which claimed to be developing, and which engaged in nuclear activities, could invoke its status as a developing country to justify the application of a special regime with respect to liability for the injurious consequences of such activities. On the other hand, he thought that if a developed country engaged in activities that might have injurious consequences for other developed countries, the latter countries should exercise due care by taking the necessary protective measures.

23. Mr. REUTER congratulated the Special Rapporteur on his learning and industry, his meticulousness and his empirical approach to the topic, which showed his determination to keep in contact with reality and avoid premature syntheses. He also congratulated him on his courage in tackling a subject which perhaps did not exist—or at least not yet.

24. It was, indeed, open to question whether there could really be liability without a wrongful act. In his opinion, nothing was less certain; for both international law and internal law were loath to venture into that field, and many of the cases cited as cases of liability without a wrongful act were in fact cases of liability for a wrongful act. The concept of liability without a wrongful act was really only a means of solving a problem that was impossible to solve for lack of proof, by dispensing the injured party from the requirement of providing proof when that was impossible. As soon as proof became possible, one left the dangerous ground of liability without a wrongful act and re-entered that of responsibility for a wrongful act. Cases of liability for the injurious consequences of

pollution were not, contrary to what might be said, cases of liability without a wrongful act. In pollution, as in other matters, it was necessary to fix thresholds which must not be exceeded, and when the rule fixing them was broken there would be responsibility for a wrongful act.

25. In the *Lake Lanoux* arbitration cited by the Special Rapporteur, the Spanish Government had tried to show that the works planned by France were wrongful in that they made the restoration to Spain of a certain quantity of water dependent on the political will of a State, which infringed the sovereignty of Spain. But if the Spanish Government had invoked the risk of a disaster caused by the bursting of the dam, the arbitral award might have been different, because there might be a rule of international law concerning that kind of risk.

26. Cases of liability without a wrongful act were thus much fewer than was supposed. But even admitting that there were such cases and that the subject existed, that presupposed the existence of general rules for all cases of liability. It might therefore be asked what those general rules were, which led to the question raised by Mr. Thiam, of the principle of the liability contemplated. The reply to that question was not clear.

27. If the Commission were to proceed as in the case of the draft on State responsibility for internationally wrongful acts, the first question to be settled would be that of the act of the State. In the present case, it was no longer the wrongful act of the State that entailed liability, but it was not just any act of the State. Nor was it the magnitude of the risk. It was therefore necessary to determine what act of the State entailed liability without fault. The Special Rapporteur had not answered that question. He might find it easier to do so if he limited the topic to liability for technical risks, for example.

28. Attribution of an act to the State also raised a problem, since it was open to question whether the rules governing such attribution were the same for no-fault liability as they were in the case of responsibility for a wrongful act. It might even be doubted whether the rules on attribution to a State were the same for all cases of no-fault liability.

29. But the essential element of the topic under consideration was damage. Hence it was clear that if the topic was to be approached in its general form, it would be necessary to propose general rules concerning damage, though in doing so there would be some danger of encroaching on the second part of the draft articles on State responsibility. The damage in question was obviously not the moral damage resulting from an internationally wrongful act. In that connexion, he pointed out that the theory stated in article 19 of the draft articles on State responsibility¹ evaded the

problem of damage as a constituent element of international responsibility.

30. In conclusion, he emphasized that if the Commission asked the Special Rapporteur to draft primary rules, it would be accepting the postulate that there were general rules on no-fault liability and that they were common to all cases of such liability. He strongly doubted, however, whether at the present time there were any general primary rules applicable to all cases of no-fault liability, for his impression was that every case was distinct. If that impression was correct, the topic did not exist, and the Special Rapporteur was right in proposing that the Commission should refrain from constructing abstract theories and make a thorough study of a number of specific cases in an attempt to deduce general rules. He approved of that method, though he thought it might still be too early to change the title of the topic.

31. Mr. TSURUOKA said that he shared the views expressed by Sir Francis Vallat (1631st meeting) concerning the notion of environment to be taken into account in studying the topic under consideration. It followed from the title of the topic that there must be damage if there was to be liability. While compensation for damage was essential, it was even more important to avert the possible injurious consequences of acts not prohibited by international law—but in doing so, care must be taken not to impede the progress of such activities.

32. As other members had emphasized, the Commission's efforts should be centred mainly on the environment, which was the pre-eminent area for collaboration. Such collaboration could take various forms, depending on whether it was between North and South, between East and West, or between developing and industrialized countries. It might be of a legal nature, particularly if it consisted in negotiations for the compensation of victims or for the harmonization of national laws. Public and private international law might also be brought into closer accord. Technical progress, which made States interdependent, made collaboration, in every sense of the word, a real necessity.

33. As far as the method of work was concerned, he thought the Special Rapporteur should keep in close and constant touch with Mr. Riphagen, the Special Rapporteur for the study of State responsibility for internationally wrongful acts. It appeared that certain principles could already be derived from the case-law and conventions cited by Mr. Sucharitkul. As in the case of the law of the non-navigational uses of international waterways, it should be possible to draft a framework agreement which States could take as a basis for concluding regional agreements, or agreements to which the parties might, for example, be States having reached a similar level of development.

34. Japan, which was one of the most highly polluted countries in the world, had obtained encouraging

¹ *Yearbook* ... 1979, vol. II (Part Two), p. 91, document A/34/10, chap. III, sect. B.1.

results over the past decade in its campaign against the injurious consequences of certain activities. Formerly, those activities had not been considered wrongful, but they had gradually come to be so treated, by recourse to such notions as abuse of right, liability without fault and an increased requirement of due care. In addition, the Japanese courts had applied the rules of procedure to the advantage of the injured party; evidence brought by the injured party had been judged more easily admissible than evidence for the adverse party. In medical matters, statistics had often been considered sufficient, without strict proof of a causal connexion. In his view, that attitude of the Japanese courts deserved attention, since it provided a way of remedying the injurious consequences arising out of lawful activities.

35. Lastly, he emphasized that the topic under consideration was both new and old. The Commission had always refrained from deciding whether it was carrying out codification or progressive development of international law on a particular matter. In view of the rapid evolution taking place in the international community, however, it was to be hoped that in the present case the Commission would try not to confine itself to pure codification.

36. As far as the notion of shared resources was concerned, the Commission should use it only with the greatest caution.

37. Mr. DÍAZ GONZÁLEZ associated himself with previous speakers in congratulating the Special Rapporteur on his report. He believed that its value lay above all in showing that the topic, under its existing title, did not have an evident, solid basis, since it might be expected to disappear with the progressive development of international law. It could be foreseen that acts which were currently permitted to States, in the sense that they were not prohibited by international law even though they had injurious consequences, would eventually be governed by rules as codification developed.

38. It seemed to him that the first part of the preliminary report had a certain importance for English-speaking countries with a common-law background, as it dealt with differences in terminology. But in countries which had inherited a civil law system, the differentiation outlined in the report was of lesser importance, since the concepts of responsibility and obligation had a well-defined legal content.

39. The principle put forward by the Special Rapporteur, that all that was not prohibited by law was permitted, must be regarded as relative to some extent. For instance, since the Second World War the rule *nulla poena sine lege* was no longer absolute, for at the Nuremberg trials an offence had been created specially to condemn war criminals.

40. The development of technology had shown that the utilization of certain resources, even when carried out in accordance with the principle of State sovereignty and when not prohibited by law, might

cause harm to another State and involve acts which gave rise to liability. It should also be borne in mind that harm arising from an act committed by a State and not prohibited by law could not always be subsequently compensated. Furthermore, it was, as the Special Rapporteur had pointed out, very difficult to draw the line between a lawful act and an act not prohibited by law which had harmful consequences. He believed that the nub of the question lay not so much in liability without fault as in compensation for harm done.

41. It was important to ask where the topic led to. If the Commission was going to establish rules governing acts committed by a State that were wrongful, such acts would no longer be acts not prohibited by international law, but would become regulated acts which were wrongful under the rules governing them. It seemed to him that the topic as such was too wide, and he could not see any basis on which the Commission could found the regulation of acts not prohibited by international law which gave rise to the liability of a State.

42. The same doubts could be expressed with regard to primary and secondary rules. It seemed to him that, so long as there was no primary rule establishing an obligation, there could be no secondary rule giving rise to responsibility. In general, his first thoughts on the topic led him to express concern at any attempt to establish rules governing the injurious consequences of acts not prohibited by international law, because the topic, as it stood, did not seem to be sufficiently tangible or real.

The meeting rose at 4.55 p.m.

1633rd MEETING

Tuesday, 15 July 1980, at 10.15 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (concluded) (A/CN.4/334 and Add.1 and 2)

[Item 7 of the agenda]

PRELIMINARY REPORT BY THE SPECIAL RAPporteur (concluded)

1. Mr. QUENTIN-BAXTER (Special Rapporteur),

replying to points raised during the discussion, said that the first speaker, Mr. Riphagen (1630th meeting), had taken the view that since the rules relating to the environment might be peculiar to the environment, the Special Rapporteur should not seek to draw up unduly wide-ranging rules. A Special Rapporteur was bound by the title of his topic, however, and consequently had to resist any temptation to treat it narrowly.

2. Mr. Riphagen had pointed out that a State's willingness to enter into commitments regarding measures to prevent injury and, in the event that injury none the less occurred, to make equitable risk allocation, was not necessarily matched by willingness to agree on a regime of liability, and that there was no absolute link between the rules relating to precautionary measures and the liability which would arise in the event that such measures were not taken, or that damage occurred, even if they were. That point served to underline the subtle boundary between lawful acts and responsibility for wrongfulness: non-compliance with such commitments would, of course, constitute a breach of an obligation, and the responsibility flowing from that breach might or might not be commensurate with the damage that had occurred.

3. Mr. Riphagen had drawn attention, at the 1609th meeting, to certain parallels in municipal law, referring in that connexion to the regimes being promoted, for example, by the OECD, and had noted that the effect of the "polluter pays" principle was similar to that of liability for an act not prohibited. The great merit of that principle was that it negated a commercial inducement to pollute, and it was quite true that the regime with which the Commission was concerned was directed first and foremost at prevention. The only qualification he wished to make, as Special Rapporteur, was that the kind of regime being promoted by OECD was agreed to by States and governed their relationships accordingly. He was not, however, suggesting that no relationship could arise at the international level unless States chose, either expressly or tacitly, to forgo their obligations under such regimes. Indeed, the only right and sensible way of dealing with, for example, transnational industrial pollution, was for the States concerned to seek to unify their plans and standards accordingly. It might well be that in cases where the transnational effect was entirely incidental to the harm which occurred within a particular territory, States would be content to leave the victim to seek the remedies available in the State where the trouble had originated, but that would be the exception rather than the rule.

4. Another point raised by Mr. Riphagen, as well as a number of other members, concerned degrees of liability, on which he (the Special Rapporteur) had not thought it necessary to make any specific suggestions at that early stage. The Commission would remember that, in its work on the topic of succession of States in matters other than treaties, it had elected to rely, at a

certain point, on an equitable rule and to indicate the factors to be taken into account in applying that rule; also the International Law Association, in its Helsinki Rules (see A/CN.4/334 and Add.1 and 2, para. 49), had included a list of factors, which was not exhaustive, to indicate the area within which States having an interest in the matter should be left to find their own accommodation.

5. By the same token, the main emphasis in the topic with which the Commission was concerned should be on prevention and on encouraging States to establish their own regimes to govern particular situations. There was no doubt that in certain circumstances such regimes would have an indirect impact on the standards relating to wrongfulness, independently of the treaty regime. For example, pursuant to treaties dealing with oil spillages at sea, States parties imposed an obligation under their municipal law upon a designated operator—provided that, in so far as was necessary, sovereign immunities should not stand in the way of justice—and set a limit to the amount of liability in any particular case. If a State failed to adhere to such rules and made no effort to reach agreement with the other States concerned on the consequences of major spillages caused by ships flying its flag, it could not be argued that the only regime that would apply was one of responsibility for an act not prohibited. Indeed, failure to take the kind of precautions which other States in a similar position considered necessary in order to prevent damage that was clearly foreseeable might well tip the balance between right and wrong. Although that was not a matter which fell to be considered within his topic, he considered that the elaboration of regimes relating to lawful acts would provide tribunals with an indication of the kind of standards that were deemed reasonable and normal in a particular situation. Hence that was one area in which his topic could have an impact on the substantive treatment of wrongfulness.

6. He agreed that there was a certain overlap between his own topic and the law of the non-navigational uses of international watercourses, but there were only advantages to be gained from such a common pool of material. He did not foresee any difficulty arising out of the overlap between his topic and State responsibility, but would bear in mind the need to take account of the relationship between the two topics and would look to Mr. Riphagen for guidance on the rules relating to damages.

7. Mr. Sucharitkul (1631st meeting) had perhaps established the balance of what the majority of speakers believed should be the scope of the topic. Specifically, he had endorsed the recommendation of the Working Group referred to in paragraph 65 of the report regarding the minimum content of the topic and had expressed the view that no maximum should be set. In preparing the report, he (the Special Rapporteur) had had no difficulty in working within that framework, although he had concentrated to some

extent on the material available concerning the environment.

8. One point alluded to by Mr. Sucharitkul concerned the moving frontier between rightfulness and wrongfulness, in other words, between acts that were regarded as permissible, provided the actor took full account of the consequences, and acts that were forbidden. Mr. Sucharitkul had rightly concluded that, as that frontier moved into the area of wrongfulness, a new element would arise to replace it in the area with which the Commission was concerned. He (the Special Rapporteur) had, however, also sought to take account of the numerous fairly innocent activities which he considered might have a permanent place in that area.

9. Mr. Sucharitkul had noted that, in certain circumstances, the less developed States were not well equipped, in terms of their own legal order, to ensure protection of their environment both at home and abroad. That factor, which was recognized in Principle 23 of the Stockholm Declaration (A/CN.4/334 and Add.1 and 2, para. 16) would undoubtedly have to be taken into account when drawing up a regime or assessing the degree of liability, but, as Mr. Schwebel had observed (1632nd meeting), the problem was not confined to the less or to the more developed countries. In that area, the emphasis was always on the special needs and circumstances of the State concerned, and existing regimes showed how much effort had been made to accommodate the interests of the various parties, all effort that was greatly to be encouraged. As Mr. Sucharitkul had stated, it was not a question of complete freedom, but of ensuring that the obligation was not unreasonably severe in its application.

10. Mr. Sucharitkul had agreed that, in the case of lawful acts, the standard of care should be stricter, but he had not specified any particular standard. There again, the various regimes allowed States sufficient latitude to agree on the level of care which would meet their requirements in a given situation.

11. He agreed with Mr. Sucharitkul that the Commission was, in a sense, concerned with created risks, as opposed to the consequences of a natural situation. He considered, however, in connexion with a point raised by Mr. Pinto (1631st meeting) that omissions also fell within the title of the topic, since liability at the international level could arise from the omission of a State to take adequate precautions to avoid harmful results.

12. Mr. Sucharitkul had suggested that the bomb tests carried out 25 years earlier on the Marshall Islands might now be regarded, in view of developments in the law, as falling within a category of wrongfulness or, at any rate, might be considered in a different light. It was perhaps relevant to note, however, that there was often an element of choice in regard to the regime to which such matters were referred. In the case mentioned by Mr. Tsuruoka, the Japanese Government had not at any stage suggested

that the United States had acted wrongfully, but only that its action might call for an appropriate measure of redress. Moreover, at least one of the conventions on liability in the nuclear field stated expressly that the institution of a new form of liability for acts not prohibited did not deprive any party of recourse to another form of complaint allowed under international law. It was perfectly possible for two regimes to exist side by side, and when there was no regime for a particular incident, for the parties to refer to some other regime.

13. Mr. Calle y Calle had rightly noted that the title of the topic, though a little awkward, established precisely the kind of classification required. He had wondered exactly what the report sought to establish by drawing a comparison, in one specific context, between the principle with which the Commission was concerned and the work of Mr. Sørensen (A/CN.334 and Add.1 and 2, foot-note 29). Admittedly, the operation of that principle, which was extremely broad, was not confined to one area; the report could also have drawn a parallel with the kind of legal relationship that arose out of an obligation incurred when some harm or loss was suffered by a State or its citizens, since it was one matter to determine the existence of a legal relationship and quite another to determine how the incidence of liability would fall in a particular case.

14. Mr. Šahović (1631st meeting) had underlined the need to deal with the topic in general terms, even suggesting that the Special Rapporteur should concentrate on principles and should not be unduly concerned about rules. While that was welcome advice, it was necessary to strike a certain balance, particularly since a specific response was expected of the Commission. Moreover, in another context, Sir Francis Vallat had spoken of the disadvantages of seeming to be always concerned with the abstract and the general. It would therefore be advisable to make some progress at the specific level without, however, sacrificing objectivity and principles.

15. Mr. Pinto, in referring to the assessment of harm (*ibid.*), had stressed the need to take account of whether or not there was a shared interest, since it was unreasonable for countries which had no hope of immediate benefit from a particular activity to be put to undue trouble to maintain it. Once again, a series of factors was involved, but it was clear from existing regimes, as well as that proposed for sea-bed mining, that those factors were being taken into consideration. By and large, the States concerned should be left to work out such matters to their mutual benefit.

16. He agreed entirely that the kind of conflict which the Commission was required to regulate was aptly illustrated by the work of R. Pound, to which Mr. Pinto had referred.

17. Sir Francis Vallat (*ibid.*) had pointed out that the term "environment" frequently conjured up a notion of changes that affected only the ecology. Although he

(the Special Rapporteur) had not intended to use that term in such a narrow context, he thought it would be wise to remain within the boundary of the physical use of the environment.

18. Sir Francis had also noted a distinction between cases which might be governed by the duty of care and the criterion of negligence, and could therefore be classified fairly easily without reference to a special regime, and cases which should be covered by guarantee. A duty of care might, however, in itself call for the establishment of a special regime. For instance, where space objects were concerned, although all necessary precautions would undoubtedly be taken, the possibility of an accident, albeit remote, was so serious that the countries concerned were required to make appropriate provision. He agreed that the Commission should not depart from the standards of the reasonable man, but he also considered that, within a given regime, States should set their own standards; where it was necessary to appraise situations not covered by a regime, reference should be had to such parallels as existed under other regimes.

19. Referring to the comments made by Mr. Ushakov (*ibid.*), he pointed out that, while the Commission must indeed be concerned with the liability to compensate, it must also consider the duty to take preventive measures. He did not regard liability as being limited to inadequate monetary compensation for damage that was not compensable. Mr. Ushakov had also said there could be liability only if damage was caused. But responsibility for wrongfulness could also exist, even if no damage was caused. The regimes of wrongfulness and liability overlapped and, in many instances, offered a choice of reference points, which made for easier and more adequate settlement of disputes. He agreed with Mr. Ushakov that international relations, rather than the mere use of territory, should be the criterion governing the general development of the topic. The Commission was concerned as much with activities undertaken outside national jurisdiction as with those occurring within national jurisdiction and producing consequences outside it.

20. He noted the distinction drawn by Mr. Ushakov between consequences that were foreseeable, and therefore gave rise to a duty to prevent, and those that were attributable to circumstances such as *force majeure*, so that the equitable principles of State responsibility might provide a means of dealing with the situation.

21. Referring to the comments made by Mr. Barboza (1632nd meeting), he said that he subscribed to the widely held view of writers that it was simply not possible to draw a valid distinction between ultra-hazardous and other activities. Indeed, he saw no salvation in such an approach.

22. With regard to the use of the term "liability", he believed that it could be interpreted as meaning not only the consequences of an obligation, but also the

obligation itself. It was the responsibility of a State not to act wrongfully, and if it did so its responsibility was engaged. Moreover, State responsibility extended to all the content and consequences dealt with under the topic of State responsibility. If the term "liability" was to be used, it must have the same meaning as the term "responsibility", although in respect of a different set of obligations. Moreover, the terms "obligation" and "liability" could be regarded as coterminous, in that all obligations set up liabilities.

23. With regard to the relationship between the regimes of liability and wrongfulness, he regarded the duty to exercise due care as encompassing the establishment of what was harmful in a given context, provision for preventive measures and, if necessary, the construction of a regime of compensation. That interpretation raised no new doctrinal problems, and it was perfectly possible for States to choose to apply a regime of liability for acts not prohibited by law, if it provided an easier way of regulating common interests. Moreover, a State's prestige was not engaged to the same extent if it was found to be in breach of a rule which did not involve wrongfulness. State practice contained innumerable examples of States dealing with each other on a limited basis and refraining from establishing binding rules or determining a firm boundary line between right and wrong, preferring to allow that boundary line to develop out of their dealings with one another.

24. He thanked Mr. Verosta for substantiating his own references to the established principle of *sic utere tuo ut alienum non laedas* (*ibid.*). He also noted Mr. Verosta's warning not to depart from the general in order to deal with the particular. The topic was so broadly defined in the report because many of those concerned regarded it as another category of secondary rules and because it was really only as a result of the Commission's work that a new way of dealing with the problem was beginning to emerge. He was also grateful to Mr. Verosta for his observations concerning preclusions and other situations, and the benefit to be derived from the study of other materials, such as treaties on the treatment of aliens and the research of the Special Rapporteur on the non-navigational uses of international watercourses.

25. He had noted Mr. Schwebel's suggestion (*ibid.*) that the study might be extended to include the question of *ex gratia* payments and other types of situation. In that connexion, he recalled that in extending the limits of their territory or economic zones, States had, in the past, taken account of the legal interests of countries that had traditionally made use of the areas in question. Situations of that type were germane to the topic under consideration. He had noted that Mr. Schwebel regarded the rules outlined in paragraph 60 of the report as providing a good working basis.

26. Referring to the observations made by Mr. Thiam (*ibid.*) regarding the distinction between the

regimes of wrongfulness and liability for lawful acts, he said that the duty of due care was, in itself, the application of a primary rule and, until that rule had been applied, the regime of wrongfulness could not come into play. States might choose not to characterize their own conduct as wrongful if it departed from certain objective standards. Only if the duty to compensate was not performed would a different form of responsibility arise. The regime of liability was a necessary and useful adjunct to the regime of responsibility for wrongfulness.

27. The doubts expressed by Mr. Reuter (*ibid.*) as to whether the topic really existed were reasonable, since no reference to it could be found in standard works. Mr. Reuter had also stated that conventional regimes usually resulted precisely from the impossibility of establishing the existence of a duty to exercise due care, so that some other absolute standard had to be substituted for it. It should be noted, however, that the applications of such a standard might extend beyond the range of questions which were normally associated with ultra-hazardous situations. In general, when activities within a State produced consequences outside its boundaries, only the State in which the activities had occurred was able to control them, or even to give an authoritative explanation as to how or whether they had been carried out. That advantage had been noted in the *Corfu Channel* case (A/CN.4/334 and Add.1 and 2, para. 36). However, the other States concerned might be entitled to a liberal inference as to the proof of events occurring in the first State.

28. Mr. Reuter had been correct in observing that, in approaching the topic, he had not attempted to propound a doctrinaire view or to suggest obligations other than very general ones. His main concern had been to indicate that, when States dealt with each other in such matters as the causing of harm, they did so on a basis of equality. Mr. Reuter's observations concerning the need to establish thresholds raised the question of the primary duty to ascertain what constituted harm in a given situation and to take appropriate measures. Greater prominence should be given to preventive than to compensatory measures.

29. With regard to the view that the Commission was breaking new ground, he pointed out that the topic had not been foisted on the Commission by the General Assembly, but had been taken up as the result of deliberate decisions taken by the Commission each year since 1973. Moreover, the title had been determined, in every detail, by the Commission itself. The General Assembly had simply taken the Commission at its word by inviting it to proceed with the study of the topic. The Commission therefore had a duty to do so.

30. With regard to the observations made by Mr. Tsuruoka (1632nd meeting), he agreed that it was important to avoid interpreting the term "environment" in a narrow, ecological sense.

31. Mr. Tsuruoka had also emphasized that preventive measures were more important than compensatory measures. He was grateful to him for his offer to provide material on the relevant State practice of Japan. He also agreed with Mr. Tsuruoka that the Commission should not lose sight of the important factor of international solidarity in dealing with the topic. He took note of Mr. Tsuruoka's reference to the case of the Japanese plant in Thailand, and of his warning not to confuse the question of shared resources with the general question of environmental protection.

32. Referring to the comments made by Mr. Díaz González (*ibid.*), he said that it had certainly not been his aim to propose an *ex post facto* law to be imposed on States which had committed no wrongful act.

33. As to the way in which he had dealt with the term "liability" in the report, he explained that he had attempted to show that the use of two words in English where only one word was used in the other working languages could raise very serious drafting problems. The Informal Composite Negotiating Text of the Third United Nations Conference on the Law of the Sea¹ suggested that such a formulation was possible, but that was a question for the Drafting Committee.

34. Referring to paragraph 65 of the report, he said that the words of the Working Group set up by the Commission at its thirtieth session showed quite clearly that the topic was concerned with cases in which danger was created within the jurisdiction of one State and damage was suffered by other States, or by citizens of other States. It was also quite clear that social and economic factors would come into play, as they had even with respect to the rules laid down by the International Court of Justice for determining the base lines from which the territorial sea should be measured.

35. While those who saw merit in a separate system of no-fault or risk responsibility might regard his approach to the topic as disappointingly conservative, it should be remembered that his course was governed by the wording of the title of the topic and by the distinction drawn by the Commission between primary and secondary rules.

The meeting rose at 11.30 a.m.

¹ "Informal Composite Negotiating Text/Revision 2", drawn up in April 1980 by the President of the Third United Nations Conference on the Law of the Sea and by the Chairmen of the main committees of the Conference (A/CONF.62/WP.10/Rev.2 and Corr.2-5).

1634th MEETING

Wednesday, 16 July 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Diaz González, Mr. Evensen, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/335)

[Item 6 of the agenda]

PRELIMINARY REPORT BY THE SPECIAL RAPPORTEUR

1. Mr. YANKOV (Special Rapporteur), introducing his preliminary report (A/CN.4/335), said that its main object was to elicit advice and guidance from the Commission on certain topical issues of substance and method before he proceeded to draw up subsequent reports containing draft articles. He would be grateful for any comments, critical observations and suggestions that would contribute to further elucidation of such issues as the scope and content of the topic.

2. Although modest in terms of its doctrinal implications, the topic was nevertheless significant, by reason of the ever-increasing dynamics of international relations in which States and international organizations were engaged in very active contacts through various means of communication, including official couriers and official bags. The adoption of appropriate rules would therefore promote the development of friendly co-operation between States and contribute to the prevention or reduction of abuses on the part of either sending or receiving States. By supplementing existing international instruments, the Commission would enhance the precision and effectiveness of the legal framework governing that field of international relations. The adoption of up-to-date international rules would remedy some existing omissions and unsuitable practices and improve conditions for the application of existing conventions, which currently met with daily difficulties. The political significance of the Commission's work on the topic should be assessed also in the light of current international events, where failure to respect diplomatic privileges and immunities had become a matter of common concern.

3. The status of the diplomatic courier and the diplomatic bag, though a topic of a highly technical nature, nevertheless had some delicate features relating to important interests of States. One consideration of paramount importance for a viable regime governing communications between States was how to establish a reasonable balance between the secrecy requirements

of the sending State and the security requirements of the receiving State. The immunity of the official bag from inspection had to be reconciled with the legitimate concern to prevent acts of terrorist sabotage and other abuses.

4. Despite those and other difficulties, the topic had the advantage of having been relatively well defined in a significant number of multilateral and bilateral treaties, including the Vienna Convention on Diplomatic Relations,¹ the Vienna Convention on Consular Relations,² the Convention on Special Missions,³ and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character,⁴ as well as in a number of rules of customary law. No serious conflicts existed in doctrine or jurisprudence, instances of disputes relating, rather, to abuses of the status of the diplomatic bag or failure to meet requirements regarding the facilities to be accorded to the diplomatic courier. Nevertheless, it was widely agreed that there was a need for more coherent uniform rules governing State practice and for further elaboration of legal doctrine on the subject, especially in regard to the diplomatic bag not accompanied by diplomatic courier, which had assumed greater importance for all countries, in particular the small and developing countries remote from the main centres of international political activity.

5. Referring to section II of his report, he said that he had thought that a consolidated account of the history of the Commission's consideration of the topic would provide a basis and constitute, to some extent, *travaux préparatoires* for the actual work of codification. In that connexion, he wished to pay a tribute to the work of the Working Group presided over by Mr. El-Erian,⁵ which, together with the comments submitted by Governments and the topical summary of the Sixth Committee's discussion on the report of the Commission at the thirty-fourth session of the General Assembly (A/CN.4/L.311), provided a very sound basis for the Commission's current consideration of the topic.

6. The review of sources of international law on the topic contained in section III of his report was not exhaustive, and he would be grateful if members of the Commission would draw his attention to any impor-

¹ United Nations, *Treaty Series*, vol. 500, p. 95 (hereinafter called "1961 Vienna Convention").

² *Ibid.*, vol. 596, p. 261 (hereinafter called "1963 Vienna Convention").

³ General Assembly resolution 2530 (XXIV), annex.

⁴ *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 (hereinafter called "1975 Vienna Convention").

⁵ See *Yearbook ... 1978*, vol. II (Part Two), pp. 138 *et seq.*, document A/33/10, paras. 137-144.

tant omissions. The review showed that there was a great scarcity of judicial decisions on the subject. While a wide variety of sources existed, there were nevertheless insufficient specific legal rules on the subject. The relevant sources were mainly conventional in character, and in almost all of them the principle of freedom of communication for all official purposes had been explicitly recognized as fundamental. The scarcity of international judicial practice was explained by the fact that States, for understandable reasons, preferred to find administrative solutions to any problems that arose, rather than refer their cases to international tribunals.

7. The main sources included the codification conventions concluded under the auspices of the United Nations, namely the Vienna Conventions of 1961, 1963 and 1975, and the Convention on Special Missions, adopted in 1969. As noted in paragraph 21 of the report, all those conventions contained provisions on the principle of freedom of communication for all official purposes and transit through the territory of a third State. In addition, the 1963 Vienna Convention contained general provisions relating to the facilities, privileges and immunities of honorary consular offices and consular posts headed by such offices, as stated in paragraph 22 of the report.

8. The report also referred to a number of other important multilateral treaties, including the Conventions on the Privileges and Immunities of the United Nations and of the Specialized Agencies, adopted by the General Assembly in 1946 and 1947 respectively,⁶ and the Convention on Diplomatic Officers, adopted by the Sixth International Conference of American States in 1928, the relevant provisions of which were quoted in paragraph 24 of the report. Other relevant multilateral treaties were listed in paragraph 25.

9. Bilateral agreements relating to diplomatic relations proper existed mainly in the form of exchanges of notes constituting agreements. A number of examples were listed in paragraph 26 of the report. Most of the relevant bilateral treaties concluded between States concerned consular relations. A survey had been made of over 150 such treaties, which provided evidence of State practice concerning the status of consular couriers and their bags, particularly in regard to their inviolability and protection. As could be seen from paragraph 27 of the report, some of those treaties had been concluded before the adoption of the 1963 Vienna Convention, while quite a significant number had been concluded after the adoption of that convention and had been modelled on it.

10. In paragraph 28 of the report, reference was made to a number of relevant bilateral treaties concluded between States and international organizations. They consisted mainly of Headquarters

Agreements and recognized the right of the organizations concerned to use couriers and bags with the same immunities and privileges as those enjoyed by diplomatic couriers and bags.

11. Other legal rules concerning the status of the diplomatic or consular courier could be found in national legislation and special regulations, as noted in paragraph 29 of the report.

12. Further evidence of relevant State practice could be found in diplomatic correspondence and official communications or statements, as noted in paragraph 30 of the report, where particular attention was drawn to the reservations made by certain States to article 27, paragraphs 3 and 4, of the 1961 Vienna Convention concerning the opening of the diplomatic bag and to the objections made to those reservations.

13. References to the status of the diplomatic courier and the diplomatic bag in doctrinal sources were of a general, rather than a specific nature. The bibliography contained in paragraph 31 of the report was not intended to be exhaustive, but attempted to cover the main schools of thought on the subject over a relatively wide geographical distribution. The sources included members of the Commission and the Secretariat.

14. The *travaux préparatoires* for the relevant provisions of the four United Nations codification conventions deserved special scrutiny. An examination of the records of those deliberations showed the significant contributions made by a number of present members of the Commission, including Mr. Bedjaoui, Mr. Dadzie, Mr. Riphagen, Mr. Tsuruoka, Mr. Ushakov and Sir Francis Vallat, to the formulation of provisions of relevance to the topic under consideration.

15. As to the form of the eventual instrument, most references in resolutions of the General Assembly spoke of the elaboration of an "appropriate legal instrument". At the current stage of the Commission's work, the main objective should be to prepare draft articles incorporating and combining elements of both *lex lata* and *lex ferenda* in such a way that they could serve as a basis for the elaboration of an appropriate legal instrument, following the well-established pattern of the Commission's work. The problem of the form of the instrument should be left to be decided by States Members of the United Nations at an appropriate stage in the codification process.

16. The empirical method was best suited to a topic of such a practical nature. As far as possible, the form of existing codification conventions should be followed, taking into consideration the specific functions of the official courier. The facilities, privileges and immunities accorded to the diplomatic courier were not intended to benefit the person concerned, but to establish conditions that would facilitate the performance of his functions, which were instrumental in the exercise of the right of communication. Consideration should be

⁶ United Nations, *Treaty Series*, vol. 1, p. 15, and *ibid.*, vol. 33, p. 261, respectively.

given to the fact that the diplomatic courier was not a member of the mission of the sending State or international organization, and did not reside permanently in the territory of the receiving State. Consequently, the facilities accorded to him should be within the scope and limits of his functions. The main concern of the Commission should be to exercise flexibility and caution in drawing analogies with diplomatic and consular agents, while at the same time avoiding the creation of unnecessary limitations which might impair the effective protection of the courier and the bag.

17. With regard to the scope and contents of the work, the terms "diplomatic courier" and "diplomatic bag" had not been used in an absolutely restrictive sense, as in the 1961 Vienna Convention. From the very outset, the Commission and the General Assembly had made it clear that those terms also covered such means of communication for all official purposes (as enumerated in paragraph 39 of the report). As stated in paragraph 40 of the report, the understanding had always been that the three multilateral conventions concluded subsequent to the 1961 Vienna Convention reflected the considerable developments that had taken place in subsequent years on various aspects of the topic under consideration, and that the relevant provisions of those conventions should therefore form the basis for any further study of the question. Of course, that more comprehensive approach did not automatically settle the question whether, or to what extent, the status of the diplomatic courier and the unaccompanied diplomatic bag should be assimilated to that of the other types of official couriers and official bags used by States or inter-governmental organizations. In that connexion, it had seemed appropriate to refer to the Commission's commentary to article 28 of its final draft on Special Missions, adopted in 1967, which was reproduced in paragraph 43 of the report. The Commission had also referred to that point in the commentaries to articles 27 and 58 of its final draft on the Representation of States in their Relations with International Organizations, adopted in 1971, reproduced in paragraph 44 of the report. In addition, the 1946 Convention on the Privileges and Immunities of the United Nations provided that the couriers and bags used by the United Nations should have the same immunities and privileges as diplomatic couriers and bags. The relevant provisions of that Convention were reproduced in paragraph 45 of the report.

18. In the list of items approved by the Commission as possible elements of a protocol on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/335, para. 47), the terms "diplomatic courier" and "diplomatic bag" were taken to include the courier and the bag as conceived in the 1963 Vienna Convention, the 1969 Convention on Special Missions and the 1975 Vienna Convention.

19. In the light of those considerations, there were certain matters on which he would appreciate the Commission's guidance.

20. In the first place, the existing conventions did not define either the courier or the bag; it would therefore be helpful if an attempt could be made to provide definitions on the basis of the functions performed.

21. Secondly, it would be desirable for the Commission to decide whether the concept of the official courier and the official bag should embrace all types of official communication. Such a comprehensive approach would reflect the developments that had taken place since the adoption of the 1961 Vienna Convention, would promote the codification and progressive development of international law, and would make for uniformity in the legal protection afforded to all kinds of couriers and bags. Moreover, in adopting that approach, the Commission would not, in his view, be exceeding its terms of reference.

22. Thirdly, rules should be drawn up determining the functions of the official courier and related matters, since there were no specific provisions on those matters in the existing conventions.

23. Fourthly, certain other points (referred to in paragraphs 50-53 of the report) required consideration. They included the facilities and immunities accorded to the official courier, the status of the *ad hoc* courier and the status of the official bag, with special reference to the need to achieve a balance between the secrecy requirements of the sending State and the security requirements of the receiving State, between the safe and rapid delivery of the bag and respect for the sovereignty and security of the receiving State, and between immunity from checking and security considerations, particularly where the safety of civil aviation was concerned. Other questions to be considered related to possible abuses by either the sending or the receiving State, and the obligations of transit States and other third States, including their obligations in cases of *force majeure*.

24. Fifthly, as noted in paragraph 54 of the report, the Commission should decide whether some more general expression was required of such basic principles as those of freedom of communication, respect for the legal order and sovereignty of the receiving State, sovereign equality and non-discrimination, and possibly also the emergent role of international organizations in the field of diplomatic law.

25. Section VI of the report made several tentative suggestions regarding the structure and format of the draft articles. Broadly, those suggestions were to the effect that the draft should consist of five sections, dealing respectively with general provisions, the status of the official courier, the status of the official courier *ad hoc*, the status of the official bag, and certain miscellaneous provisions.

26. The idea underlying paragraph 61 of the report was that the Commission should seek to adopt a pragmatic and flexible approach to what was essentially a modest topic. That did not mean, however, that the topic was of little significance, for the international situation provided daily evidence of the ever-increasing importance of all facets of diplomatic law and of the need to take account of the dynamics of international relations.

27. Lastly, he expressed his appreciation to the Secretariat for the assistance it had given him in his work.

28. Mr. CALLE Y CALLE said that the task of the Commission was not to codify legal rules in the strict sense, since that had already been done in existing conventions—in particular, the 1961 Vienna Convention—but rather to set forth in detail all matters relating to those tools of State known as the diplomatic courier and the diplomatic bag.

29. He noted from the report, however, that it was proposed to refer not to the diplomatic courier and diplomatic bag, but to the “official” courier and “official” bag. While he appreciated that the latter terms would serve the purposes of the Commission’s work and would have the merit of covering all the various kinds of couriers in the different sectors of diplomacy, he believed that they would unduly institutionalize and over-emphasize what were essentially instruments in diplomatic exchanges between countries. In his own country, commercial bags between trade missions and the Ministry of Trade had been introduced, and were also made use of by military and other attachés. Those bags had, however, always been channelled through the Ministry of Foreign Affairs and had enjoyed all the facilities, privileges and immunities extended to the diplomatic bag. Thus, if he favoured the term “diplomatic”, it was perhaps because it implied a status of immunity and inviolability behind which the personality of the State could be perceived. Possibly, too, that was why provision had been made for the pouches of international organizations to be accorded the same facilities and immunities as the diplomatic bag. Any unnecessary extension of that concept would, in his view, undermine it and divest it of its special attributes: immunity, inviolability and security.

30. He therefore considered that the main concern should be protection of the unaccompanied diplomatic bag. To ensure such protection, the bag must be provided with the necessary supporting documents from the Ministry of Foreign Affairs showing its origin, be closed with the seals of the State and be addressed to a diplomatic mission.

31. He believed it was important to strengthen the long-standing diplomatic guarantees and to revert to the principles which many regarded as sacrosanct, particularly at a time when there was a growing number of violations of diplomatic law, some of which,

as noted in paragraph 62 of the report, had caused public concern.

32. Lastly, he expressed his confidence in the Special Rapporteur, with whose guidance the Commission would undoubtedly be able to draw up valid provisions.

33. Mr. REUTER, after emphasizing the merits of the report, said that the Commission should draft a set of articles without, for the time being, settling the question of its future. The drafting of articles was a salutary exercise, which made it necessary to use only terms having a very precise meaning.

34. If the Commission opted for a set of draft articles, it should decide on their purpose. In that connexion, he noted that in their observations several Governments had expressed concern. Some of them thought that a draft of articles was perhaps not essential, whereas others had expressed more open opposition. It was true that the diplomatic bag was subject to frequent abuses. To mention only his own country, at the Ministry of Foreign Affairs, French diplomatic bags arriving from abroad had for some years been opened in the presence of persons who were not attached to the Foreign Ministry, in particular a representative of the Ministry of Finance. The French Government had, indeed, judged it necessary to exercise some supervision over its own agents in regard to diplomatic bags. Moreover, the only criminal attempt against the Ministry of Foreign Affairs for many years dated back to the Algerian troubles and had been made possible by a device placed in a diplomatic bag. It was therefore not surprising that some Governments were anxious about what might be going on under cover of the diplomatic bag. That cautious attitude was further justified by the fact that some countries were in very delicate situations, whether as transit States or as States situated in particularly troubled regions of the world.

35. The Special Rapporteur had stated, both in his report and in his oral presentation, that some international organizations benefited from a regime similar to that governing the diplomatic bag. It was true that abundant correspondence was exchanged between Geneva, Vienna and New York by diplomatic bag. Although he was in favour of assimilating international organizations as closely as possible to States, he thought it preferable to abstain, initially, from dealing with questions relating to international organizations and their privileges.

36. On the question whether the existing conventions should be further developed, assuming the existence of an official courier and an official bag, he shared the opinion of the Special Rapporteur. Where there were normal relations between a State and one of its representatives abroad, the substance of the problem was the same: there was not much difference between the courier of a special mission or of a State delegation to an international organization and a diplomatic

courier. From a tactical point of view, however, he feared that the use of the expressions "official courier" and "official bag" might draw the attention of Governments to the reality of international life. For besides diplomatic and consular relations, there was a whole network of para-diplomatic and para-consular relations, so that Governments might have a reaction of anxiety at the continually increasing number of diplomatic couriers and diplomatic bags. Enormous amounts of correspondence left ministries of foreign affairs every day by diplomatic bag, and it was hardly surprising that that situation, even if it did not worry ambassadors, was a matter of concern to customs personnel and those responsible for territorial security or anti-terrorist brigades. He was therefore in favour of qualifying both the courier and the bag as "diplomatic" in the articles to be drafted by the Commission. At the same time, comparisons could be made with the existing conventions in order to prepare Governments for a possible extension in the draft articles.

37. If the draft articles became a convention, its links with the four existing conventions would have to be specified, which would be sure to raise delicate problems. It was regrettable that the 1969 Convention on Special Missions and the 1975 Vienna Convention had obtained few ratifications, and that the 1963 Convention had obtained fewer than the 1961 Vienna Convention. That was one more reason to take the precaution of stating, not that the Commission would confine its work to the diplomatic courier and the diplomatic bag, but that it would start with those two concepts, which were the most important and the most certain, though it might subsequently extend them.

38. In general, he approved of the plan proposed by the Special Rapporteur for the draft articles, but he hoped that the study of the general provisions, like that of the miscellaneous provisions, would only take place after all the specific questions had been examined. As some Governments still doubted the advisability of drafting articles on the subject, it was important to convince them of it before proceeding to the general and miscellaneous provisions.

39. With regard to the many specific questions listed in the plan proposed by the Special Rapporteur, he only wondered whether the Commission was prepared to consider the following question: should it be accepted that diplomatic bags, whether accompanied or not, could be examined by equipment which revealed their contents by means of X-rays, or even by means of rays capable of fogging any suspicious photographic film they might contain? It was well known that the diplomatic bag was sometimes used to carry espionage material.

40. While it was true that principles should be declared, as the Special Rapporteur had intimated, the content of the articles envisaged by the Commission should nevertheless be specified first. A principle as basic as that of non-discrimination was not always applied in practice. If that principle was declared,

should it be deduced that a State could claim that it had been subjected to a discriminatory measure if its diplomatic bag was required to be opened, when no similar case had occurred for many years? Was there discrimination if four ambassadors from countries situated in a troubled region of the world were called upon by the State to which they were accredited to open their diplomatic bags, whereas about a hundred other ambassadors accredited to the same State were not so called upon? Only when the content of the draft articles had been specified would it be possible to formulate such a general principle as that of non-discrimination.

41. Finally, he pointed out that the Third United Nations Conference on the Law of the Sea had been seized of a proposal derogating from the principle of freedom of the high seas in the case of traffic in narcotic drugs.⁷ That issue was not without importance for the topic under consideration, since events had shown that the diplomatic services of poor countries could even engage in drug trafficking to finance their secret services.

Jurisdictional immunities of States and their property (continued)* (A/CN.4/331 and Add.1, A/CN.4/L.317)

[Item 5 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

42. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the texts adopted by the Committee of draft articles 1 and 6, which had been referred to it for consideration.

43. The proposed texts of those articles (A/CN.4/L.317) read:

Article 1. Scope of the present articles

The present articles apply to questions relating to the immunity of one State and its property from the jurisdiction of another State.

Article 6. State immunity

1. A State is immune from the jurisdiction of another State in accordance with the provisions of the present articles.

2. Effect shall be given to State immunity in accordance with the provisions of the present articles.

ARTICLE 1⁸ (Scope of the present articles)

44. Mr. VEROSTA (Chairman of the Drafting

* Resumed from the 1626th meeting.

⁷ "Informal Composite Negotiating Text/Revision 2", drawn up in April 1980 by the President of the Third United Nations Conference on the Law of the Sea and by the Chairmen of the main committees of the Conference (A/CONF.62/WP.10/Rev.2 and Corr.2-5).

⁸ For consideration of the text initially submitted by the Special Rapporteur, see 1622nd and 1623rd meetings, 1624th meeting, paras. 1-27, 1625th and 1626th meetings.

Committee) said that article 1 was the first article in part I (Introduction) of the draft articles on the jurisdictional immunities of States and their property, and article 6 was the first article in part II (General Provisions). The original numbering of those two articles had been retained pending a final decision by the Commission on the numbering of all the draft articles.

45. While article 1 embodied the basic rule laid down in the text originally proposed by the Special Rapporteur, certain drafting changes had been introduced for the sake of clarity. Specifically, the expression “jurisdictional immunities” had been replaced by a reference to “the immunity of one State and its property from the jurisdiction of another State”, the reference to “territorial” and “foreign” States had been omitted and the expression “accorded or extended” had been deleted.

46. Mr. USHAKOV said he was neither for nor against article 1. In his opinion, it was not an article, since it did not state any legal rule. It was merely descriptive and referred to “questions relating to the immunity of one State and its property” without specifying what those questions were. As it stood, the article did not even define the scope of the draft articles. He therefore considered that the Commission should not submit such an article to the General Assembly.

47. Mr. VEROSTA said that the Drafting Committee had decided, after a long discussion, that it was not possible at that stage to cast the draft article in more specific terms. It had therefore decided to adopt the text proposed, with the word “questions”, on the understanding that some more suitable form of words might be found when the content of all the other draft articles had been agreed.

48. Mr. REUTER, referring to the French texts of articles 1 and 6, asked why the word “*immunité*”, in the singular, had been used in draft article 1 and in paragraph 2 of draft article 6, when “*immunités*”, in the plural, appeared in the title to draft article 6.

49. Mr. VEROSTA said that the singular had been used in article 1 on the understanding that it could, if necessary, be replaced by the plural at a later stage.

50. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to adopt draft article 1, subject to the comments made.

It was so decided.

ARTICLE 6⁹ (State immunity)¹⁰

51. Mr. VEROSTA (Chairman of the Drafting

Committee) said that draft article 6 incorporated certain drafting changes similar to those made to article 1. In paragraph 1, the words “a foreign State” and “a territorial State” had been replaced, respectively, by the words “a State” and “another State”. Also, to underline the nature of the rule, the words “shall be” had been replaced by “is”. In paragraph 2, the word “territorial” had again been deleted, and the reference to the judicial and administrative authorities, which had been considered to be unduly restrictive at that stage of the Commission’s work, had been omitted. For the sake of consistency with paragraph 1, the words “recognized in the present articles” had been replaced by the words “in accordance with the provisions of the present articles”.

52. Mr. USHAKOV said that he had taken part in the work of the Drafting Committee, where he had opposed draft article 6. Even the title was unsatisfactory, since the article did not deal with “State immunity”. Paragraph 1 merely referred to what followed: it provided that “A State is immune from the jurisdiction of another State in accordance with the provisions of the present articles”. It followed that the principle of jurisdictional immunity existed only in accordance with the draft articles, whereas in reality it was recognized by international law. That, moreover, had been demonstrated by the Special Rapporteur in his report.

53. He was therefore completely opposed to the wording of draft article 6, paragraph 1, as it stood, and had proposed the following wording to the Drafting Committee:

“Each State is exempt from the power of any other State. A State and State property are not subject to the jurisdiction of another State, except as provided by the present articles.”

That wording had the advantage of stating a principle and specifying that it could be subject to exceptions.

54. Mr. ŠAHOVIĆ said that he had not taken part in the work of the Drafting Committee and did not know why draft articles 1 and 6 had been adopted in their present form. Personally, he thought those articles called for very detailed commentaries reflecting the discussions in the Commission, and he would have preferred to know the content of the commentaries before pronouncing on the texts of the articles.

55. In his view, the two provisions were hardly comprehensible and were perhaps not worth submitting to the General Assembly. The Commission must not close its eyes to the fact that many questions had been left in abeyance when it had referred draft articles 1 and 6 to the Drafting Committee. It was important that the positions taken on each of those questions be duly mentioned in the commentary.

56. Moreover, he was inclined to agree with Mr. Ushakov, particularly in regard to draft article 6.

⁹ For consideration of the text initially submitted by the Special Rapporteur, see 1623rd meeting, 1624th meeting, paras. 1–7, 1625th and 1626th meetings.

¹⁰ For text, see para. 43 above.

57. Mr. VEROSTA said that the Drafting Committee had discussed the question at some length, and the majority had agreed that it would be advisable to submit at least two articles to the forthcoming session of the General Assembly.

58. Mr. SCHWEBEL said that he could understand Mr. Šahović's reaction, since the two draft articles, standing on their own, seemed somewhat bare. Read together with the commentaries, however, they would be quite comprehensible and would constitute a useful, albeit preliminary, step in the preparation of the draft. Moreover, the two draft articles had been prepared with a view to laying the groundwork, without prejudice to any views that might be held on the differences which remained. He therefore trusted that the Commission would adopt those draft articles.

59. The CHAIRMAN said that Mr. Ushakov's point could perhaps be met by recording his proposal in the Commission's report. An appropriate reference could also be made to Mr. Šahović's reservations.

60. Mr. USHAKOV observed that the commentary could not alter the meaning of the article, but only explain it. He could not imagine a commentary dealing with a principle that was not embodied in the article. Moreover, the Special Rapporteur had tried to prove the existence of that principle in international law, in the considerations concerning article 6 put forward in his report.

61. Mr. ŠAHOVIĆ said that he had not made a reservation, but had expressed an opinion. In his opinion, only articles that had been carefully drafted after mature consideration should be submitted to the General Assembly.

The meeting rose at 1.15 p.m.

1635th MEETING

Thursday, 17 July 1980, at 10.20 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

Tribute to Mr. Santiago Torres-Bernárdez

1. The CHAIRMAN said it had been written in the *Bhagavad-gītā* (the Song of the Lord), some 2,000 years ago, that the God Krishna had spoken to the

Prince Arjuna of knowledge as a sacrifice, a gift and an offering to the Gods. He, as Chairman of the Commission, wished in turn to refer to one whose patient search had brought the gift of knowledge to many—to an exemplary international civil servant, Mr. Santiago Torres-Bernárdez.

2. If the veil of anonymity with which Mr. Torres-Bernárdez had cloaked his work were lifted for a moment, he could be seen at the centre of every major codification conference convened by the United Nations. He had served the United Nations for more than twenty years, some fifteen of which he had spent as Deputy Secretary of the Commission. He had given not only of his knowledge but, more important, of his wisdom. With never-failing courtesy and good humour, he had made a vital contribution to the moulding of opinion within the Commission, and had guarded the essential traditions and strengths of the Commission with courage and firmness. He was, indeed, the very embodiment of its spirit.

3. But as the Commission stood to lose, so did the International Court of Justice stand to gain, for Mr. Torres-Bernárdez would serve the Court with the same high distinction with which he had served the Commission.

4. On behalf of the Commission, he congratulated Mr. Torres-Bernárdez on his appointment as Registrar of the International Court of Justice and wished him and his wife every success and happiness for the future.

5. Mr. TSURUOKA, speaking also on behalf of Mr. Pinto, Mr. Sucharitkul and Mr. Tabibi, the other Asian members of the Commission, expressed their pleasure at hearing that Mr. Torres-Bernárdez had been appointed Registrar of the International Court of Justice. That pleasure was tinged with a certain melancholy, however, for they were thus losing an associate with whom he himself had had bonds of friendship for over twenty years. In his new duties, Mr. Torres-Bernárdez would be able to continue making a valuable contribution to the cause of international law.

6. Rather than enumerate all his virtues, he would merely say that a splendid future certainly awaited him. He wished Mr. Torres-Bernárdez every success in his important post as Registrar.

7. Mr. BEDJAOUI, speaking also on behalf of Mr. Thiam, another African member of the Commission, said how moved they were at seeing Mr. Torres-Bernárdez leave for The Hague. A real pillar of the Commission, he had made a great contribution to the success of its work in recent years. The pleasure of seeing him take up the important post as Registrar of the Court was mixed with a feeling of melancholy at his departure from the Commission. Personally, he felt proud of having been the friend for more than a quarter of a century of the man who was leaving them after having given them so much.

8. Although it was true that the Commission was losing a great servant in the person of Mr. Torres-Bernárdez, the Court was gaining a most valuable associate. He would be rejoining many former members of the Commission, so that neither he nor they would feel exiled.
9. In conclusion he wished to draw attention to the modesty of Mr. Torres-Bernárdez, who on more than one occasion had produced most valuable ideas, which the Commission had taken up, leaving their author anonymous.
10. Mr. CALLE Y CALLE, speaking on behalf of the Latin American members of the Commission, said they wished to join in the tributes which previous speakers had paid to Mr. Torres-Bernárdez.
11. Mr. Torres-Bernárdez, on whose devotion to duty the Chairman had already remarked, was an outstanding example of an international civil servant. Throughout his long career in the service of the United Nations, he had made many valuable contributions, especially to the work on codification. An active associate of the Commission, he was also one of the chroniclers and interpreters of the United Nations in the Commission's field of endeavour.
12. In congratulating Mr. Torres-Bernárdez on his appointment as Registrar of the International Court of Justice, he felt bound also to congratulate the Court on its choice of a man with such great intellectual and human qualities.
13. Mr. USHAKOV, speaking also on behalf of Mr. Yankov, expressed his satisfaction at the choice made by the International Court of Justice in appointing Mr. Torres-Bernárdez as Registrar. It was sad to see him leaving the Commission, but they must be glad that he could continue his legal activities at the Court. With him, the Court was gaining not only an outstanding and well-qualified lawyer, but also a man of attractive, enthusiastic and devoted character.
14. He was convinced that Mr. Torres-Bernárdez had not yet reached the summit of his career, and hoped to see him again, either in the Commission or at the Court, performing other duties. He wished him every success.
15. Sir Francis VALLAT, speaking on behalf of the Western European members of the Commission, said that of the many qualities of Mr. Torres-Bernárdez, he had been struck in particular by two: his scholarship and his devotion to duty. He had also had occasion, when he had served with Mr. Torres-Bernárdez as a Director of Studies at the Centre for Studies and Research at The Hague in 1970, to appreciate his remarkable grasp of the law of treaties and his ability to apply his knowledge for the benefit of the students. Among his many contributions to the Commission's endeavours, Mr. Torres-Bernárdez would be especially remembered for his work in connexion with the draft convention on the law of treaties and the draft articles on State responsibility.
16. With the departure of Mr. Torres-Bernárdez and his wife, the members of the Commission were losing two friends whom they looked forward to seeing again. The Commission's loss was, however, the Court's gain.
17. Mr. ŠAHOVIĆ said that he felt the appointment of Mr. Torres-Bernárdez as a great loss to the Commission and to himself, since he had been his friend for twenty years. Not only in the Commission, but also in the Sixth Committee of the General Assembly and at various diplomatic conferences for the codification and progressive development of international law, he had had occasion to appreciate the qualities of Mr. Torres-Bernárdez. By his personal work and the help he had given members of the Commission, he had undoubtedly made a most valuable contribution. He wished him every success in his professional life.
18. Mr. QUENTIN-BAXTER said that previous speakers had already indicated how much the Commission stood to lose and the International Court of Justice to gain from Mr. Torres-Bernárdez' departure.
19. Institutions were never any stronger than those who served them, and it was extremely important that there should be long periods of service that would allow traditions to be built up and maintained long after the men who had created them had moved on. Mr. Torres-Bernárdez was one such man; his influence would remain with the Commission and continue to be of significance to it.
20. Mr. VEROSTA said he endorsed all that had been said about Mr. Torres-Bernárdez. Since first meeting him at the 1961 session of the General Assembly, he had often had occasion to work with him. As President of the United Nations Conference on Consular Relations at Vienna in 1963, he had appreciated his coolness and composure and the many other qualities that members of the Commission had already spoken of. On more than one occasion Mr. Torres-Bernárdez had held fearlessly to his point of view, thus giving most valuable support to the President of that Conference.
21. Mr. Torres-Bernárdez was not only an eminent jurist; he was also a model international official, devoted to the cause of the United Nations. In him, the Commission was losing a most valuable associate who had been promoted to higher duties, in the performance of which he wished him great success.
22. Mr. SCHWEBEL said that Mr. Torres-Bernárdez, who had always shown the deepest interest in the progressive development not only of international law, but of the United Nations itself, had made an outstanding contribution to the work of the Commission and to the codification process. He had provided the Commission with very valuable support

and would undoubtedly make a remarkable Registrar of the International Court of Justice.

23. He joined previous speakers in wishing Mr. Torres-Bernárdez and his wife every success and happiness at The Hague.

24. Mr. AGO, speaking as a former member of the Commission, said that during his long service on the Commission he had seen Mr. Torres-Bernárdez arrive and develop his personality and ability through the work on codification. He had appreciated his qualities not only in the Commission, but also in New York and Vienna. Of the members of the Commission, he had himself certainly been the one to benefit most from the co-operation of Mr. Torres-Bernárdez, whose preliminary research on circumstances precluding wrongfulness had been extremely useful to him as Special Rapporteur on the first part of the topic of State responsibility. Moreover, the contribution of Mr. Torres-Bernárdez to the drafting of the Commission's final reports had been invaluable. The modesty with which he had always covered his competence and his wide knowledge had only been exceeded by his extraordinary devotion to the cause he had been appointed to serve.

25. If he were still a member of the Commission, he would deeply regret seeing Mr. Torres-Bernárdez leaving for other spheres and taking up other duties; but as a member of the Court, how he welcomed his arrival!

26. Speaking as a member of the Court, he referred to the enthusiasm with which those of its members who had recently been members of the Commission had proposed Mr. Torres-Bernárdez as Registrar and supported his candidature. That bore witness to their appreciation of all that he had done for the Commission. He would not feel exiled at The Hague, because he had already worked at the Academy of International Law, which had its headquarters there, and especially because at the International Court of Justice he would find many friends who had known him in the Commission and had long appreciated his qualities. Referring, in particular, to the nationality of Mr. Torres-Bernárdez, he said he was sure he would prove a worthy inheritor of the great tradition established by the late lamented Julio López Oliván.

27. He himself had shown that a former member of the Commission never entirely ceased to belong to it; he thought that Mr. Torres-Bernárdez, too, would never entirely cease to have links with the Commission and to visit it from time to time, in so far as his new duties permitted. It was a good omen that an eminent official of the Commission was now to become the principal officer of the Court. At a time when the international community was not giving the law all the attention it merited, it was highly desirable that closer co-operation should be established between the two main legal organs of the United Nations. He was confident that Mr. Torres-Bernárdez would be able to

do much to further that end, and it was with the expression of that wish that he would conclude.

28. The CHAIRMAN invited Mr. Torres-Bernárdez to address the Commission.

29. Mr. TORRES-BERNÁRDEZ (Deputy-Secretary to the Commission), thanking the members of the Commission for their kind words, said that he did not regret the twenty-one years he had spent in the cause of the progressive development and codification of international law.

30. He had joined the secretariat of the Commission in 1960, the year in which it had been completing the first reading of the draft articles on consular relations. That had been a decisive time in its work of codification. Behind had lain the years when the Statute had been drawn up and when the Commission had first embarked on its task; behind, too, had lain the cold war, and decolonization had reached its peak, with all the positive influence that such political events had for promotion of the codification process and its universal dimension. By then, the Commission had gained considerable experience and confidence; the doubts about codification that dated from the Conference for the Codification of International Law (The Hague, 1930), and the doubts that had arisen within the Commission as a result of the reaction of States to the draft articles on arbitral procedure had been fully overcome.

31. There had been one development in particular which had shown that the codification of international law was feasible. He was referring, of course, to the four conventions on the law of the sea adopted in 1958 on the basis of draft articles prepared by the Commission. The failure of the Second Conference on the Law of the Sea to agree on certain outstanding matters had in no way undermined the Commission's confidence, either in regard to the mandate entrusted to it by the General Assembly or to the feasibility of its fulfilment in practice.

32. Since that time, the Commission's record of achievement had been impressive. In the first place, the following codification conventions had been adopted by States on the basis of drafts prepared by the Commission: the Vienna Convention on Diplomatic Relations, and the Convention on the Reduction of Statelessness, in 1961; the Vienna Convention on Consular Relations, in 1963; the Vienna Convention on the Law of Treaties and the Convention on Special Missions, in 1969; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, in 1973; the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, in 1975; and the Vienna Convention on Succession of States in respect of Treaties, in 1978. In addition, the Commission had completed the draft articles on the most-favoured-nation clauses and had concluded the

first reading of the draft articles on succession of States in respect of matters other than treaties and the draft articles on treaties concluded between States and international organizations or between international organizations, as well as the first reading of Part I of the draft on State responsibility for internationally wrongful acts.

33. It was not for him to expand on the achievement which that major work of codification represented in intellectual and diplomatic terms. But he had no doubt whatsoever that when the textbooks came to deal with developments in general international law during the twentieth century, they would emphasize that it had been in the course of the two preceding decades, and as a result of the part played by the Commission, that the character of international law had started to change; for alongside the customary rules and the unwritten practice from which such law traditionally derived, there had gradually emerged a body of written rules which, also general in terms of their purpose and actual or potential scope, constituted a genuine codified *common* international law. Indeed, that was already evident from recently published textbooks, which recognized the impact on international law of the work of codification and progressive development in which the Commission had played such a central part.

34. If he were to be asked what the Commission's most significant contribution over the years had been, he would look for the answer not in an examination of the relative merits of the various drafts prepared thus far, but in something that seemed far more important to him, namely, the strengthening of the fundamental concept of an "international community", in the sense not only of the sum of its parts, but also of a genuine community with its own aims and aspirations. Such a concept emerged clearly from the draft articles prepared by the Commission, in which those on *jus cogens* took pride of place, but other examples abounded throughout practically all the Commission's work. The aims and aspirations of the international community had also been taken into account in selecting the topics to be studied by the Commission; it should not be forgotten that topics in which the individual and common interests of States converged, such as offences against the peace and security of mankind and the law of the sea, had been among the first to be considered by the Commission. The same applied to other topics on the current programme, in particular to "International liability for injurious consequences arising out of acts not prohibited by international law".

35. Indeed, the very existence of the Commission attested to the fact that the concept of the "international community" was a legal reality to which States, taken individually, were alive. It was States which had created an International Law Commission composed not of governmental representatives, but of representatives of the main forms of civilization and the main legal systems of the world, thereby enabling

the Commission to take account in its drafts of the interests and aspirations not only of various States or groups of States, but of the international community as a whole. Thus, both by its composition and in its work, the Commission had transcended the narrow and unduly individualistic conception of international law that had prevailed until recently.

36. That was why the drafts prepared by the Commission carried the weight they did. The reaction of States in the Sixth Committee of the General Assembly to the Commission's drafts and the ultimate codification of various topics at plenipotentiary conferences or by the General Assembly had not come about by chance, nor had they been solely the result of the undoubtedly high quality of the Commission's work. The real reason was that the Commission presented the features of a body that was genuinely a body of the international community. Thus the results of the Commission's work were seen as objective findings based on the interests and aspirations of the international community as a whole, and were accordingly examined as such by the representatives of States when the time came to draw up codification instruments. The Commission was therefore far more than just a subsidiary body of the General Assembly.

37. He had been fortunate in that he had been able to follow the Commission's work during decisive years when international law had seen significant progress. He had also been fortunate in that he had taken part, with respect to several topics, in the full cycle of the codification process, from the first to the last stages, and had thereby also become acquainted with its diplomatic dimensions. The experience he had thus gained had convinced him that the codification process constituted an integral whole and that its various stages should not be isolated. The process of progressive development of international law and its codification, in which the Commission participated, called for a combined diplomatic and scientific approach. There, in fact, lay the difference between the Commission's method and the tasks performed by the various special or *ad hoc* committees of the United Nations which made a diplomatic contribution to the development and codification of international law; there, too, lay the difference between the codification work carried out by the Commission and that carried out by scientific bodies concerned with international law.

38. In that connexion, he wished to stress the importance of retaining, as the general method of codifying and progressively developing international law, what was regarded as "the Commission's method". For although to some it might seem unduly restrictive or slow, it was, as already noted by the Commission, an excellent method for carrying out the task assigned to the Commission by the General Assembly pursuant to Article 13, paragraph 1, a of the Charter of the United Nations: the progressive development of international law and its codifications;

that, and elaboration of new law were not identical concepts, as those who criticized the Commission's method appeared to think.

39. The drafters of the Commission's Statute had done an excellent piece of work, and the subsequent achievements were the surest confirmation of the suitability of the method adopted. If any efforts were needed in that regard, they should be directed to consolidating "the Commission's method" and removing any slight defects it might have, with a view to guaranteeing its continued effectiveness.

40. One important feature of "the Commission's method" was that it benefited from the constant presence of a specialized secretariat: the Codification Division of the Office of Legal Affairs. The Commission therefore had a real interest in the composition of that Division and its strengthening. Of the many functions performed by the Codification Division, two merited special mention. The first consisted in providing information to members of the codification bodies served by the Division and ensuring co-ordination between such bodies. That function, which was carried out publicly and also by procedures that were not so immediately apparent but were equally necessary and effective, was essential for the codification process in general and for "the Commission's method" in particular. The second function consisted in following administrative developments within the Organization and advising the administrative services responsible, so as to ensure that certain problems that might otherwise waste the Commission's time were settled in advance. The staff of the Codification Division, to whom he wished to pay a tribute, were therefore required not only to have a knowledge of international law and codification procedures, but also to be totally dedicated to their work, tactful, and faithful to the codification process.

41. Lastly, the honour which the International Court of Justice had conferred on him by his appointment as Registrar could be attributed to all he had learned during his time with the Commission. He trusted that the Commission and its members would enjoy continued success, and, for his part, he would do his utmost to strengthen the ties that already existed between the Commission and the International Court of Justice.

State responsibility (concluded)* (A/CN.4/318/Add.5-7, A/CN.4/328 and Add.1-4, A/CN.4/L.318)

[Item 2 of the agenda]

**DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE**

ARTICLE 33¹ (State of necessity)

42. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Committee of article 33 (State of necessity) (A/CN.4/L.318), which read:

Article 33. State of necessity

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

(b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

(a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or

(b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

(c) if the State in question has contributed to the occurrence of the state of necessity.

43. Mr. VEROSTA (Chairman of the Drafting Committee) pointed out that draft article 33, as originally proposed by Mr. Ago (A/CN.4/318/Add.5-7, para. 81),² had contained three paragraphs. The first paragraph had stated positively the conditions under which the wrongfulness of an act of a State not in conformity with what was required of it by an international obligation was precluded by a state of necessity, namely, if the State had no other means of safeguarding one of its essential interests which was threatened by a grave and imminent peril, and only in so far as failure to comply with the obligation towards another State did not entail the sacrifice of an interest of that State comparable or superior to the interest which it was intended to safeguard.

44. Paragraphs 2 and 3 of the original draft article had then stipulated three situations in which paragraph 1 would not apply, namely, if the occurrence of the situation of necessity was caused by the State claiming to invoke it as a ground for its conduct (para. 2); if the international obligation with which the act of the State was not in conformity arose out of a peremptory norm of general international law, and in particular if that act involved non-compliance with the prohibition of aggression (para. 3 (a)); if the international obligation with which the act of the State was not in conformity was laid down by a conventional instrument which, explicitly or implicitly, precluded the

¹ For consideration of the text initially submitted by Mr. Ago, see 1612th meeting, paras. 34 *et seq.*, and 1613th-1618th meetings.

² Text reproduced in 1612th meeting, para. 35.

* Resumed from the 1629th meeting.

applicability of any plea of necessity in respect of non-compliance with the said obligation (para. 3 (b)).

45. The Drafting Committee had recast the article adopting as a sign of caution the negative approach used in article 62 of the Vienna Convention on the Law of Treaties³ concerning fundamental change of circumstances. The new text of the draft article before the Commission contained only two paragraphs. Unlike the original paragraph 1, its first paragraph did not state when the wrongfulness of an act would be precluded by a State of necessity, but stipulated, negatively, that a state of necessity could not be invoked as a ground for precluding wrongfulness unless the two conditions set out in subparagraphs (a) and (b) were met.

46. Those two conditions, while basically the same as those laid down in the original text, had been redrafted to attain greater clarity and precision. Accordingly, the earlier reference to a “comparable or superior” interest had been dropped. Instead, both subparagraphs (a) and (b) of paragraph 1 referred simply to “an essential interest”, it being understood that the double reference implied a comparison between the two interests involved. In addition, the reference in the original paragraph 1 to an act which “does not entail the sacrifice of an interest” had been replaced in the new paragraph 1 (b) by a reference to an act which “did not seriously impair an essential interest”.

47. Paragraph 2 covered, in three subparagraphs, the three situations in which a state of necessity could not be invoked by a State as a ground for precluding wrongfulness. Those three situations were basically the same as those dealt with in subparagraphs 3 (a) and (b) and paragraph 2 of the text proposed by Mr. Ago. The introductory sentence of paragraph 2, like that of paragraph 1, had been drafted in the negative form he had already indicated, whereas both paragraphs 2 and 3 of the former text had used the formula “paragraph 1 does not apply”. Paragraphs 2 (a) and (b) of the new text corresponded to paragraphs 3 (a) and (b) of the former text. However, paragraph 2 (a) did not include the reference to “non-compliance with the prohibition of aggression” contained in the former text, since it had been considered not only unnecessary, in view of the comprehensive terms of paragraph 2 (a), but also likely to give rise to differences of interpretation regarding the prohibition of the use of force under international law. In paragraph 2 (b), the Drafting Committee had replaced the cumbersome phrase “precludes the applicability of any plea of ‘necessity’ in respect of non-compliance with the said obligation” by the phrase “excludes the possibility of invoking the state of necessity with respect to that obligation”. Finally, paragraph 2 (c) corresponded to paragraph 2

of the text proposed by Mr. Ago. However, unlike that paragraph, which referred to “the situation of ‘necessity’ . . . caused”, paragraph 2 (c) introduced the concept of contribution, thus maintaining conformity with the similar concept already used in article 31, paragraph 2 and article 32, paragraph 2.⁴

48. Mr. USHAKOV said he still did not believe that article 33 was justified in the draft. The concept of an essential interest which a State might invoke to evade its responsibility was very subjective. To a State, every one of its interests was essential. There was always competition between the interests of the two States concerned; it might therefore be asked who was to decide which interest should prevail. If such a subjective criterion was retained, a State might be tempted to invoke the state of necessity abusively as a ground for preclusion of wrongfulness.

49. Mr. VEROSTA (Chairman of the Drafting Committee) said that Mr. Ushakov had drawn the attention of the Drafting Committee to his view. Nevertheless, the majority of the members of the Committee had felt that such a draft article should be included in Chapter V of the draft.

50. Sir Francis VALLAT said that, in order to maintain a proper balance, it should be noted that the point raised by Mr. Ushakov had been taken into account by the members of the Drafting Committee and that some members had expressed the view that, at the appropriate time, it would be necessary to include in the draft a satisfactory article dealing with the settlement of disputes, possibly by arbitration or judicial settlement.

51. Mr. REUTER said he could accept Draft article 33, taking into account article 31, in which the concept of *force majeure* had a very narrow meaning. If that were not so, draft article 33 might have been drafted differently.

52. The CHAIRMAN said that, if there were no objections, he would take it that the Commission wished to adopt draft article 33, with the reservation expressed by Mr. Ushakov.

It was so decided.

ARTICLE 34⁵ (Self-defence)

53. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Committee’s text of article 34 (A/CN.4/318), which read:

Article 34. Self-defence

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act

³ For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287. Hereinafter called “Vienna Convention”.

⁴ For the text of the draft articles adopted so far by the Commission, see *Yearbook . . . 1979*, vol. II (Part Two), pp. 91 *et seq.*, document A/34/10, chap. III, sect. B.1.

⁵ For consideration of the text initially submitted by Mr. Ago, see 1619th to 1621st meetings, 1627th meeting, paras. 1–25, 1628th meeting, paras. 1–28, and 1629th meeting.

constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

54. Mr. VEROSTA (Chairman of the Drafting Committee) said that draft article 34, as originally proposed by Mr. Ago (A/CN.4/318/Add.5-7, para. 124),⁶ had provided that the wrongfulness of an act of a State not in conformity with an international obligation of that State was precluded "if the State committed the act in order to defend itself or another State against armed attack as provided for in Article 51 of the Charter of the United Nations". On the basis of the discussion of the original text in the Commission, and taking into account, in particular, the difference of views on the extent of the right of self-defence under international law, the Drafting Committee had decided to replace that phrase by the more general wording "if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations".

55. Mr. USHAKOV said that he approved of the substance of the article, but found its wording unacceptable because it had too many defects. In the first place, it was unnecessary to state that the wrongfulness of an act constituting a lawful measure of self-defence was precluded, since it was presumed that what constituted self-defence was lawful *ab initio*. Secondly, it should be indicated that self-defence must be exercised in conformity with Article 51 of the United Nations Charter. Thirdly, to state that lawful measures could be taken in self-defence implied that unlawful measures could also be taken, which would be contrary to the very concept of self-defence. As self-defence was a natural right, the measures which it presupposed were always lawful. Fourthly, it was strange to speak of preclusion of the wrongfulness of lawful measures. Fifthly, it was also strange to say that an "act constitutes a . . . measure". Logically, it was rather a measure which constituted an act.

56. For all those reasons he suggested the following model for the wording of draft article 34:

"Recourse by a State to self-defence in conformity with Article 51 of the Charter of the United Nations precludes the wrongfulness of an act of that State constituting such recourse to self-defence."

57. Mr. FRANCIS said that, while he did not wish to raise a formal objection to the compromise text proposed by the Drafting Committee, he preferred the text originally submitted by Mr. Ago. During the Commission's consideration of draft article 34 (1621st meeting), he had warned against any implicit or explicit attempt to amend the Charter of the United Nations. A general reference to the non-use of force in conformity with the Charter could be taken as a reference to Article 2, paragraph 4, Article 42, Article 51, or Article 52 of the Charter, whereas any explicit

reference to self-defence could apply only to Article 51. The text proposed by the Drafting Committee to some extent weakened the import of the original draft.

58. Mr. DÍAZ GONZÁLEZ said that although, like Mr. Francis, he did not wish to object formally to the draft proposed by the Drafting Committee, he agreed with the comments made by Mr. Ushakov. Article 51 of the Charter contained a specific reference to the inherent right of self-defence, the exercise of which could not be wrongful. Consequently, the text of the draft article could be made much clearer by replacing the words "a lawful measure of self-defence taken" by "action taken in the exercise of the right of self-defence".

59. Mr. RIPHAGEN said that self-defence was a motive, not a concrete series of acts. Any act—including genocide or a serious violation of human rights, which were not lawful measures—could be described as self-defence. Consequently, the inclusion of the word "lawful" was essential.

60. Mr. YANKOV said that while he had no formal objection to the text proposed by the Drafting Committee, he agreed with the views expressed by Mr. Ushakov, Mr. Francis and Mr. Diaz González. The text would be better if it followed more closely the wording and meaning of Article 51 of the Charter and contained a specific reference to that Article. Accordingly, the insertion of the words "in the exercise of its inherent right of self-defence" after the word "taken" would leave less room for different interpretations.

61. The CHAIRMAN said that, if there were no objections, he would take it that the Commission wished to adopt draft article 34, as proposed by the Drafting Committee, taking into account the comments made by the members of the Commission and the specific reservation entered by Mr. Ushakov.

It was so decided.

ARTICLE 35 (Safeguard clause on compensation for damage)

62. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Committee of draft article 35 (A/CN.4/L.318), which read:

Article 35. Safeguard clause on compensation for damage

Preclusion of the wrongfulness of an act of a State by virtue of the provisions of articles 29, 31, 32 or 33 does not prejudice any question that may arise in regard to compensation for damage caused by that act.

63. Mr. VEROSTA (Chairman of the Drafting Committee) said that the Commission, at its thirty-first session, during its discussion of the article on *force majeure* and fortuitous event, had considered whether, bearing in mind the comments already made, it should add to the article a third paragraph stating that preclusion of the wrongfulness of an act of a State

⁶ Text reproduced in 1619th meeting, para. 1.

committed in the circumstances indicated in paragraphs 1 and 2 of that article did not affect the possibility that the State committing the act, might, on grounds other than that of responsibility for a wrongful act, incur certain obligations, such as an obligation to make reparation for damage caused by the act in question. The Commission had found, however, that a stipulation of that kind would also have to apply to other circumstances precluding wrongfulness dealt with in chapter V. It had decided, therefore, that at its thirty-second session, after completing its consideration of the various circumstances precluding the international wrongfulness of an act of the State, it would examine the advisability of inserting such a proviso in chapter V.⁷ At the current session, the Drafting Committee had considered the possibility of preparing such a draft article.

64. On the basis of a text submitted to it by Mr. Ago, the Committee had adopted the text of draft article 35 now submitted to the Commission for its approval. The text enumerated the four articles under which the wrongfulness of an act of a State could be precluded, and stated that such preclusion did not prejudice any question that might arise in regard to compensation for damage caused by that act. The article, which constituted a safeguard clause, served as a convenient link between the provisions of part 1, which had already been completed, and those of part 2, which would be adopted in the future. The contents of those future provisions might determine whether or not article 35, as drafted, would need to be retained.

65. Mr. REUTER said that in French legal terminology the word “*compensation*” had a completely different meaning from that used by the Drafting Committee. He suggested that it should be replaced by “*indemnisation*”.

66. He wondered whether the idea of doubt expressed in the French text by the words “*des questions qui pourraient se poser*” was adequately rendered in English by “any question that may arise”. Until such time as the Commission had decided whether the circumstances referred to in articles 29, 31, 32 and 33 might create an obligation to make reparation, it was important to refer to that question in very cautious terms. He himself was not yet in a position to answer it.

67. Mr. DÍAZ GONZÁLEZ said that the word “or” in the reference to articles 29 and 31 to 33 should be replaced by “and”. Furthermore, the word “*compensación*”, in the Spanish text, should be replaced by “*indemnización*”.

68. Mr. USHAKOV said that, while he accepted that draft article 35 was a safeguard clause, he thought it was not necessary to mention it expressly in the title.

Taking guidance from article 73 of the Vienna Convention, the Commission might entitle the article “Cases of indemnification for damage”.

69. Sir Francis VALLAT said that he had doubts about the use of the words “safeguard clause” in the title, because they did not reflect the content of the draft article.

70. The CHAIRMAN suggested that the title might read simply “Compensation for damage”.

71. Mr. AGO said that he approved the replacement of “*compensation*” by “*indemnisation*” in the French text.

72. He thought that to entitle draft article 35 “Compensation for damage” would be to take a position on the question that had not yet been settled by the Commission. If the Commission did not like the expression “safeguard clause”, it could be guided by the Vienna Convention, as Mr. Ushakov had suggested.

73. Mr. REUTER proposed that the article should be entitled “Possible compensation for damage”.

74. Mr. ŠAHOVIĆ said he understood the reservations to which the expression “safeguard clause” might give rise, but it was a good description of the provisional situation in which the Commission found itself. That expression might possibly be placed in square brackets.

75. If the word “possible” was included in the title of article 35, its meaning would have to be defined, which might be inconvenient.

76. Mr. AGO suggested the title “Reservation as to compensation for damage”, since in fact the Commission wished to reserve that question.

77. Following an exchange of views concerning the advisability of replacing the word “or” by “and” and the word “may” by “might”, the CHAIRMAN said that, if there were no objections, he would take it that the commission wished to adopt the English text of the draft article without amendment, to replace the words “*compensation*” in the French text and “*compensación*” in the Spanish text by the words “*indemnisation*” and “*indemnización*” respectively, and to amend the title of the draft article to read “Reservation as to compensation for damage”.

It was so decided.

Article 35, as amended, was adopted.

78. The CHAIRMAN thanked Mr. Ago and the Drafting Committee and its Chairman.

The meeting rose at 1.15 p.m.

⁷ Yearbook . . . 1979, vol. II (Part Two), p. 133, document A/34/10, chap. III, sect. B.2, article 31, para. (42) of the commentary.

1636th MEETING

Thursday, 17 July 1980, at 3.20 p.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)* (A/CN.4/335)

[Item 6 of the agenda]

PRELIMINARY REPORT BY THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. BEDJAOUI congratulated the Special Rapporteur on his preliminary report (A/CN.4/335), which showed great theoretical knowledge and long practical experience. He emphasized the importance, for the very existence of inter-State relations, of the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, at a time when there was a perceivable danger of diplomatic privileges and immunities being called in question, as the Special Rapporteur had observed at the end of his report. He drew the Commission's attention to the special situation of the third world countries in regard to the topic. Most of those countries had no diplomatic couriers, owing to lack of human and material resources, and the unaccompanied diplomatic bag presented a particularly difficult problem for them because their national airlines did not generally make long-distance flights.

2. He believed that the first characteristic of diplomatic law relating to the courier and the bag was that it derived essentially from conventional sources. The reason why the General Assembly, at its thirty-first session, had requested the Commission to study the question of the diplomatic courier and the diplomatic bag, was in order that it should develop and give more concrete form to the 1961 Vienna Convention¹ and the other Vienna conventions on diplomatic law of 1963, 1969 and 1975.²

3. The second characteristic of diplomatic law was that its conventional source was itself supplied by fully established general principles, the foremost of which was the principle of freedom of communication for all official purposes. The Special Rapporteur had asked

what place those principles should have in the future draft articles. He (Mr. Bedjaoui) believed that it was in the general provisions that the principle of freedom of communication for all official purposes should be reaffirmed, together with the principle of respect for the laws and regulations of the receiving State. In his opinion, there was a gap to be filled there, since the existing conventions contained no provisions on the subject.

4. A third characteristic of diplomatic law was that it needed to be clearly stated with respect to the diplomatic courier and diplomatic bag, for recourse to the conventional sources was not enough. As the Special Rapporteur had observed, the best sources on the subject were bilateral treaties relating to consular relations, but conventional law showed that provisions relating to the diplomatic courier and the diplomatic bag were incomplete, as the Algerian Government had pointed out. Thus, as the Special Rapporteur had stated in paragraph 14 of his report, further elaboration of the conventional data should be effected by means of codification and progressive development, which should be all the easier to accomplish because the principles of the subject-matter were very certain.

5. It was not necessary to decide, at that stage, on the form of the draft to be prepared—convention, protocol or other appropriate legal instrument.

6. In his opinion, no distinction should be made between the diplomatic courier and bag and the consular courier and bag; the problem should be tackled in a general way, referring to the "official courier" and the "official bag", since the consular bags of a State were often brought to its embassy and transported by the same courier as the diplomatic bag.

7. He did not intend to state an opinion on the functional and non-personal nature of the immunities granted to the courier, since that was a problem which would be considered later. But he wished to urge the Special Rapporteur to deal very specially with the question of the courier *ad hoc*, because that was a problem of particular interest to third world countries, which had no permanent couriers. He also wished to stress the need to give the unaccompanied bag a protective status as wide as respect for the laws and regulations of the receiving and transit countries would permit.

8. Lastly, he believed that the Special Rapporteur could go ahead, since his task was now well defined, thanks to the detailed programme of action drawn up by the Working Group, to the secretariat's research work and to the preliminary comments by Governments on the scope and orientation of the work to be undertaken.

9. Mr. ŠAHOVIĆ congratulated the Special Rapporteur on having presented a clear and precise analytical report on a complex subject, which posed a number of awkward problems whose solution would determine

* Resumed from the 1634th meeting.

¹ See 1634th meeting, foot-note 1.

² *Ibid.*, foot-notes 2, 3 and 4, respectively.

the final success of the Commission's work. The study of the subject had given rise to some scepticism and, in the Sixth Committee of the General Assembly, a number of Member States had questioned its usefulness. In his opinion, it was a subject of current interest, for new facts had emerged in the practice of States which made it necessary to reconsider the legal basis for regulation of the diplomatic courier and the diplomatic bag. He considered that the Commission should persist in its task and define the broad outline of the study at the present session.

10. The legal basis for the study was to be found in the Vienna conventions on diplomatic law and more particularly in the articles concerning the diplomatic courier and bag. However, in regard to application of the rules already adopted in those conventions, there were a number of problems arising out of State practice in the matter. The comments of Member States were not very concrete in that regard and contained mainly general opinions, but they did make it possible to identify a certain number of specific problems. The Commission should thus take State practice as the starting point for its study, taking into account the problems already encountered by States. It should review existing rules in the light of new aspects of the question, of technical and political problems, and of the special situation of the third world countries, in order to draw up rules which could be accepted by the whole of the international community.

11. In his opinion, however, elaboration of those rules should not be carried too far, and they should not be raised, in the hierarchy of the norms of diplomatic law, to the same level as the general basic rules already codified by the Commission in the Vienna conventions and approved by the international community as part of general international law. It would be enough to prepare a draft of articles that could be adopted in the form of an additional protocol to the Vienna conventions on diplomatic law.

12. He did not think that any great importance need be attached to the problem of assimilation of the different categories of diplomatic courier and diplomatic bag. He saw no objection to speaking of the "official courier" and "official bag", as the Special Rapporteur had proposed, though he did not find it really necessary. The question should be approached from the standpoint of the functions and legal status of the diplomatic courier, and both the courier and the bag should be guaranteed a special status based on the diplomatic and consular privileges and immunities accorded to States under the Vienna conventions.

13. Mr. EVENSEN commended the Special Rapporteur for his excellent report and oral presentation (1634th meeting). Section III was particularly useful. He also thanked the Secretariat for its invaluable working paper on the topic.

14. He entirely agreed with the view expressed in section IV that preparation of an instrument on the

topic should combine codification and progressive development of international law. The more general of the relevant conventions left unanswered many essential present-day questions concerning couriers and diplomatic bags, especially unaccompanied diplomatic bags. Reference was made in paragraph 36 of the report to the elaboration of "a protocol" or "an appropriate legal instrument". While it was too early to discuss terminology at that stage, he did not consider that a "protocol" was the best term. The Commission's task was to draw up a legal instrument, not a declaration, resolution or code of conduct. The instrument should contain a number of essential details, should be of practical value and should take its rightful place among the many legal instruments recently prepared on the related topics of diplomats, consuls and international organizations. The outline in section VI, together with the issues indicated by the Working Group, as set out in section V, was acceptable and provided a useful basis for the Commission's work.

15. With regard to the questions raised by the Special Rapporteur, he agreed that it would be useful at the outset to formulate some kind of definition, and suggested that it should take account of the existing situation, referred to by Mr. Bedjaoui. Only a few States had permanent professional couriers; small States had to rely on more *ad hoc* arrangements, using representatives of diplomatic missions abroad or of foreign ministries at home. Couriers were also being used increasingly by permanent missions to international organizations, by special missions to conferences and by international organizations themselves. In his own experience, for example, couriers were needed for United Nations forces and for United Nations observers in special situations and in countries involved in conflict. It was therefore as important to establish a regime for *ad hoc* couriers as it was to establish a regime for more permanent professional couriers. The Special Rapporteur should try to draft articles on the official functions of couriers and the official functions and scope of diplomatic bags, bearing in mind future needs and possibilities.

16. As to multiple appointment and nationality of the diplomatic courier (A/CN.4/335, para. 47, points 3 and 7) the principles should be flexible. The Nordic countries, for example, used joint couriers, or in some cases the couriers of one country were used by the others. For small countries, like his own, the possibility of using the diplomatic bag of another country was very useful. The possibility of entrusting the official bag to the captain of a commercial aircraft or a ship (*ibid.*, para. 60, point IV, 8) had also been found extremely useful, perhaps because the three Scandinavian countries had a joint airline, mainly government-owned, though not government-controlled.

17. In reply to a question by the Special Rapporteur, he said it was important to include articles on the rights and obligations of transit countries and third countries.

Useful information could be obtained from existing conventions. In reply to another question, he said he believed that it might be useful for the instrument to contain references to other diplomatic or consular conventions in some contexts. The idea should not be excluded.

18. With reference to Mr. Reuter's statement at the 1634th meeting, he wondered whether it was sufficient to include provisions in the instrument concerning abuse of the official bag and its consequences. He suggested that the Special Rapporteur might reflect on whether the instrument should not also contain an outline of procedures to be followed by Governments, embassies and delegations abroad to prevent abuse as far as possible, with emphasis on their serious and far-reaching obligations.

19. He hoped that the Special Rapporteur would continue his work on the lines indicated in his preliminary report and start formulating draft articles, which he looked forward to discussing at the 1981 session.

20. Mr. TABIBI congratulated the Special Rapporteur and the Secretariat on their reports on the topic. The subject was a highly sensitive one, because couriers and diplomatic bags were an essential part of relations between States, between States and international organizations and between diplomatic missions. They were particularly important nowadays, because codes and ciphers were no longer safe or reliable, owing to the new scientific means of breaking them. But with the growth of abuse, the diplomatic bag was not only losing its security, it could even become a danger. All the years of work, all the international conventions and all the organizations combating the drug traffic had not been able to stop it, because of abuse of the diplomatic bag.

21. The topic was a vital one, especially for the smaller States which lacked the means to protect themselves. In its approach, the Commission must respect certain established principles recognized by international law, such as respect for freedom of communication and the means of communication, non-discrimination in regard to the movement of the courier and the diplomatic bag, and respect for the security and laws of the host State and third States. It should proceed within the framework of previous work and conventions. He agreed with the contents of section III of the preliminary report and the reference to the four United Nations codification conventions.

22. The task of the diplomatic or official courier had grown from a simple duty to a function that could be performed by an *ad hoc* courier, such as the captain of a ship, the pilot of an aircraft, the driver of a motor-car or train, or even the leader of a caravan of camels or of horse transport. The diplomatic bag, too, had changed and what had once been described as an official letter had become a sealed container in a wagon, train, ship or aircraft. But even the diplomatic bag was not

inviolable; its contents could be photographed by electronic devices. Some countries now found it safer to send a courier with a verbal message.

23. He had an open mind on the form of the instrument to be elaborated; whether it was to be a protocol or a convention was not important at that stage. The Commission had to draft a set of practical articles; it could decide later what type of instrument to submit to the General Assembly. With regard to the scope of the draft, in his opinion it would be better to concentrate first on States and deal with international organizations later.

The law of the non-navigational uses of international watercourses (concluded)* (A/CN.4/332 and Add.1, A/CN.4/L.316)

[Item 4 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

24. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the draft articles and explanatory note proposed by the Committee (A/CN.4/L.316), which read:

Article 1. Scope of the present articles

1. The present articles apply to uses of international watercourse systems and of their waters for purposes other than navigation and to measures of conservation related to the uses of those watercourse systems and their waters.

2. The use of the waters of international watercourse systems for navigation is not within the scope of the present articles except in so far as other uses of the waters affect navigation or are affected by navigation.

Article 2. System States

For the purposes of the present articles, a State in whose territory part of the waters of an international watercourse system exist is a system State.

Article 3. System agreements

1. A system agreement is an agreement between two or more system States which applies and adjusts the provisions of the present articles to the characteristics and uses of a particular international watercourse system or part thereof.

2. A system agreement shall define the waters to which it applies. It may be entered into with respect to an entire international watercourse system, or with respect to any part thereof or particular project, programme or use provided that the use by one or more other system States of the waters of an international watercourse system is not, to an appreciable extent, affected adversely.

3. In so far as the uses of an international watercourse system may require, system States shall negotiate in good faith for the purpose of concluding one or more system agreements.

* Resumed from the 1612th meeting.

Article 4. Parties to the negotiation and conclusion of system agreements

1. Every system State of an international watercourse system is entitled to participate in the negotiation of and to become a party to any system agreement that applies to that international watercourse system as a whole.

2. A system State whose use of the waters of an international watercourse system may be affected to an appreciable extent by the implementation of a proposed system agreement that applies only to a part of the system or to a particular project, programme or use is entitled to participate in the negotiation of such an agreement, to the extent that its use is thereby affected, pursuant to article 3 of the present articles.

Article 5. Use of waters which constitute a shared natural resource

1. To the extent that the use of waters of an international watercourse system in the territory of one system State affects the use of waters of that system in the territory of another system State, the waters are, for the purposes of the present articles, a shared natural resource.

2. Waters of an international watercourse system which constitute a shared natural resource shall be used by a system State in accordance with the present articles.

...

Article X. Relationship between the present articles and other treaties in force

Without prejudice to paragraph 3 of article 3, the provisions of the present articles do not affect treaties in force relating to a particular international watercourse system or any part thereof or particular project, programme or use.

Note

A watercourse system is formed of hydrographic components such as rivers, lakes, canals, glaciers and groundwater constituting by virtue of their physical relationship a unitary whole; thus, any use affecting waters in one part of the system may affect waters in another part.

An "international watercourse system" is a watercourse system, components of which are situated in two or more States.

To the extent that part of the waters in one State are not affected by or do not affect uses of waters in another State, they shall not be treated as being included in the international watercourse system. Thus, to the extent that the uses of the waters of the system have an effect on one another, to that extent the system is international, but only to that extent; accordingly, there is not an absolute, but relative, international character of the watercourse.

25. Mr. VEROSTA (Chairman of the Drafting Committee) said that the six articles, together with the explanatory note, corresponded to articles 1, 2, 4, 5 and 7 originally submitted in the Special Rapporteur's second report (A/CN.4/332 and Add.1, paras. 52, 59, 69, 105 and 142).³ Article 3 (*ibid.*, para. 64), for which no text had been proposed in that report, was intended to reserve future inclusion of a provision on the meaning of the terms used in the draft articles. The Drafting Committee had not considered article 6 (*ibid.*, para. 130), dealing with collection and exchange of information, because it had been unable to deal adequately with the important issues raised in the short

time available. The Committee had found it appropriate at the present stage to propose a new article X, entitled "Relationship between the present articles and other treaties in force". He drew attention to the explanatory note which the Committee had adopted as a provisional working hypothesis.

26. In order to take account of criticisms made in the Commission, the Drafting Committee had decided to use the term "*cours d'eaux*" instead of "*voie d'eaux*" in the French text of the articles, in order to align the terminology used in the various languages. A corresponding change would therefore be needed in the title of the topic. He suggested that the Commission might wish to take a decision on the proposed change before discussing the draft articles.

27. The CHAIRMAN invited the Commission to take a preliminary decision on the change in the French text proposed by the Chairman of the Drafting Committee. If there were no objections, he would take it that the Commission approved that change.

It was so decided.

28. Mr. VEROSTA (Chairman of the Drafting Committee) said that the Drafting Committee had adopted the explanatory note following the draft articles as a provisional working hypothesis on what was meant, at that preliminary stage of work, by the expressions "watercourse system" and "international watercourse system" used throughout the draft articles. It had not been the Committee's intention to prepare final definitions of those terms for inclusion in the draft articles, but to suggest to the Commission that the contents of the note should appear in the introductory section of the relevant chapter of the Commission's report, as an indication to the General Assembly of a tentative understanding of what was meant by certain terms used.

29. Some members of the Drafting Committee who had supported the note had pointed out that by virtue of the provisions of the proposed article 3, paragraph 2, it was clear that, regardless of any tentative notions as to what might constitute an international watercourse system, a system agreement concluded under the draft articles would itself define the waters to which it applied. At least one member of the Drafting Committee had expressed the view that it would be better to start work on the topic on the basis of the more classical definition of the international river as "a river that separates or traverses the territory of two or more States"—a definition which could be expanded to suit particular uses to be covered in the draft.

30. The first paragraph of the note provided a scientific definition of the expression "watercourse system", whose hydrographic components constituted a unitary whole by virtue of their physical relationship. Any use affecting waters in one part of the system *might* affect waters in another part. Such use of waters might take place in the upstream or the

³ The text of the seven articles initially submitted by the Special Rapporteur is reproduced in the 1607th meeting, para. 1.

downstream part of the system. The second paragraph referred to the international character of the watercourse system, resulting from the fact that its components were situated in two or more States. The third paragraph dealt with the consequences of the premises established in the first two paragraphs, namely, that if the part of the waters in one State were not affected by, or did not affect, uses of waters in another State, they should not be regarded, for the purposes of the draft articles, as being included in the international watercourse system. In other words, the international character of the watercourse was not absolute, but depended on the extent to which the use of waters of the system situated in two or more States affected one another.

31. He suggested that the Commission might now wish to consider the contents of the note and decide whether or not it should be included in the Commission's report as a tentative working hypothesis, as suggested by the Drafting Committee.

32. The CHAIRMAN invited members of the Commission to consider whether the note following the draft articles should be adopted as a tentative working hypothesis.

33. Mr. ŠAHOVIĆ said he accepted the draft articles proposed by the Drafting Committee, on the understanding that they were to be interpreted having regard to the right of nations to permanent sovereignty over their natural resources, the rights of riparian States and the principle of good neighbourliness.

NOTE⁴

34. Mr. USHAKOV said that the definition of the expression "international watercourse system" proposed in the note was neither a legal nor a scientific definition, since the Drafting Committee had not defined the expression "hydrographic component", but had merely quoted examples. He considered that without a legal definition of an "international watercourse system", the proposed articles were meaningless.

35. Mr. BARBOZA said that the majority of the Drafting Committee would have preferred to leave the definition of a watercourse system to the final stages of drafting, but some members had pressed for a rough definition, to be used as a working hypothesis. The text finally proposed was intended only as a starting point, and would not commit the Commission in any way. The views of the Sixth Committee of the General Assembly would obviously have to be taken into account in adopting the final definition.

36. The CHAIRMAN suggested that, in view of the different opinions expressed, the commentary should explain that the note had no scientific pretensions and was merely a tentative working hypothesis, subject to

amendment, in the light of the views expressed in the Sixth Committee of the General Assembly, by the Commission in the later stages of its work. He took it that the note could be adopted on that basis.

It was so decided.

ARTICLE 1⁵ (Scope of the present articles)⁶

37. Mr. VEROSTA (Chairman of the Drafting Committee) said that the structure of the text adopted by the Drafting Committee was basically the same as that of the original article.⁷ In paragraph 1, the Drafting Committee had considered it appropriate to specify the uses covered. It had preferred the expression "uses . . . for purposes other than navigation" to the term "non-navigational uses". The Drafting Committee had also decided to make it clearer that the article applied to the uses both of the international watercourse system itself and of its waters. The reason for doing so was that, while uses of the watercourse system itself implied uses of its waters, the converse might not always be true. Finally, the Drafting Committee had chosen the expression "measures of conservation related to the uses", which was meant to include those consequences of the uses, or other questions related to the uses, which, in the Special Rapporteur's original text, had been referred to as "problems . . . such as flood control, erosion, sedimentation and salt water intrusion". The expression "measures of conservation related to the uses" was to be understood as referring also to pollution.

38. Paragraph 2 of the original article had recognized that navigational uses affected or were affected by non-navigational uses and should not, therefore, be excluded from the scope of the articles. The new text was drafted so as to bring out clearly the general rule that navigational uses were excluded from the scope of the articles to the extent indicated.

39. Mr. USHAKOV said he was unable to express an opinion on the article as he did not know what was meant by the expression "international watercourse system". He drew attention to a contradiction between paragraph 1, which stated that the articles applied to "uses of international watercourse systems and of their waters for purposes other than navigation", and paragraph 2, which provided that the articles applied to navigation in certain circumstances.

40. Mr. FRANCIS said he wished to make a reservation on paragraph 2, for the reasons advanced by Mr. Ushakov.

41. Mr. BARBOZA said he did not see any contradiction between the two paragraphs. Both were

⁵ For consideration of the text initially submitted by the Special Rapporteur, see 1607th to 1610th meetings, 1611th meeting, paras. 1-23, and 1612th meeting, paras. 1-33.

⁶ For text, see para. 24 above.

⁷ See foot-note 1.

⁴ For text, see para. 24 above.

essential for protecting the waterway systems referred to.

42. As far as paragraph 2 was concerned, navigation might, for example, be affected by the excessive use of waters for irrigation. Conversely, navigation might lead to excessive pollution. There could be no protection in either case unless the provisions of paragraph 2 were applied.

43. The CHAIRMAN said that the differences of opinion concerning the interrelationship of paragraphs 1 and 2, and Mr. Ushakov's inability to accept the tentative working hypothesis, would be reflected in the report.

44. Mr. YANKOV said that he wished to make some reservations. Even for a working hypothesis at that stage, he would have preferred something more descriptive of the international watercourse than the notion of a watercourse system. Secondly, he had some doubts about the words "for purposes other than navigation". He would welcome an explanation from the Chairman of the Drafting Committee or the Special Rapporteur as to whether, for example, a small vessel intended not for navigation in the conventional sense of the transport of goods or persons, but for hydrological research or irrigation, would be governed by the present articles or would be outside their scope.

45. In his view, the expression "non-navigational uses" was simpler, and possibly more appropriate, than a reference to "purposes".

46. Mr. SCHWEBEL (Special Rapporteur) said that he, personally, had had no problem with the term "non-navigational uses", but the Drafting Committee had considered the phrase "purposes other than navigation" to be clearer. The case cited by Mr. Yankov would undoubtedly come within the scope of the articles, because such a vessel would be navigating, and if its navigational activities affected other uses, or vice versa, it would come under paragraph 2, while if it was used for such purposes as irrigation, it would come under paragraph 1.

47. The Commission had adopted a questionnaire,⁸ which had been sent to Governments. One of the questions had related to the extent to which the Commission should study the navigational uses of international watercourses, and all of the many Governments that had replied had supported the study of navigational uses to the extent that they affected, or were affected by, non-navigational uses. To narrow down the article would be to depart from the views of the Governments which had replied to the questionnaire, and from the action of the General Assembly, which, in his view, the Commission was not free to do. There was no apparent contradiction in the article.

48. Mr. FRANCIS said that, in the light of the comments made by Mr. Barboza and the Special Rapporteur, article 1 appeared to deal with questions of State responsibility.

49. The CHAIRMAN said that the comments made would be recorded. He suggested that the Commission should adopt article 1 on that understanding.

It was so decided.

ARTICLE 2⁹ (System States)¹⁰

50. Mr. VEROSTA (Chairman of the Drafting Committee) said that the title of article 2 (in English) was the same as that proposed by the Special Rapporteur.¹¹ The text adopted by the Drafting Committee maintained the basic rule, with certain drafting changes to make it more precise. The reference to water that "flows" had been replaced by a reference to waters that "exist", so as to take account of differing views on the concept of flowing. The new text referred to "part of the waters", to avoid the implication that all the waters of a system might exist at any particular time in a particular State.

51. Mr. USHAKOV said he could not express any opinion on article 2 either, as he still did not know what was meant by an "international watercourse system".

52. The CHAIRMAN suggested that the Commission should adopt article 2 on the understanding that Mr. Ushakov's criticism would be recorded.

It was so decided.

ARTICLE 3¹² (System agreements)¹³

53. Mr. VEROSTA (Chairman of the Drafting Committee) said that article 3 corresponded to the article 4 proposed by the Special Rapporteur,¹⁴ and (in English) had the same title. Taking into account the views expressed in the Commission, the Drafting Committee had decided to give more detailed treatment to what was one of the foundations of the draft, namely, the concept of the articles as a framework instrument. In accordance with paragraph 1 of the Special Rapporteur's text, the articles were to be supplemented by one or more system agreements as required.

54. The first sentence of paragraph 2 had been added to give further emphasis to the framework character of the draft articles, and was in the nature of a safeguard clause. The second sentence of paragraph 2 reproduced, with some additions, the original text of

⁹ See foot-note 2 above.

¹⁰ For text, see para. 24 above.

¹¹ See foot-note 1 above.

¹² See foot-note 2 above.

¹³ For text, see para. 24 above.

¹⁴ See foot-note 1 above.

⁸ See *Yearbook . . . 1976*, Vol. II (Part One), pp. 147 *et seq.*, document A/CN.4/294 and Add.1, para. 6.

paragraph 2 proposed by the Special Rapporteur. The Drafting Committee had considered the last part of the second sentence to be a better rendering of the idea expressed in the Special Rapporteur's text: instead of referring to the interests of all system States, it emphasized the interests of system States other than those which were parties to the system agreement.

55. Paragraph 3 expressed in a more circumscribed manner the rule in paragraph 1 of the original text, by which the articles were to be supplemented by system agreements. There was no obligation to conclude such agreements. The paragraph was merely designed to introduce a further measure of protection.

56. Mr. USHAKOV said that no system agreement existed at present, since the system agreements which article 3 attempted to define would only be concluded after adoption of the convention which the Commission was drafting. Article 3 therefore seemed to be pointless.

57. The CHAIRMAN said that, in the absence of further comments, and on the understanding that Mr. Ushakov's criticism and disclaimer, which reflected his general position on other articles, would be recorded, he would take it that the Commission agreed to adopt article 3.

It was so decided.

ARTICLE 4¹⁵ (Parties to the negotiation and conclusion of system agreements)¹⁶

58. Mr. VEROSTA (Chairman of the Drafting Committee) said that article 4 corresponded to article 5 in the Special Rapporteur's report¹⁷ and had the same title. The text adopted by the Drafting Committee followed the model of the Special Rapporteur's text, but some drafting changes had been made to achieve greater clarity and precision.

59. In paragraph 1, the reference to "All system States" had been replaced by a reference to "Every system State of an international watercourse system". Instead of referring to the "conclusion of any system agreement", the new text used the phrase "to become a party to any system agreement".

60. In paragraph 2, the words "Each system state" had been replaced by the words "A system State", and the word "enjoyment" had been deleted. The phrase "the implementation of a proposed system agreement" in the new text was more precise than the corresponding words "the provisions of a system agreement" in the original text. The words "a particular project, programme or use", which appeared in paragraph 2 of article 3, had been added in paragraph 2 of article 4. In the light of article 3, paragraph 3, the words "entitled

to participate in the negotiation and conclusion" had been replaced by a reference to participation in negotiation only.

61. Mr. USHAKOV said he thought article 4 was also pointless, for the reasons he had given in connexion with article 3.

62. The CHAIRMAN said that Mr. Ushakov's comment would be recorded. If there were no objections, he would take it that the Commission was prepared to adopt article 4.

It was so decided.

ARTICLE 5¹⁸ (Use of waters which constitute a shared natural resource)¹⁹

63. Mr. VEROSTA (Chairman of the Drafting Committee) said that article 5 was based on the article 7 proposed by the Special Rapporteur.²⁰ Bearing in mind the views expressed in the Commission, and in order to avoid giving the impression that the present text was intended to define a shared natural resource in general terms, the Drafting Committee had considered it appropriate to include all the required limitations in detail.

64. Mr. USHAKOV pointed out that there was a contradiction between paragraph 2 of article 5, which appeared to indicate that only waters of an international watercourse system that constituted a shared natural resource should be used in accordance with the articles, and paragraph 1 of article 1, according to which the articles applied to uses of all international watercourse systems, whether or not they constituted a shared natural resource.

65. Mr. QUENTIN-BAXTER said that he had some difficulty in determining how the limitation in article 1, paragraph 2, would be applied when interpreting article 5, paragraph 1, which appeared to make even navigational uses the basis for bringing the system concerned entirely within the scope of the draft articles.

66. Mr. RIPHAGEN said that he read article 5, paragraph 2, as an obligation on States to use the waters of a shared natural resource in accordance with the present articles. It presupposed that there would be some obligations under the articles that would be independent of the existence of a systems agreement.

67. Mr. SCHWEBEL (Special Rapporteur) said that he had been surprised by Mr. Ushakov's question whether there would be two separate sets of articles, and he saw no reason why there should be. As the articles were developed, certain principles and provisions would be included, and the concept of a shared

¹⁵ See foot-note 2 above.

¹⁶ For text, see para. 24 above.

¹⁷ See foot-note 1 above.

¹⁸ See foot-note 2 above.

¹⁹ For text, see para. 24 above.

²⁰ See foot-note 1 above.

natural resource would be applied in accordance with those principles and provisions.

68. With regard to the relationship between article 1 and article 5, it was not intended to adopt any absolute definition of an international watercourse or to limit the definition to the Final Act of the Congress of Vienna (1815),²¹ which, in scientific and other circles, was regarded as totally obsolete for the non-navigational uses of international watercourses. Nor was there any intention of adopting a more expanded definition. The intention was rather to relate the definition to the effects of the uses of the water by States sharing the watercourse. A subsidiary element of that approach was to be found in article 1, paragraph 2, where navigation was brought into the scope of the articles only in so far as it affected other uses or was affected by them. There was, in his view, a consistency between the approach of article 1, paragraph 2, and that of other articles, including article 5.

69. The CHAIRMAN said that, on the understanding that the various statements made would be reflected in the report, he would take it that the Commission was prepared to adopt article 5.

It was so decided.

ARTICLE X (Relationship between the present articles and other treaties in force)²²

70. Mr. VEROSTA (Chairman of the Drafting Committee) said that article X might be placed among the final provisions of the draft. The Drafting Committee had considered that it should be included at the present stage, however, in order to reassure States about the effect on existing treaties of the final instrument that might be adopted on the basis of the draft articles. There was no intention of replacing or prejudicing other relevant treaties in force. The text was based on article 73, paragraph 1 of the 1963 Vienna Convention,²³ but it was tempered by the inclusion of a reference to the fact that it was without prejudice to the provisions of article 3, paragraph 3.

71. Mr. USHAKOV said that the effect of article X was nil, since the body of the article did not correspond to its title.

72. The CHAIRMAN said he took it that, on the understanding that Mr. Ushakov's comment would be recorded, the Commission was prepared to adopt article X.

It was so decided.

The meeting rose at 6.20 p.m.

²¹ Reproduced in *Yearbook ... 1979*, vol. II (Part One), document A/CN.4/320, para. 43.

²² For text, see para. 24 above.

²³ See 1634th meeting, foot-note 2.

1637th MEETING

Friday, 18 July 1980, at 10.15 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Diaz González, Mr. Evensen, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (concluded) (A/CN.4/335)

[Item 6 of the agenda]

PRELIMINARY REPORT BY THE
SPECIAL RAPPORTEUR (concluded)

1. Mr. SCHWEBEL congratulated the Special Rapporteur on his excellent report (A/CN.4/335), which was a model of scholarship, clarity and good sense. However, he remained unconvinced of the need for a protocol on the topic in question. As the Special Rapporteur had pointed out, the General Assembly had referred only to the possible elaboration of an appropriate legal instrument on the topic; besides, as was pointed out in paragraph 233 of the topical summary of the Sixth Committee's discussion on the Commission's report to the thirty-fourth session of the General Assembly (A/CN.4/L.311), some representatives had expressed serious doubts about the utility of work on the topic, because it was already adequately covered in existing agreements and because other problems regarding diplomatic immunities of a more fundamental and serious nature might deserve closer attention. He saw great cogency in that view. At a time when the gravest and most grotesque violation of diplomatic immunity in the history of international law was still being perpetrated, preoccupation with a relatively minor practice seemed all the more misplaced. Indeed, if a protocol was drafted and adopted, it was debatable how widespread its ratification would be, in view of the doubts of many States regarding the need for it.

2. As to the substance of the report, he expressed the hope that the Special Rapporteur would give most earnest thought to the question of respect for national and international law. In that connexion, Mr. Reuter (1634th meeting) had drawn the attention of the Commission to the notorious abuses of the diplomatic bag for drug trafficking and terroristic smuggling. Some years earlier, the United States of America had been constrained to indict one of its nationals, who, in contravention of United States law, had sold a large quantity of submachine guns suitable for terrorist activities to the United Nations mission, in New York, of a State whose connexions with international terrorism were notorious. The individual in question

had been convicted and vigorous representations had been made to the State concerned, which had subsequently admitted that the weapons bought had been transported in the diplomatic bag. Some of those weapons had later been returned and, at an appropriate time, the officials of the mission had been declared *persona non grata* and had left the United States. That incident represented only one of many such abuses, for which it was difficult to find a remedy.

3. Diplomatic immunities were of the utmost importance for the conduct of diplomatic relations and must be observed, but consideration must be given, not only to enhancing those immunities, but also to what could be done to eliminate abuses of the diplomatic bag. It was important to be realistic and to refrain from seeking excessive immunities. He did not see why the diplomatic bag should not be subject to routine airport security inspection procedures, provided such procedures did not involve opening the bag. Nor was it clear why a diplomatic courier carrying a weapon should not be obliged to declare it, and perhaps to surrender it temporarily before boarding an aircraft. Although that might be regarded as an infringement of his immunities, it should be recognized that certain couriers of certain States might be pursuing their duties in derogation of diplomatic immunities and international law. The international system should not lend its support to such attacks on its very fabric.

4. Mr. FRANCIS associated himself with the sentiments expressed by other speakers concerning the excellence of the Special Rapporteur's report.

5. The two basic aims of the work on which the Commission was engaged should be, first, to eliminate abuses of the diplomatic bag and abuses by diplomatic couriers, as far as they were known to exist; and secondly, to develop the law, taking account of existing situations. He noted that, in the last sentence of his report, the Special Rapporteur suggested that all means of communication for official purposes through official couriers and official bags should enjoy the same degree of international legal protection. In that connexion, he referred to Mr. Bedjaoui's remarks (1636th meeting) on the difficulties of certain third world countries in which couriers were not an established institution and official bags were not confined to the categories of the four basic conventions. For example, a bag covered by the 1961 Vienna Convention¹ might be prepared for despatch on a particular day, but for reasons of urgency might have to be opened in order to remove basic confidential documents and hand them to a courier. In the case of a mission to the United Nations in New York, confidential papers might be removed from a bag covered by the 1975 Vienna Convention² and transferred to the consular bag. Consequently, the Special Rapporteur's call for a uniform approach was very welcome to all

third world countries. The inviolability of a State's correspondence was no less indivisible than its sovereignty. The lack of judicial decisions on the subject could be regarded as an advantage, since it was better for the law to develop on the basis of actual State practice than on the basis of controversial doctrine.

6. Referring to the questions on which the Special Rapporteur sought guidance from the Commission, he said it would be useful to adopt a definition of the diplomatic bag and the diplomatic courier. A definition of the functions of the courier would also be helpful in the application of a future convention.

7. With regard to the structure of the draft articles, quite clearly, the future instrument should include some of the general principles embodied in the other basic conventions on the subject. Mr. Bedjaoui had expressed the view that it would be advisable to begin by stating general principles concerning freedom of communication and respect for the laws and regulations of the receiving State, while Mr. Reuter had maintained that principles could be enunciated after the treatment of the two main elements of the draft. In his own view, there was room for both approaches. The basic principles could be stated at the outset, after which would follow the treatment of the two main elements and the enunciation of the other general principles.

8. As to the points raised in paragraphs 57 to 60 of the report, he had no difficulty with the terms "official courier" and "official bag". But in the light of Mr. Reuter's comment that States might be reluctant to accept the change to those terms at once, it might be preferable to retain the terms "diplomatic courier" and "diplomatic bag", placing the word "diplomatic" in quotation marks and indicating that it was intended to cover all similar functions.

9. He had no difficulty with the approach outlined in paragraphs 59 and 60 of the report, which contained all the elements necessary to enable the Commission to proceed with the draft articles.

10. Mr. QUENTIN-BAXTER expressed appreciation to the Special Rapporteur for his preliminary report, which helped to focus awareness on the issues involved. As previous speakers had pointed out, an important concern in dealing with such a narrow and practical subject was the need to maintain a balance between the sovereignty of a State and its control over its own territory, on the one hand, and its duty to other States, on the other hand. In the field in question, the solution to that problem could not be found by lawyers alone, but also required technical expertise.

11. One question that arose, for example, was whether a diplomatic bag could be subjected to an airport security inspection without compromising the secrecy of the communications it contained. Another question was that of agricultural regulations. In an

¹ See 1634th meeting, foot-note 1.

² *Ibid.*, foot-note 4.

isolated country such as his own, the introduction of certain plant and animal diseases could cripple vital areas of the economy. Consequently, all individuals entering the country were subjected to strict inspection. As far as drug trafficking was concerned, the New Zealand authorities had learned that to maintain standards less stringent than those of other countries was to invite the use of one's own country as a centre for the distribution of drugs to other parts of the world. In view of all the technical problems involved, it was difficult to believe that a conference of States could deal with the type of instrument contemplated without the support of technical experts. Indeed, if the Special Rapporteur himself required such assistance, every effort should be made to provide it through the United Nations system.

12. He regarded the subject as both important and interesting.

13. Mr. TSURUOKA, after associating himself with the congratulations addressed to the Special Rapporteur, said that his position had not changed in regard to the need to draft an international legal instrument on the subject before the Commission. But that could not be done unless both freedom of communication and the security of the receiving and transit States were taken into account. What the Special Rapporteur had said on the subject was reassuring, since it was proposed to use empirical and inductive methods to draw up a pragmatic instrument. That instrument would merely be intended to fill gaps, some of which could give rise to abuses; and it would be worded in such a way that the majority of States could become parties and apply it.

14. The reason why the Commission had to resort to empirical methods was that it did not represent particular political interests, but acted for the international community as a whole and must avoid any excessive schematization, which might meet with fierce opposition. In short, it was necessary to act with caution, not to lose sight of the practical nature of the enterprise, and not to adopt over-ambitious aims. The slightest exaggeration in the protection of freedom of communication could lead to abuses. As a diplomat, he was convinced that Governments would not be interested in a legal instrument that was not of an eminently practical nature. As the Special Rapporteur had drawn attention to that danger, however, he was not unduly anxious about it.

15. Mr. THIAM observed that many different points of view had been expressed on one of the questions raised in the Special Rapporteur's excellent report: that of the use of the expressions "diplomatic courier" and "diplomatic bag" or "official courier" and "official bag". Personally, he thought that question could only be decided when the work had made further progress. Above all, it was important to decide how to reconcile freedom of communication with the rights of the receiving State. It seemed quite easy to state an appropriate principle, but it would probably be

extremely difficult to ensure its observance. The Special Rapporteur should endeavour to show how the application of such a principle could be given practical effect. Otherwise it would be difficult to draft a convention which had any chance of being applied.

16. In general, he approved of the structure proposed for the draft by the Special Rapporteur, but he wondered whether some important questions listed under the heading "Miscellaneous provisions" (A/CN.4/335, para. 60) ought not to be studied under another heading. Those questions included: obligations of the receiving State; obligations of the transit State; obligations of the third State in cases of *force majeure*; respect for the laws and regulations of the receiving State; non-discrimination; and relationship to existing conventions. One would expect to find less important questions under the heading "Miscellaneous provisions".

17. Lastly, he would like the Special Rapporteur to clarify the meaning of the word "facilities", which occurred several times in the items listed in the proposed structure. That term was of a diplomatic rather than a legal nature. Where, then, was the boundary between the "facilities" and the rights accorded to a diplomatic courier? If it was only a question of facilities, there was no need for codification, but if it was a question of rights, their exact content must be determined.

18. Mr. DÍAZ GONZÁLEZ congratulated the Special Rapporteur on his clear and honest report.

19. Reference had already been made to the debate in the Sixth Committee at the thirty-fourth session of the General Assembly, concerning the utility of drafting a legal instrument on the topic. There had been a marked divergence of views. A large majority had considered that the provisions of the existing conventions constituted an adequate framework for the regulation of the subject. In his opinion, it would be preferable to urge States to respect and apply the provisions of those conventions, in accordance with international law and current practice.

20. As Mr. Bedjaoui had observed at the previous meeting, the topic was of the utmost importance to countries that were unable to afford the luxury of regular diplomatic couriers. Moreover, there were countries in which neither freedom of expression nor inviolability of either official or private correspondence existed. In such countries, the only relatively sure method of prompt communication was by means of the diplomatic courier and diplomatic bag. Even so, as Mr. Reuter had pointed out, it was possible, using modern techniques, to inspect the contents of an unaccompanied diplomatic bag without leaving any external sign that the bag had been violated. Consequently, the only way to guarantee the secrecy of correspondence was by means of the diplomatic courier, with or without a diplomatic bag.

21. With regard to the proposal to use the term "official" instead of "diplomatic", it was not the official nature of the correspondence which guaranteed the inviolability of the bag or the protection of the courier. The basis of the guarantee was to be found in the privileges and immunities enjoyed by States in respect of their permanent diplomatic missions, consular missions, special missions, and delegations to international organizations. All documentation, of whatever nature, sent by States to their agents abroad or received from them, could be regarded as official. Venezuela, like other Latin-American countries with which it had concluded special agreements, maintained a military air courier service to the capitals of various Latin-American countries. For obvious reasons, he preferred the term "diplomatic" to describe the bag and courier, rather than the term "official".

22. The Special Rapporteur's report was comprehensive and contained all the elements necessary for beginning the process of codification. He wondered, however, how far the Commission could go in drafting a set of articles that would constitute a legal instrument without duplicating or amending the existing conventions. The General Assembly should be asked to decide how far it wished the Commission to proceed in that direction.

23. Mr. RIPHAGEN associated himself with the views expressed by previous speakers in congratulating the Special Rapporteur on his report.

24. Referring to the proposed structure of the draft articles (A/CN.4/335, para. 60), he said it might be preferable to deal with questions in their order of importance. The two principles constituting the whole basis of the topic were respect for the laws and regulations of receiving and transit States and freedom of communication between sending States and their official representatives abroad. The first principle should be included at the beginning of the draft, rather than in a later section, as proposed in the report. He noted that item 6 under heading V (Miscellaneous provisions) contained no reference to respect for the laws and regulations of the transit State, or to international law in general. Those two elements should be included.

25. The most important point concerning freedom of communication was the status of the bag. Other elements, such as the privileges and immunities of the courier were functionally dependent on that status—a fact that should be reflected in the structure of the draft. The next most important point was the treatment of the bag. Most frequently, the bag was entrusted to the captain of a commercial aircraft or ship, an item which had been placed at the end of section IV of the proposed structure.

26. After dealing with the status of the bag, the draft should take up the questions of the courier *ad hoc*, the official courier, and their personal privileges and immunities. Next should follow articles on the inviol-

ability of means of transport used in the performance of official functions and, in so far as necessary, the inviolability of private accommodation.

27. He was fully confident that, under the guidance of the Special Rapporteur, it would be possible to arrive at a practical solution.

28. Sir Francis VALLAT associated himself with the sentiments expressed by previous speakers in congratulating the Special Rapporteur on his report.

29. In general, he supported the structural approach outlined by Mr. Riphagen, and urged the Special Rapporteur to give it serious consideration. He also shared the doubts expressed by Mr. Schwebel and associated himself with the views expressed by Mr. Reuter at the 1634th meeting.

30. He wished to emphasize the advisability of not changing the title of the topic by using the term "official" instead of "diplomatic" to describe the courier and the bag. The Commission should begin by considering any problems which might arise in respect of the diplomatic courier and the diplomatic bag.

31. The structure of the draft, as proposed in the report, could lead to the consideration of excessive detail, which could be dangerous in the process of codification. He had always maintained that the Commission could succeed in its work only if it concerned itself solely with general rules and principles, avoiding questions of detail, which could be dealt with in *ad hoc* conventions. He urged the Special Rapporteur to bear that consideration in mind in dealing with the topic.

32. Mr. USHAKOV said he was extremely satisfied with the report under discussion, which gave an adequate account of the subject-matter to be codified. The terminology used in the various existing conventions to designate couriers and bags was very varied, but it was clear that the situation was the same in each case. It was important, therefore, first, to regroup the existing rules and secondly, to fill the gaps revealed by practice.

33. There was an intensification of diplomatic and other relations, which increased the number of couriers and bags; that trend might well cause concern. Moreover, abuses had been committed, there would be more abuses and established rules would continue to be broken. That should not deter the Commission, however, from codifying the subject under discussion. Abuses and violations had never replaced the law, and it was precisely the lack of strict legal rules adapted to the circumstances that gave rise to abuses and violations. It had to be presumed that every new legal rule would be obeyed, as otherwise law would be meaningless. Consequently, the Commission should not pay too much attention to the fears expressed by certain Governments.

34. What was important at that point was to draw up the list of questions to be studied, and where that was

concerned he had no comments to make on the structure proposed by the Special Rapporteur.

35. The CHAIRMAN, speaking as a member of the Commission, said that he endorsed the comments made by Mr. Bedjaoui and Mr. Tabibi (1636th meeting). While he had no objection to the Special Rapporteur's proposed structure, he was somewhat attracted by Mr. Riphagen's suggestions in that regard.

36. Viewing the matter essentially from the position of a receiving State, he fully agreed that only such facilities, privileges and immunities as were required for their functions should be accorded to the diplomatic courier and bag. The courier's central exemptions should be those of personal inviolability and immunity from arrest and detention; any further exemptions would have to be considered very carefully. The bag should not normally be opened or detained, but where there were strong grounds for believing that unauthorized material was being carried, the general rule should be that, subject to the normal procedures, it could be opened or examined in some other way.

37. A definition of the courier and bag would be very useful. So far as the courier *ad hoc* was concerned, he noted that, while the report referred to the obligations of the receiving State and the transit State, it made no reference to the obligations of the courier towards the transit State, which, in his view, were equally important. Furthermore, he considered that, in cases where privileges, immunities and facilities were conferred on a courier *ad hoc*, they should not be deemed to exclude the privileges, immunities and facilities to which he might be entitled otherwise than under the articles. In other words, an ambassador on mission, when acting as a courier *ad hoc*, should also enjoy the privileges, immunities and facilities of a diplomat in transit.

38. Mr. YANKOV (Special Rapporteur), summing up the discussion, said that the comments made by members would greatly assist him in his further work.

39. He was gratified to note that there had been general recognition of the importance of the codification and progressive development of international law relating to the status of the diplomatic courier and bag. He had recently been reminded of the practical problems involved when, having met two couriers at Sofia airport, he had taken the opportunity to sound out their views; he had been interested to find that some of the issues they had mentioned, particularly the need for increased protection and security, had been raised in the Commission. Mr. Bedjaoui, for example, had underlined the need for a response to the unprecedented growth of international communications and had stressed that the dialectics of modern diplomatic intercourse added new dimensions to the problem. Mr. Quentin-Baxter had spoken of the practical importance of the economic aspects of the problem, as well as of technical know-how. Mr. Díaz

González, while emphasizing the importance of the existing conventions for countries which could not afford professional couriers, had nonetheless recognized the need for a set of draft articles.

40. Other speakers, however, had expressed certain reservations, urging caution and warning against an unduly ambitious or academic approach. Reference had been made to the need for preventive and other measures to counteract possible abuses. While that was a very real problem, the Commission's task was to draft rules that would not only prevent such abuses but would also create a viable and effective framework designed to promote international co-operation and to reduce the likelihood of difficulties and disputes.

41. It had been suggested that the subject was not perhaps the most pressing one in the field of diplomatic law. While that was admittedly so, the Commission's task was not only to react to urgent problems, but also to work in a broader context. It therefore seemed to him that the status of the diplomatic courier and bag warranted the Commission's attention and that, if it could fill in the existing gaps, it would be making a positive contribution to international law.

42. Several comments had been made regarding the method to be adopted in carrying out the study and preparing the draft articles from which he noted that there was general support for an empiric and pragmatic approach based on the four existing conventions. One problem was how to strike a balance between the general rules and the specific technicalities involved. Another problem, to which he had already referred, both in his report and in his oral presentation, was how to strike a balance between the secrecy requirements of the sending State and the security and other legitimate requirements of the receiving and transit States, having regard, on the one hand, to the possibility of abuses and, on the other hand, to the new facilities offered by sophisticated technology for verifying the contents of the bag.

43. As Mr. Riphagen had observed, there was in fact an interplay between two basic principles: freedom of communication and respect for the laws of the receiving State. To those two principles, however, should be added a third, namely, respect for the rules of international law. He agreed with Mr. Francis that uniformity of approach was a basic requirement for the effective legal protection of official communications. He also agreed with Mr. Pinto on the importance of the functional approach, which he had sought to underline in his report and oral presentation by explaining that the purpose of the facilities, privileges and immunities accorded to the courier and the bag was not to benefit the person, but to create the conditions necessary for the normal and effective performance of the functions concerned.

44. It was clear from the discussion that the prevailing view was that the question of the form of the draft articles should be left for States to decide at a

later stage. Although Mr. Reuter had suggested that the possibility of a convention which would supplement the existing conventions should not be excluded *a priori*, he had nevertheless expressed himself in favour of the more cautious approach advocated in the report and supported by other speakers.

45. Mr. Schwebel had raised the question of the possible response of States to the legal instrument ultimately adopted. That was always a problem in the preparatory stages of codification work, but the Commission should not confine itself to describing existing practices and rules; it should endeavour to go further even at the risk that the international community might challenge its endeavour.

46. He had found the Commission's discussion on the scope and content of the topic particularly useful. His own understanding, based on the reports of the Working Group (A/CN.4/335, paras. 10 *et seq.*), was that a comprehensive approach should be adopted with a view to preparing a coherent set of draft articles; the problem was how to achieve that comprehensive approach while avoiding over-generalization. As Mr. Díaz González had rightly pointed out, official correspondence covered many different kinds of communication between a Government and its missions abroad. It was therefore necessary to evolve some formula covering all such communications.

47. He noted that, in general, the Commission did not favour the introduction of the new concept of the "official courier" and "official bag", which he had suggested merely as a working hypothesis. The concept of the diplomatic courier and diplomatic bag could perhaps therefore be retained, but accompanied by a clause along the lines of those embodied in article III (section 10) of the Convention on the Privileges and Immunities of the United Nations,³ article IV (section 12) of the Convention on the Privileges and Immunities of Specialized Agencies⁴ and article 72 of the Vienna Convention of 1975.

48. He could not, however, overlook the plain fact that, given the same circumstances, couriers and bags must enjoy the same protection. From his own experience as an ambassador, he knew only too well that the problems involved for a mission to the United Nations in New York were infinitely more complex than those for, say, a diplomatic mission in London. It was particularly important, when instructions and documents were awaited concerning an important resolution to be adopted at an international conference, that all the means of communication should enjoy the same protection. He did not think there was any real dispute over the fundamental issue; the problem was rather to find a solution which took account of the need for uniformity, without raising undue alarm by introducing new notions. As Mr. Francis had said, what was needed was a legal umbrella.

³ United Nations, *Treaty Series*, vol. 1, p. 20.

⁴ *Ibid.*, vol. 33, p. 270.

49. It was Mr. Reuter who had first referred to possible abuses and to the need to provide a legal framework for their prevention and control, although all subsequent speakers had emphasized the importance of the problem, and Mr. Evensen, at the previous meeting, had even suggested that a special draft article should be prepared on the legal consequences of such abuses. He did not dispute that such abuses were merely the tip of the iceberg, and he recognized the difficulty of arriving at a consensus formula. He considered, however, that it should be pointed out to States that their concern about security should be matched by concern about the safe and rapid delivery of their communications.

50. He welcomed the emphasis which certain members had placed on the need for a definition of the courier and bag, and noted that Mr. Evensen had also suggested that special articles determining the functions of the diplomatic courier should be drafted.

51. With regard to the structure of the draft articles, as explained in paragraph 60 of the report, his suggestions were purely tentative, and a more limited approach could certainly be considered at that initial stage. Mr. Reuter had suggested that the Commission should not deal with general principles until draft articles on specific issues had been prepared, while other members had favoured a degree of flexibility. The main problem was how to express the ideas involved; after that had been done, it could be decided whether a cautious or a bold approach was indicated. The heading "Miscellaneous provisions" was intended to cover a variety of issues, and its precise content would have to be determined at a later stage.

52. It had also been suggested that it would perhaps be preferable to deal first with the bag and then with the courier. The existing conventions, however, dealt with the courier first, which had a certain logic. What really mattered, however, was the content and presentation of the draft articles.

53. Mr. Thiam had asked what was meant by the word "facilities" and where the boundary between "facilities" and legal obligations lay. The word "facilities" in fact appeared in a number of conventions: specifically, in article 25 of the 1961 Vienna Convention and article 28 of the 1963 Vienna Convention.⁵ As he understood that word, it did indeed denote an obligation on the part of the receiving and transit States to facilitate the functions in question. The Working Group had also favoured that word, since it had been thought that it would cause less alarm than the expression "privileges and immunities" and that it was necessary to place the courier and bag on an equal footing with diplomatic agents. He understood Mr. Thiam's concern, however, and would reconsider the matter.

54. He agreed on the importance of the courier *ad hoc* and the status of the unaccompanied bag. He had

⁵ See 1634th meeting, foot-note 2.

also taken note of the relationship of the topic with other conventions and in particular with article 73 of the 1963 Vienna Convention and article 3 of the 1975 Vienna Convention.

55. In conclusion, he thanked members of the Commission and the secretariat for their assistance.

56. The CHAIRMAN thanked the Special Rapporteur, on behalf of the Commission, for his report and oral presentation.

Jurisdictional immunities of States and their property (concluded)* (A/CN.4/331 and Add.1, A/CN.4/L.317)

[Item 5 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (concluded)

ARTICLE 6 (State immunity)⁶ (concluded)

57. The CHAIRMAN reminded members that at the 1634th meeting the Commission had heard the report of the Chairman of the Drafting Committee and had adopted draft article 1, subject to certain reservations regarding points of substance and drafting. The Commission had then considered draft article 6. There had been clear criticism of the presentation of the principle of State immunity, and a request had been made for the inclusion in the Commission's report of an alternative version of that principle. There had also been criticisms relating to the difficulty of reaching a conclusion without the fuller background provided by the commentaries to be incorporated in the report, which was not yet before the Commission.

58. In view of that situation, he suggested that the Commission should adopt draft article 6 as proposed by the Drafting Committee, on the understanding that members would have an opportunity, when the report was before them, to ensure that their views were adequately recorded.

It was so decided.

The meeting rose at 1 p.m.

* Resumed from the 1634th meeting.

⁶ For text, see 1634th meeting, para. 43.

1638th MEETING

Tuesday, 22 July 1980, at 10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Diaz González, Mr. Evensen, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Draft report of the Commission on the work of its thirty-second session

1. The CHAIRMAN invited the Commission to consider its draft report on its thirty-second session, 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.314 and Add.1 and Add.1/Corr.1)

A. Introduction

Paragraphs 1–4

Paragraphs 1–4 were approved.

Paragraph 5

2. Sir Francis VALLAT proposed that the words “the final codification”, in the third sentence, should be replaced by the words “the final instrument of codification”.

It was so decided.

Paragraph 5, as amended, was approved.

Paragraphs 6–9

Paragraphs 6–9 were approved.

Section A, as amended, was approved.

B. Draft articles on treaties concluded between States and international organizations or between international organizations

TEXT OF ARTICLES 61–80 AND ANNEX, WITH COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS THIRTY-SECOND SESSION

PART V. Invalidation, termination and suspension of the operation of treaties

SECTION 3. Termination and suspension of the operation of treaties

ARTICLES 61–64

Commentary to article 61 (Supervening impossibility of performance)

Paragraph (4)

3. Mr. REUTER (Special Rapporteur), referring to the penultimate sentence, said he had originally thought that some members wished article 73 to state a general reservation. But since neither the Commission nor the Drafting Committee had adopted a general formula for that article, he proposed that the penultimate sentence be deleted; as a consequential amendment, the word “Accordingly” at the beginning of the next sentence should also be deleted.

It was so decided.

The commentary to article 61, as amended, was approved.

Commentary to article 62 (Fundamental change of circumstances)

Paragraph (2)

4. Mr. VEROSTA proposed that, to bring the French text of the sixth sentence into line with the English, the comma after the word “*circumstances*” should be replaced by a full-stop, and that a new sentence should start with the word “*Mais*”.

It was so decided.

Paragraph (8)

5. Mr. SCHWEBEL proposed that the words “by authority”, in the fourth sentence, be replaced by the words “where it is especially accorded that authority”.

It was so decided.

The commentary to article 62, as amended, was approved.

Commentary to article 63 (Severance of diplomatic or consular relations)

Paragraph (1)

6. Mr. SCHWEBEL, drawing attention to a typographical error, pointed out that the word “in”, in the first line, should be deleted.

7. Mr. YANKOV, referring to the same line, proposed that the word “and” be replaced by the word “or”, as in the title of the article.

It was so decided.

The commentary to article 63, as amended, was approved.

Commentary to article 64 (Emergence of a new peremptory norm of general international law (*jus cogens*))

The commentary to article 64 was approved.

Section 3, as amended was approved.

SECTION 4. Procedure

ARTICLES 65–68

Commentary to article 65 (Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty)

Paragraph (1)

8. Sir Francis VALLAT pointed out that, in the third line of the English text, the bracket should be closed after the word “draft” and before the comma.

The commentary to article 65, as amended, was approved.

Commentary to article 66 (Procedures for judicial settlement, arbitration and conciliation)

Paragraph (5)

9. Mr. SCHWEBEL said he wondered whether the word “notion” was appropriate in the context.

10. Sir Francis VALLAT proposed that, to meet Mr.

Schwebel’s point, the English text should be brought into line with the French: the word “dispute” would then be underlined and the word “notion” would not.

It was so decided.

Paragraph (7)

11. Mr. REUTER proposed that the word “therefore”, in the second sentence (“*donc*” in the French text), be deleted.

It was so decided.

Paragraph (9)

12. Sir Francis VALLAT, referring to the second sentence, said he thought a reference should also be made to the “existence” of a peremptory norm. He therefore proposed that the words “the interpretation and the application of peremptory norms” should be replaced by the words “the existence, interpretation or application of a peremptory norm”, and that the necessary consequential amendment should be made to the first sentence of the paragraph.

It was so decided.

13. Mr. SCHWEBEL said that the last sentence of the paragraph suggested that a dispute between two international organizations, or possibly between a State and an international organization in which a second organization was involved, would not be one that arose within the scope of the activities of those organizations and that, accordingly, they might not be able to request an advisory opinion of the International Court of Justice. That seemed to him to be a somewhat far-fetched idea, and he therefore proposed that the last sentence of paragraph (9) be deleted.

It was so decided.

Paragraph (13)

14. Sir Francis VALLAT proposed that, to clarify the intent of the last sentence of the paragraph, the words “recourse to the International Court of Justice in the case of a dispute” should be replaced by the words “the submission to the International Court of Justice of a dispute”.

It was so decided.

The commentary to article 66, as amended, was approved.

Commentary to article 67 (Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty)

The commentary to article 67 was approved.

Commentary to article 68 (Revocation of notifications and instruments provided for in articles 65 and 67)

The commentary to article 68 was approved.

Section 4, as amended, was approved.

SECTION 5. *Consequences of the invalidity, termination or suspension of the operation of a treaty*

ARTICLES 69–72

Commentary to article 69 (Consequences of the invalidity of a treaty)

Paragraph (2)

15. Sir Francis VALLAT pointed out that the word “There”, at the beginning of the second sentence, should be replaced by “They”.

16. Mr. SCHWEBEL proposed that, in the same sentence, a comma be inserted after the words “draft articles”.

It was so decided.

The commentary to article 69, as amended, was approved.

Commentary to article 70 (Consequences of the termination of a treaty)

The commentary to article 70 was approved.

Commentary to article 71 (Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law)

17. Sir Francis VALLAT said that, in his view, the word “imperfect” in the last sentence of the commentary, was too strong. He proposed, however, that it be left to the Special Rapporteur to make an appropriate amendment.

It was so decided.

Subject to that amendment, the commentary to article 71 was approved.

Commentary to article 72 (Consequences of the suspension of the operation of a treaty)

The commentary to article 72 was approved.

Section 5, as amended, was approved.

Part V, as amended, was approved.

PART VI. *Miscellaneous provisions*

ARTICLES 73–75

Commentary to article 73 (Cases of succession of States, responsibility of a State or of an international organization, outbreak of hostilities, termination of the existence of an organization and termination of participation by a State in the membership of an organization)

18. The CHAIRMAN drew attention to the corrections to Parts VI and VII of Chapter IV of the report contained in document A/CN.4/L.314/Add.1/Corr.1.

Paragraph (1)

Paragraph (1), as corrected by document A/CN.4/L.314/Add.1/Corr.1, was approved.

Paragraph (2)

19. Mr. RIPHAGEN expressed reservations on the interpretation of article 73 of the Vienna Convention

on the Law of Treaties contained in paragraph (2). He wondered whether it was absolutely necessary to include it in the report.

20. Mr. REUTER (Special Rapporteur) pointed out that, both in the Drafting Committee and in the Commission, a great many matters which could have been reserved had been mentioned, but had not finally been retained in the draft. It therefore seemed necessary to state somewhere that the Vienna Convention did not claim to list all matters which might be reserved. The reason why succession of States and the international responsibility of a State were the only matters mentioned in article 73 of the Vienna Convention was that, at the time, they had been due to become the subject of draft articles. Thus the awkward problems of recognition of a State or Government, which might be posed by participation in a multi-lateral treaty, had not been mentioned, although they had given rise to animated discussion. Unlike Mr. Riphagen, he believed that those problems had not been solved by the Vienna Convention on Diplomatic Relations.

21. It would therefore be inappropriate to delete paragraph (2) of the commentary under discussion, which explained the subtleties of the situation. It would be going too far to say that all the matters not listed in article 73 of the Vienna Convention were not reserved. It had, of course, been specified that there were no causes of nullity of a treaty other than those set out in part V of the Vienna Convention, but it had never been affirmed in general terms that any question not subject to an express reservation in article 73 was deemed to be settled by that instrument.

22. It should also be noted that all the problems which might arise were not mentioned in paragraph (2) of the commentary under discussion. On that point he referred to the considerations he had expressed at the end of his summary of the discussion on draft article 73 (see 1592nd meeting, paras. 15–19). In his view it was essential to indicate, in the commentary to that provision, that the Commission had not taken a position on a number of questions that might arise.

23. Mr. SCHWEBEL said that a compromise solution might be simply to delete the second and third sentences of paragraph (2).

24. Sir Francis VALLAT proposed that the second sentence of the paragraph be deleted and that, in the last sentence, the words “The list in article 73 is certainly not exhaustive; it is merely intended” should be replaced by the words “In the view of the Commission, article 73 is merely intended”.

It was so decided.

Paragraph (2), as amended, was approved.

Paragraph (3)

25. Sir Francis VALLAT proposed that, in view of the amended wording of paragraph (2), the words “In

the light of this view of” should be inserted at the beginning of the paragraph, and the words “having thus been determined” should be deleted.

It was so decided.

Paragraph (3), as amended, was approved.

Paragraph (4)

Paragraph (4) was approved.

Paragraph (5)

26. Mr. RIPHAGEN said that the last sentence of the paragraph was not entirely accurate. He proposed that the words “formulated in terms identical to those of” should be replaced by the words “having the same purpose as that provided in”.

It was so decided.

Paragraph (5), as amended, was approved.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were approved.

Paragraph (8)

27. Mr. USHAKOV expressed reservations on paragraph (8). He did not see what difficulties establishment of an international organization presented in regard to treaties concluded by States which had subsequently become members of the organization and might have transferred certain powers to it. Furthermore, he did not think the case referred to in paragraph (8) concerned a real international organization.

28. Mr. VEROSTA, referring to the end of the first sentence of the French text, suggested that the word “*naissance*”, which suggested a mysterious phenomenon, should be replaced by “*constitution*”.

It was so decided.

Paragraph (8), as amended, was approved.

Paragraph (9)

Paragraph 9 was approved.

Paragraph (10)

Paragraph (10), as corrected by document A/CN.4/L.314/Add.1/Corr.1, was approved.

Paragraphs (11) to (14)

Paragraphs (11) to (14) were approved.

The commentary to article 73, as amended, was approved.

Commentary to article 74 (Diplomatic and consular relations and the conclusion of treaties)

The commentary to article 74 was approved.

Commentary to article 75 (Case of an aggressor State)

Paragraph (1)

29. Mr. VEROSTA proposed that the word “*conflit*”

in the first sentence of the French text, be replaced by “*guerre*”.

It was so decided.

Paragraph (1), as amended, was approved.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were approved.

The commentary to article 75, as amended, was approved.

Part VI, as amended, was approved.

PART VII. Depositories, notifications, corrections and registration

ARTICLES 76–80

Commentary to article 76 (Depositories of treaties)

The commentary to article 76 was approved.

Commentary to article 77 (Functions of depositories)

Paragraphs (1)–(5)

Paragraphs (1)–(5) were approved.

Paragraph (6)

30. Sir Francis VALLAT said that the word “Unfortunately”, in the last sentence, was inappropriate.

31. Mr. SCHWEBEL proposed that it should be replaced by the word “However”.

It was so decided.

Paragraph (6), as amended, was approved.

Paragraph (7)

Paragraph (7), with the correction to foot-note 36 contained in document A/CN.4/L.314/Add.1/Corr.1, was approved.

Paragraphs (8)–(10)

Paragraphs (8)–(10) were approved.

The commentary to article 77, as amended, was approved.

Commentary to article 78 (Notifications and communications)

The commentary to article 78 was approved.

Commentary to article 79 (Correction of errors in texts or in certified copies of treaties)

The commentary to article 79 was approved.

Commentary to article 80 (Registration and publication of treaties)

Paragraph (1)

32. Sir Francis VALLAT said that the word “held”, in the second sentence, was too strong, since it was

normally used with reference to judicial decisions. He proposed that it should be replaced by the word “said”.

It was so decided.

Paragraph (1), as amended, was approved.

Paragraph (2)

Paragraph (2) was approved.

The commentary to article 80, as amended, was approved.

Part VII, as amended, was approved.

The meeting rose at 12.55 p.m.

1639th MEETING

Wednesday, 23 July 1980, at 9.45 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Diaz González, Mr. Evensen, Mr. Francis, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

1. The CHAIRMAN said it was his pleasure to welcome to the Commission the Observer for the Arab Commission for International Law, Mr. Mahmoud El Baccouch, Director of the Treaties Department of the League of Arab States.

Draft report of the Commission on the work of its thirty-second 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.314 and Add.1 and Add.1/Corr.1)

ANNEX (A/CN.4/L.314/Add.1)

Commentary to the Annex to the draft articles (Procedures established in application of article 66)

2. The CHAIRMAN invited the Commission to consider, paragraph by paragraph, the commentary to the annex to the draft articles contained in document A/CN.4/L.314/Add.1.

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

3. Sir Francis VALLAT proposed that the word “extremely”, in the first sentence, should be deleted.

4. Mr. REUTER (Special Rapporteur) proposed that a corresponding change—namely, of the word “fort”—should be made to the French text.

It was so decided.

Paragraph (2), as amended, was approved.

Paragraph (3)

5. Mr. SCHWEBEL said that the fifth sentence was ambiguous and called for clarification.

6. Sir Francis VALLAT suggested that the sentence could be made clearer by replacing the word “might” by “cannot”.

7. Mr. SCHWEBEL suggested that, to remove all ambiguity, the word “which” should be replaced by the words “since they”.

8. Mr. REUTER (Special Rapporteur) proposed that the words “which might be members of the United Nations” should be replaced by the words “in their character as members of the United Nations, since they cannot be such members”.

It was so decided.

9. Mr. DÍAZ GONZÁLEZ said that in the Spanish version of the text, the meaning of the sentence in question did not correspond to the meaning of the English and French texts.

10. The CHAIRMAN said that the Spanish version of the text would be brought into line with the revised English and French versions.

On that understanding, paragraph (3), as amended, was approved.

Paragraphs (4)–(6)

Paragraphs (4)–(6) were approved.

Paragraph (7)

11. Mr. SCHWEBEL said that there appeared to be a typographical error in the second sentence of the English version of the text. The apostrophe after the word “States” should be deleted. Also, in the same sentence the word “an” should read “and”.

It was so decided.

Paragraph (7), as amended, was approved.

Paragraph (8)

12. Mr. SCHWEBEL proposed that the word “trust”, in the last sentence, should be replaced by the word “confidence”.

It was so decided.

Paragraph (8), as amended, was approved.

Paragraph (9)

Paragraph (9) was approved.

The commentary to the annex, as amended, was approved.

Chapter IV, as amended, was approved.

Tribute to the Special Rapporteur

13. The CHAIRMAN announced that the Commission had completed its first reading of the draft articles on treaties concluded between States and international organizations or between international organizations. He reminded members that, during preparation of the draft articles on the law of treaties from 1950 to 1966, the Commission had several times considered the question whether the draft should apply not only to treaties between States, but also to treaties concluded by other entities, in particular international organizations. The Commission had decided to confine its work to treaties between States, and the draft articles which finally became the basic proposal before the United Nations Conference on the Law of Treaties, held at Vienna in 1968 and 1969, had related to treaties between States, the Conference itself had recommended to the General Assembly that it should refer to the Commission the question of treaties concluded between States and international organizations, or between two or more international organizations.¹ In accordance with that recommendation, in 1969 the General Assembly had recommended, in paragraph 5 of its resolution 2501 (XXIV), that the Commission should study that question, in consultation with the principal international organizations.

14. In 1970, at its twenty-second session, the Commission had embarked on what had proved to be a decade of study of the question of treaties concluded between States and international organizations or between two or more international organizations. From the very first steps taken in the Commission's sub-committee on the topic in 1970, the entire programme of work had been conceived and executed under the guidance of Professor Paul Reuter. As the leading expert in the field, it was natural that the Commission should have turned to him for leadership. He had been appointed Special Rapporteur for the topic in 1971, and his brilliant series of reports had begun in 1972. In his first report,² after a careful review of references to the topic by the Commission, and afterwards by the Vienna Conference, he had made a preliminary examination of several essential problems such as the capacity of international organizations to conclude treaties; the form in which they expressed their consent to be bound by a treaty; the question of representation; the effect of treaties concluded by organizations; and the meaning of the

saving clause in article 5 of the Vienna Convention on the Law of Treaties regarding the "relevant rules of the organization". Those had been some of the areas in which the Commission, under Professor Reuter's guidance, had later made significant advances in the progressive development of the law. Between 1970 and 1974, the Commission's work had been substantially assisted by bibliographies, lists of treaties, and studies prepared by the Secretariat, as well as by the replies of the principal international organizations to a questionnaire circulated by the Commission.

15. Professor Reuter had presented his preliminary draft articles to the Commission in 1974, in his third report.³ In that year too, the Commission's thinking on the nature and scope of its study of the topic, and the form of presentation of the results, had become clearer. As to form, the Commission had decided to prepare draft articles "capable of constituting the substance of a Convention at the appropriate time",⁴ but not to prejudge its future decision on what recommendation it would ultimately make regarding the most appropriate procedure to be followed thereafter. That decision still remained to be taken, and would be taken at a later stage, after a further series of consultations envisaged by the Special Rapporteur with the principal international organizations. As to the nature and scope of the study, the topic's close relationship to the Vienna Convention seemed to ordain that the draft articles could not be divorced from that Convention, which should provide a general framework for them. The Commission's approach was summarized in a single sentence from the report on its twenty-sixth session:

The Commission can have no better guide than to take the text of each of the articles of that Convention in turn and consider what changes of drafting or of substance are needed in formulating a similar article dealing with the same problem in the case of treaties concluded between States and international organizations or between international organizations.⁵

The stage had thus been set for one of the most exacting tasks of development and codification ever undertaken—a task which, in the rigidity of its basic rules, might at that time have been unique.

16. In a series of nine reports presented to the Commission, the Special Rapporteur had faithfully observed the rules, while being careful, on each issue of significance, to bring home to the Commission the different ways in which those issues might be resolved. Through endless hours of intricate discussion, he had maintained the balance between those who had been more ready to establish an equivalence between the capacities of States and international organizations, and were eager to enter a new dimension of international legal theory and those who had been more cautious and had seen serious dangers in abandoning

¹ 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. 285, "Resolution relating to Article 1 of the Vienna Convention on the Law of Treaties".

² *Yearbook . . . 1972*, vol. II, p. 171, document A/CN.4/258.

³ *Yearbook . . . 1974*, vol. II (Part One), p. 135, document A/CN.4/279.

⁴ *Ibid.*, p. 292, document A/9610/Rev.1, para. 136.

⁵ *Ibid.*, para. 139.

traditional distinctions which placed States in a pre-eminent position.

17. With 60 draft articles already sent out to Member States for comment, the 20 draft articles and the annex on procedures for dispute settlement considered by the Commission at the current session represented the final segment of the series. The report on those texts by the Drafting Committee and the Commission's adoption of them with the relevant commentaries marked the conclusion of the Commission's consideration on first reading of the entire series of articles presented by Mr. Reuter, many of which were of outstanding significance as progressive development of the law.

18. Mr. Reuter had been presented with an extraordinary task, involving not merely development and codification but, in addition, the most important work of adaptation. He had been asked to adapt what many held to be a near perfect statement of treaty principles so that it could apply in the realm of international organizations, of which little had been known. He had not been able to rely on a wealth of practice and case law from which to derive principles, nor—even if he had had such materials—had he been entirely free as to how to present the form and content of the principles; for in all cases he had had to take the Vienna Convention on the Law of Treaties as a guide. Nor should it be forgotten that the law of international organizations itself had continued to evolve during the ten years of his study, and it had been necessary for Mr. Reuter, and through him, the Commission, to keep abreast of and take account of such developments. These considerations had combined to make the study one of unusual complexity. To complete it successfully had required a mind not only superbly analytical and creative, but also of such subtlety and sophistication as to be able to carry out progressive development while remaining within the strict basic rules laid down. Mr. Reuter possessed those qualities in the highest degree. He had amply demonstrated them in the ten years in which he had led the Commission in exploring such difficult terrain. Under his leadership, the Commission had charted a course that would ensure the success of the second reading of the draft articles. Perhaps by then it would have been possible to reduce the areas which Mr. Reuter had so aptly termed *terra incognita*, or to eliminate them altogether.

19. The draft articles, as pioneered by him, or in some higher stage of evolution following their second reading, would without doubt be of very great interest to the whole international community of States and organizations. One had only to look at the new Convention on the Law of the Sea, and the new Agreement establishing the Common Fund for Commodities to appreciate the obviously highly topical nature of Professor Reuter's work. Far from being of no more than scientific interest, the subject of treaties between States and international organizations or between organizations would seem to be one

of high practical significance for the development of international law.

20. It was a measure of Mr. Reuter's wisdom and stature that he had been able to deal so brilliantly with such an extraordinary task, while maintaining the lightness of his scholarly touch, and an unfailing kindly good humour. He expressed the Commission's deep gratitude and appreciation to Mr. Reuter for guiding its work in a very difficult field to so successful a conclusion.

21. Mr. TSURUOKA, speaking on behalf of the Asian members of the Commission, said that he associated himself with the Chairman's tribute to the Special Rapporteur. It was undoubtedly because Mr. Reuter had so skilfully guided them, thanks to his complete mastery of the subject, that the members of the Commission had been able to bring their work on the subject entrusted to him to a successful conclusion. Throughout the discussions he had shown a patience, perseverance and tenacity that reflected his unique personality. More than once his attitude had borne witness to a complete intellectual integrity, which compelled the admiration of all and earned him the warmest congratulations. The task accomplished, thanks to him, held a special place in the Commission's work and would certainly serve the cause of peace and prosperity in the world.

22. Mr. THIAM, speaking on behalf of the African members of the Commission, expressed his gratitude to the Special Rapporteur for the valuable contribution he had made to the Commission's work. The draft articles just completed filled an important gap which it had become necessary to fill as a result of the multiplication of international organizations, the privileged instruments of both universal and regional co-operation. The work accomplished under the Special Rapporteur's guidance would be a great source of inspiration for Africa, where the need for multilateral co-operation was being increasingly felt. The draft articles clearly bore the mark of the principal qualities of their author: simplicity and modesty, often carried to the point of self-criticism; for Professor Reuter had often emphasized his doubts rather than his certainties. He warmly congratulated the Special Rapporteur and expressed the hope that the draft prepared under his guidance would become a convention.

23. Mr. DÍAZ GONZÁLEZ, speaking on behalf of the Latin-American members of the Commission, said that the Commission owed a debt of gratitude to the Special Rapporteur on the completion of ten years of magnificent work on a most important topic. From Mr. Reuter's reports and statements in the Commission, he had learned a great deal, not only about international law, but also about French wit and graciousness. Those reports and statements had contained an element of irony expressed with a finesse that only a person of such profound wisdom and humanity could possess. Mr. Reuter, who had always been a friend of the third world countries, was regarded

with affection in Venezuela and, he was sure, in other Latin-American countries. He felt sure that the articles drafted under Mr. Reuter's guidance would not only become an outstanding convention, but would serve as a basis and inspiration for the Commission's future work.

24. Mr. USHAKOV said that the severity with which he had sometimes judged the Special Rapporteur's work did not in any way affect the friendship and admiration he felt for him. Henceforth, Mr. Reuter's name would always be associated with the branch of international law whose codification and progressive development he had made possible. The convention that should result from the draft articles would be of great importance for the international community, because of the increasingly prominent part played by international organizations in contemporary life.

25. Sir Francis VALLAT said that a debt of gratitude was owed to Mr. Reuter for his ten years' work as Special Rapporteur, which had been exemplary in all respects. His qualities, both as a scholar and as a colleague, had characterized his work and had led the Commission through all the intricacies of the topic entrusted to him. He possessed the ability—essential in a Special Rapporteur—to combine firmness in adhering to the views he believed to be correct with responsiveness to the views of others.

26. Mr. ŠAHOVIĆ associated himself with the congratulations addressed to the Special Rapporteur and drew attention to the contribution which the draft articles would make to the codification and progressive development of contemporary international law. He reminded the Commission that two former members, Mr. Hambro and Mr. Kearney, had been convinced, from the outset, of the need to codify the topic. But their enthusiasm had never been generally shared, and it was to be feared that the draft articles might still be treated with some reserve in the Sixth Commission or at a future codification conference. There was no denying that the draft added a new dimension to the concept of the legal personality of international organizations.

27. Mr. SCHWEBEL joined with the other members of the Commission in congratulating the Special Rapporteur on the completion of the first reading of his excellent draft articles, which were a testimony of his immense learning and superb drafting ability. Mr. Reuter's personal qualities had lent vitality to the Commission's consideration of his topic. He combined an admirable independence and idealism with concern for the role of international organizations in international life, which was an essential quality in any one engaged in the furtherance of international law. He embodied the great qualities of French liberalism and internationalism, and it was to be hoped that the Commission would continue to enjoy his presence for many years to come.

28. Mr. YANKOV said that it gave him great personal pleasure and satisfaction to be able to congratulate the Special Rapporteur on the completion of the first reading of his magnificent draft. His topic was one which expressed new dimensions in international relations and reflected the ever-increasing part played by international organizations in international affairs. He wished to express his admiration for Mr. Reuter's exceptional qualities as a lawyer and teacher, and for his personal attributes of firmness, straightforwardness and intellectual generosity.

29. Mr. VEROSTA associated himself with the congratulations addressed to the Special Rapporteur, whose great work would enrich both legal science and international legislation. Mr. Reuter combined Cartesian clarity with a very sure legal instinct; his personality and deeply human charm gave a special tone to the Commission's discussions.

30. Mr. REUTER thanked the members of the Commission for their kind words and their valuable contributions to the work entrusted to him.

31. To the new special rapporteurs of the Commission he would say that becoming a special rapporteur was rather like taking religious vows: it was essential to have faith. When he had come to the Commission in 1964, he had not really had faith. To be a believer it was, indeed, necessary to have deep moral convictions and unshakeable hope. Members of the Commission sometimes had good reason to wonder whether States would recognize the usefulness of their work. Over the years, his faith had grown stronger, as he had become aware of the value of the Commission and its work. He owed that new awareness to the other members of the Commission and the Secretariat. In the modern world, co-operation had become a real necessity in every sphere, even that of hostilities. It seemed inevitable that a special rapporteur should sometimes have doubts and go through crises, but when he had overcome the difficulties he saw the greatness and nobility of his task.

32. The draft articles of which the drafting had been completed, far from being the product of the Special Rapporteur alone, were the result of the collective work of all the members of the Commission. He could not thank each one of them personally, but there were two he wished to mention. One was Mr. Ushakov, for his enormous capacity for work and his passion for drafting; he was also an opponent, but an honest opponent, anxious to point out the political problems which had to be considered. The other, Mr. Tsuruoka, senior member of the Commission, was among those members who had given him the encouragement he had sometimes needed as Special Rapporteur.

33. Lastly, he warmly thanked present and past members of the Secretariat who had given him their valuable assistance. Devoted to their task and convinced of its usefulness, they had more than once given him comfort.

CHAPTER II. Succession of States in respect of matters other than treaties (A/CN.4/L.315)

A. Introduction

Paragraphs 1–6

Paragraphs 1–6 were approved.

Section A was approved.

B. Draft articles on succession of States in respect of matters other than treaties

ARTICLES C, D, E AND F

Commentary to article C (Transfer of part of the territory of a State)

Paragraph (12)

34. Sir Francis VALLAT proposed that the word “revert”, in the second sentence, be replaced by the word “pass”.

It was so decided.

Paragraph (12), as amended, was approved.

Paragraph (22)

35. Sir Francis VALLAT, referring to the third sentence of the paragraph, said that, in his view, the expression “in an irreproachable condition of viability” did not convey the meaning intended. The word “viability”, in English, meant self-sufficiency, whereas the basic principle to be expressed was that the part of territory concerned must be transferred to the successor State in such a condition that it could reasonably be managed and administered.

36. After an exchange of views in which Mr. DÍAZ GONZÁLEZ, Mr. REUTER, Mr. ŠAHOVIĆ, Mr. SCHWEBEL and Mr. VEROSTA took part, Mr. YANKOV proposed that the third sentence of paragraph (22) be brought into line with the second sentence of paragraph (6); it would then read:

“The basic principle is that the part of territory concerned must be transferred to the successor State so as to leave to the successor as viable a territory as possible in order to avoid any disruption of management and facilitate proper administration”.

It was so decided.

Paragraph (22), as amended, was approved.

37. Mr. SCHWEBEL said it seemed to him that excessive use had been made of underlining, not only in paragraph (22), but throughout the commentaries to articles C, D, E and F; presumably the passages in question would appear in italics in the printed version. Stylistically, that would be most unattractive, and he doubted whether it was really necessary.

38. Mr. VEROSTA and Mr. YANKOV endorsed that view.

39. Mr. REUTER said that, if the Commission decided to delete the underlining in one chapter of the report, it must agree to do so in all the others. He therefore proposed that the Secretariat be asked to review the report as a whole, and to omit such

emphasis except in cases where it was absolutely necessary.

It was so decided.

Paragraph (23)

40. Mr. USHAKOV, referring to the French text, proposed that the expression “*principes équitables*”, in the third sentence of subparagraph (iv), be replaced by “*principes d'équité*”.

It was so decided.

Paragraph (23), as amended, was approved.

Paragraph (25)

41. Sir Francis VALLAT proposed that the last four words of the paragraph, “small parcels of land”, be replaced by the words “small areas of territory”.

It was so decided.

Paragraph (25), as amended, was approved.

The commentary to article C, as amended, was approved.

Commentary to article D (Uniting of States)

Paragraph (6)

42. Mr. REUTER, referring to the first sentence of the French text, said that the word “*viabilité*” was inappropriate in the context; possibly it could be replaced simply by the word “*vie*”.

43. Mr. FRANCIS, supported by Sir Francis VALLAT, said that, in the English text, it would be preferable to retain the word “viability”.

44. Mr. VEROSTA proposed that the word “viability” be replaced, in all language versions, by the word “administration” or its equivalent, since, as was clear from paragraph (7), that was the meaning intended.

It was so decided.

45. Sir Francis VALLAT said that, while paragraph (6) was apparently meant to be a statement of fact, the second sentence, as worded, seemed to be more in the nature of a statement of law. He therefore proposed that the word “pass”, in the second sentence, be replaced by the words “are normally transferred”.

It was so decided.

46. Mr. VEROSTA, supported by Mr. USHAKOV, proposed that in the last sentence of paragraph (6), the expression “constituent States” be replaced by “component parts” and the words “those States” by “those parts”.

It was so decided.

47. Mr. RIPHAGEN proposed, as a consequential amendment, that the term “constituent States”, in the

third sentence, be replaced by the term "predecessor States".

It was so decided.

Paragraph (6), as amended, was approved.

Paragraph (7)

48. Mr. DÍAZ GONZÁLEZ proposed that the words "such as councils and viceroalties", in the second sentence, be deleted.

It was so decided.

Paragraph (7), as amended, was approved.

The commentary to article D, as amended, was approved.

Commentary to article E (Separation of part or parts of the territory of a State) and article F (Dissolution of a State)

Paragraph (3)

49. Mr. REUTER proposed that the word "archivistique", in the third sentence of the French text, be replaced by the words "sur les archives".

It was so decided.

Paragraph (3), as amended, was approved.

Paragraph (4)

50. Mr. REUTER proposed that, in the penultimate sentence of the French text, the phrase "représentant des valeurs culturelles et historiques très élevées autant pour les uns que pour les autres" should be reworded to read "représentant, pour les uns comme pour les autres, des valeurs culturelles et historiques très élevées".

It was so decided.

Paragraph (4), as amended, was approved.

Paragraph (10)

51. Mr. VEROSTA, referring to the first sentence, proposed that the word "Empire" be replaced by the word "Monarchy" and that the words "Austro-Hungarian imperial archives" be replaced by the words "archives of the Austro-Hungarian Monarchy".

It was so decided.

52. Mr. REUTER proposed that the word "archivistiques", in the second sentence of the French text, be replaced by "sur les archives".

It was so decided.

Paragraph (10), as amended, was approved.

Paragraph (12)

53. Mr. VEROSTA pointed out that the correct spelling of the name of the second county mentioned in the fourth sentence was "Vas".

The commentary to articles E and F, as amended, was approved.

Section B as a whole, as amended, was approved.

Chapter II as a whole, as amended, was approved.

54. The CHAIRMAN said that he wished, on behalf of all members, to record the Commission's appreciation of the work of Mr. Bedjaoui, the Special Rapporteur, on the supplementary draft articles on succession of States in respect of State archives.

The meeting rose at 12.40 p.m.

1640th MEETING

Thursday, 24 July 1980, at 10.20 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Also present: Mr. Ago.

Draft report of the Commission on the work of its thirty-second session (*continued*)

CHAPTER III. *State responsibility* (A/CN.4/L.320 and Add.1-4)

A. *Introduction* (A/CN.4/L.320)

Paragraphs 1-16

Paragraphs 1-16 were approved.

Section A was approved.

B. *Draft articles on State responsibility*

PART 1. *The origin of international responsibility*

Commentary to article 35 (Reservation as to compensation for damage) (A/CN.4/L.320/Add.3)

The commentary to article 35 was approved.

Part 1, as amended, was adopted.

PART 2. *The content, forms and degrees of international responsibility* (A/CN.4/L.320/Add.4)

Paragraph 18

1. Sir Francis VALLAT, referring to the second sentence, suggested that, after the words "new legal relationships", some wording in brackets should be added, to indicate the kind of relationships concerned.

2. Mr. RIPHAGEN (Special Rapporteur) proposed that the additional wording in brackets should read "new rights and corresponding obligations".

It was so decided.

Paragraph 18, as amended, was approved.

Paragraphs 19–23

3. Mr. SCHWEBEL said that, in his view, that part of the report as a whole was unduly concise and paragraphs 19, 20 and 21, in particular, should be expanded, if it was hoped to elicit some reaction from the Sixth Committee of the General Assembly.

4. Mr. ŠAHOVIĆ agreed with Mr. Schwebel.

5. Mr. RIPHAGEN (Special Rapporteur) said that, in drafting the report, he had been mindful of past criticism concerning the excessive length of the Commission's reports. Members of the Sixth Committee could, if they so wished, refer to the preliminary report on the content, forms and degrees of State responsibility (A/CN.4/330) and to the relevant summary records of the Commission's discussions.

6. Sir Francis VALLAT said he agreed that a longer report would have been preferable, but recognized that it was not practicable to expand the text at that stage. Moreover, the merit of paragraphs 23 *et seq.* was that their brevity served to highlight the points raised. At the same time, he considered that some indication should be given of the reasons for such a brief report, and he therefore proposed that, in the first line of paragraph 23, the words "which was of a preliminary character" should be added, between commas, after the word "Commission".

It was so decided.

Paragraphs 19–23, as amended, were approved.

Paragraph 24

7. Mr. SCHWEBEL, referring to the last line, proposed that the word "revisions", followed by a comma, be added before the word "rearrangements".

It was so decided.

Paragraph 24, as amended, was approved.

Part 2, as amended, was approved.

CHAPTER VI. Jurisdictional immunities of States and their property (A/CN.4/L.322)

A. Introduction

Paragraph 10

8. Mr. SCHWEBEL proposed that the word "recovering", in the penultimate sentence, be replaced by the word "receiving".

It was so decided.

Paragraph 10, as amended, was approved.

Paragraph 11

9. Mr. ŠAHOVIĆ suggested that it would be advisable to indicate the number or names of the States that had replied to the questionnaire formulated by the Special Rapporteur.

10. Sir Francis VALLAT proposed that a foot-note, giving the names of the States in question, be added.

It was so decided.

Paragraph 11 was approved subject to that addition.

Paragraph 14

11. Mr. REUTER proposed that, in the last sentence, the words "In order not to prejudge" should be replaced by the words "Without prejudice to", and their equivalent in the other language versions.

It was so decided.

Paragraph 14, as amended, was approved.

Paragraph 23

12. Mr. SCHWEBEL proposed that, in the fifth sentence, the words "some sympathy" should be replaced by the word "support" and the words "many members" by the word "others".

It was so decided.

Paragraph 23, as amended, was approved.

Section A, as amended, was approved.

B. Draft articles on jurisdictional immunities of States and their property

PART I. Introduction

Commentary to article 1 (Scope of the present articles)

The commentary to article 1 was approved.

PART II. General principles

Commentary to article 6 (State immunity)

Paragraphs (1)–(4)

13. Mr. ŠAHOVIĆ said that the expression "some-what problematical", in the first sentence of paragraph (1), was not very felicitous: possibly some more elegant turn of phrase could be found.

14. Mr. REUTER, agreeing with Mr. Šahović, said that, in French, the word "*problématique*" was decidedly pejorative. He would therefore suggest that the expression "*est quelque peu problématique*" be replaced by "*pose des problèmes*" (in English: "poses problems").

15. Sir Francis VALLAT proposed, as an alternative, that the words "poses serious problems" should be used, in order to underline the nature of the problems involved.

It was so decided.

16. Mr. USHAKOV said that paragraphs (1) and (3) suggested that article 6 laid down a general rule of State immunity. In fact, the article laid down no such rule, as was apparent from its reference to "the provisions of the present articles".

17. After an exchange of views in which Mr. RIPHAGEN, Mr. SCHWEBEL and Sir Francis

VALLAT took part, the CHAIRMAN suggested, to meet Mr. Ushakov's point, a change in paragraph 14 of Section A of chapter VI; the penultimate sentence should end with the words "adopted those draft articles", the remainder of the sentence being deleted, and, as a consequential amendment, the words "in Part I", in the last sentence of the same paragraph should also be deleted.

It was so decided.

Paragraphs (1)–(4), as amended, were approved.

Paragraph (5)

18. Mr. USHAKOV proposed that the words "the present article", at the end of the first sentence, should be replaced by the words "the present articles".

It was so decided.

Paragraph (5), as amended, was approved.

Paragraph (7)

19. Mr. SCHWEBEL proposed that the word "appreciable", in the third sentence, be replaced by the word "apparent".

It was so decided.

20. Sir Francis VALLAT, referring to foot-note 22, suggested that the words "United Kingdom", which were used in reference to the Statute of 7 Anne, should be deleted.

21. Mr. FRANCIS proposed that they be replaced by the word "British" to show that the statute in question was European.

It was so decided.

Paragraph (7), as amended, was approved.

Paragraph (9)

22. Sir Francis VALLAT, referring to the second sentence, proposed that, to reflect the content of the report more accurately, the words "especially in the United Kingdom of Great Britain and Northern Ireland" should be replaced by "especially in England and the United States".

It was so decided.

Paragraph (9), as amended, was approved.

Paragraph (23)

23. Mr. VEROSTA proposed that the words "A further distinction", at the beginning of the last sentence, be replaced by "Another distinction".

It was so decided.

Paragraph (23), as amended, was approved.

Paragraph (32)

24. Mr. RIPHAGEN said that since the Commission appeared to disagree as to the existence of a

general rule of international law establishing State immunity, the words "as a general rule of international law" should be deleted from the second sentence. Furthermore, in view of the dearth of judicial decisions on the subject, the conclusion drawn in the third sentence was only tentative, so that sentence should also be deleted.

25. Mr. USHAKOV said that the conclusion drawn in paragraph (32) followed logically from what had been stated in the preceding paragraphs. Consequently, the commentary should either be left as it stood or deleted altogether.

26. Mr. REUTER said that, while he could accept a reference to a trend towards the establishment of rules of customary international law governing State immunity, he was unable to accept a reference to a single general rule of State immunity.

27. Mr. SCHWEBEL proposed that the paragraph should be left intact and that a qualification similar to that contained in the third sentence of paragraph (27) should be added.

28. Mr. ŠAHOVIĆ said that in view of the different opinions held by members of the Commission of the existence of a principle of State immunity in customary international law, the last sentence of the paragraph might be amended so as to avoid any reference to a definite conclusion on the matter.

29. Sir Francis VALLAT observed that much of the judicial practice referred to in the commentary related to the nineteenth century, when the functions of the State had not included commercial and trading activities. It could no longer be said that the general rule of State immunity was generally accepted as a rule of customary international law. He proposed that the word "the" preceding the words "general rule" in the last sentence, should be replaced by the word "a".

It was so decided.

30. Mr. REUTER said he could not accept the proposed wording of the last sentence.

31. Mr. QUENTIN-BAXTER proposed that, in the second sentence, the words "general rule" should be replaced by the word "concept".

It was so decided.

Paragraph (32), as amended, was approved.

Paragraph (33)

32. Mr. SCHWEBEL proposed that the underlining of the words "executive branch of the government" should be deleted.

It was so decided.

Paragraph (33), as amended, was approved.

Paragraph (36)

33. Sir Francis VALLAT proposed that the words “the Legal Adviser or” in the first sentence, should be deleted.

It was so decided.

Paragraph (36), as amended, was approved.

Paragraph (37)

34. Mr. SCHWEBEL, referring to the first sentence, said that while the judiciary should be independent of the executive in matters of adjudication, in some countries that was not the case. Moreover, the doctrine of the separation of powers was not a universal doctrine. He proposed, therefore, that the word “normally” should be replaced by the word “generally” and that the words “due to the doctrine of separation of powers” should be deleted.

It was so decided.

35. Mr. REUTER said that he wished to express a formal reservation regarding the developments reflected in paragraph (37) which were based exclusively on English and United States common law and took no account of European judicial decisions, so that they could not form a basis for international law.

Paragraph (37), as amended, was approved.

Paragraph (38)

36. Mr. REUTER expressed the reservation that the developments reflected in paragraph (38) related to the field of comparative constitutional law and had nothing to do with public international law.

37. Sir Francis VALLAT endorsed the view.

38. Mr. SCHWEBEL proposed that, in order to facilitate the work of the Commission, members should be given more time to study the commentary as a whole, before considering it further.

It was so decided.

The meeting rose at 12.55 p.m.

1641st MEETING

Thursday, 24 July 1980, at 3.20 p.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Draft report of the Commission on the work of its thirty-second session (*continued*)

CHAPTER VI. *Jurisdictional immunities of States and their property (concluded)* (A/CN.4/L.322)

B. *Draft articles on jurisdictional immunities of States and their property (concluded)*

PART II (General principles) (*concluded*)

Commentary to article 6 (State immunity) (concluded)

1. Mr. THIAM observed that there had been many reservations on the Special Rapporteur's second report on jurisdictional immunities of States and their property (A/CN.4/331 and Add.1); he thought it would be wiser to defer consideration of the topic until the following year.

2. The CHAIRMAN said that Mr. Thiam's comment would be recorded in the summary records of the session.

3. Sir Francis VALLAT said it would be less than justice not to send forward to the General Assembly the paragraphs which had already been considered in connexion with articles 1 and 6, indicating very clearly the provisional nature of article 6. Paragraphs (36) and (37) of the commentary were repetitive and tended to give the impression of extending the practice in the matter, which was largely United States of America practice, and presenting it as if it applied on a much wider basis than it actually did. Those difficulties might be removed by adding the following sentence to paragraph (6) of the commentary: “Accordingly, it is considered useful to set out the following information, which is based upon the second report submitted by the Special Rapporteur”.

4. Paragraphs (36) and (37), in turn, needed to be cut down in order to narrow their scope to some extent, which could best be done by merging them into a single paragraph. He proposed, therefore, that the first sentence of paragraph (36) should be revised to read as follows: “Apart from the determination of the question of fact or of status, the executive may also have the right to intervene *amicus curiae*, through a responsible governmental agency such as the Attorney General, for example, by making a suggestion to the effect that in a given case immunity should be accorded or denied”.

5. The next sentence should be deleted. Paragraph (36) should then continue with the first sentence of the former paragraph (37), amended to read as follows: “Since the judiciary, in principle as well as in practice, is generally independent of the executive in matters of adjudication, it appears that the courts are not always bound to follow the lead of the executive in every case”. Foot-note 77 should be placed after the words “to follow suit” in the next sentence, and foot-note 78 after the word “instance” at the end of that sentence. In the following sentence, the words “the courts could still grant jurisdictional immunity” should be amended to “the courts may still grant jurisdictional immunity”.

6. Mr. THIAM said that he maintained his reservation, but was not opposed to Sir Francis Vallat's proposal, which was an improvement in that it meant submitting the Special Rapporteur's second report for information purposes without approving it.

7. The CHAIRMAN said that all members thought there were certain drawbacks in the report, but that was largely due to the fact that Mr. Sucharitkul had been unable to present it in person. He suggested that the Commission should accept the amendment to paragraph (6) proposed by Sir Francis Vallat, as well as his proposals in regard to paragraphs (36) and (37), which would then be merged into a single paragraph.

It was so decided.

Paragraphs (36) and (37), as combined and amended, were approved.

Paragraph (49)

8. Sir Francis VALLAT questioned the citation in foot-note 104, as well as the earlier foot-note 75 (in reference to para. (35)).

9. The CHAIRMAN said that those foot-notes would be checked by the Secretariat.

Paragraph (49) was approved.

The commentary to article 6, as amended, was approved.

Section B, as amended, was approved.

Chapter VI, as amended, was approved.

CHAPTER IX. Other decisions and conclusions (A/CN.4/L.325)

10. The CHAIRMAN explained that the dots after the letter "A" in the table of contents were to indicate space left for the report of the Planning Group on the programme and methods of work of the Commission, which was not yet quite ready.

B. Relations with the International Court of Justice

11. The CHAIRMAN pointed out that Mr. Sette Câmara had attended some of the Commission's meetings, but he was not sure that he had been present as an observer for the Court.

Section B was approved.

C. Co-operation with other bodies

12. Sir Francis VALLAT proposed that mention should also be made of the Arab Commission for International Law, which had sent an observer to recent Commission meetings.

13. The CHAIRMAN said that an appropriate reference would be added in Chapter IX of the report.

Section C, subject to that addition, was approved.

D. Date and place of the thirty-third session

14. The CHAIRMAN observed that it had been decided the preceding day to hold the thirty-third session from 4 May to 24 July 1981.

Section D was approved.

E. Representation at the thirty-fifth session of the General Assembly

Section E was approved.

F. International Law Seminar

15. Mr. RATON (Secretariat) informed the Commission that the Swedish Government had just announced that it had made an additional payment, bringing the total amount of its contribution to the Seminar up to US \$8,000. He therefore proposed that the third sentence of paragraph 23 should be replaced by the following sentence: "Particular thanks are due to the Governments of the Netherlands and Sweden, which, following the example set by the Norwegian Government in 1979, tripled their contributions in 1980."

16. The CHAIRMAN said that a reference to Sweden would be included in paragraph 23.

Section F, as amended, was approved.

CHAPTER I. Organization of the session (A/CN.4/L.319)

17. Sir Francis VALLAT pointed out that the reference to "two of those articles", in the eighth line of paragraph 2, should be amended to read "three of those articles".

It was so decided.

18. The CHAIRMAN said that the blank spaces in paragraph 9 would, of course, be filled in by the Secretariat.

Chapter I, as amended, was approved.

CHAPTER VIII. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/L.324)

Paragraph 4

19. Mr. ŠAHOVIĆ thought it was unnecessary to say that the topic was "modest".

20. Mr. YANKOV (Special Rapporteur) said he had not used the adjective "modest" as a general qualification, but only with respect to the topic's doctrinal implications. However, he would not object to its deletion.

21. The CHAIRMAN suggested that the beginning of the first sentence of paragraph 4 should be shortened to read: "It was pointed out by the Special Rapporteur that the topic was significant, in view of ...".

It was so decided.

Paragraph 4, as amended, was approved.

Paragraph 7

22. Mr. SCHWEBEL, referring to chapter VIII as a whole, said he saw no reflection of the view that

codification of the topic was unnecessary because the existing codification was sufficient. Paragraph 7, in particular, did not quite give the flavour of the relevant General Assembly resolution.

23. Mr. YANKOV (Special Rapporteur) said that General Assembly resolution 31/76 had referred to “the desirability of elaborating provisions concerning the status of the diplomatic courier”. Paragraph 7 referred to that resolution, as well as to General Assembly resolution 33/140, which mentioned the “elaboration of an appropriate legal instrument”. He thought, therefore, that paragraph 7 should be kept as it stood, while Mr. Schwebel’s point could be covered later.

Paragraph 7 was approved.

Paragraph 20

24. Mr. SCHWEBEL proposed that the following sentence should be added to paragraph 20: “However, it was also maintained that there is no need for a new instrument, on the ground that the essential rules are sufficiently codified in existing treaties”.

It was so decided.

Paragraph 20, as amended, was approved.

Paragraph 21

25. Sir Francis VALLAT said he shared Mr. Schwebel’s doubts about the need for codification. In his opinion, it was very dangerous to go into excessive detail. He proposed that the last clause in paragraph 21, which read: “and even contraproductive and therefore he urged that priority be given to the elaboration of general rules”, should be deleted.

It was so decided.

Paragraph 21, as amended, was approved.

Paragraph 22

26. Mr. SCHWEBEL proposed the inclusion, at the beginning of the paragraph, of some such sentence as “It was recalled that General Assembly resolution 34/141 of 17 December 1979 referred to ‘the possible elaboration of an appropriate legal instrument’”. In the third sentence, the words “the question relating to the form of the eventual legal instrument . . .” should be amended to read: “the question relating to the form of any eventual legal instrument . . .”. In the last line, the words “the prospects for ratification of the eventual instrument.” should be amended to read: “the prospects for ratification of any such instrument.”

It was so decided.

Paragraph 22, as amended, was approved.

Paragraph 26

27. Mr. RIPHAGEN proposed that the words “It was also noted that the items”, in the penultimate

sentence, should be amended to read: “It was also noted that some items . . .”.

It was so decided.

28. Mr. ŠAHOVIĆ suggested that, in the French text, the words “*Un membre de la Commission*”, at the beginning of the last sentence, should be replaced by the word “*On*”, to indicate that it was not one isolated opinion.

29. The CHAIRMAN suggested the use of some equally neutral expression, such as “The view was expressed”, in the English text.

30. Mr. YANKOV (Special Rapporteur) said it was true that one member would prefer to put all issues relating to the bag before the issues relating to the courier. According to the concept of a functional approach, privileges and immunities were not extended to the person, but to the function.

31. Sir Francis VALLAT proposed the deletion of the word “prominent” in the expression “a more prominent functional approach”.

32. The CHAIRMAN suggested that the last sentence should be amended to read: “The view was expressed that a more functional approach would justify placing the draft articles on the status of the bag before the draft articles on the status of the courier”.

It was so decided.

Paragraph 26, as amended, was approved.

Paragraph 29

33. Sir Francis VALLAT proposed that paragraph 29 should be placed immediately after paragraph 26, as it would be convenient to have the two ideas dealt with side by side.

It was so decided.

Paragraph 30

34. Sir Francis VALLAT suggested that the word “any” should be substituted for the word “the” before the phrase “eventual legal instrument”, in order to conform with paragraph 22 as amended.

Paragraph 30, as amended, was approved.

Chapter VIII, as amended, was approved.

CHAPTER VII. *International liability for injurious consequences arising out of acts not prohibited by international law*
(A/CN.4/L.323)

35. Mr. QUENTIN-BAXTER (Special Rapporteur) pointed out that the paragraph numbers indicated on the title page for section 13 should be 9–22.

A. Introduction

Section A was approved.

B. Consideration of the topic at the present session

Paragraph 9

36. Mr. QUENTIN-BAXTER (Special Rapporteur) drew attention to a typographical error in the last line, where the words "of management" should read "or management".

Paragraph 9, as corrected, was approved.

Paragraph 12

37. Mr. THIAM suggested that, in the last sentence, the word "jurisdiction" should be replaced by the word "control".

38. Mr. QUENTIN-BAXTER (Special Rapporteur) said that he understood the reason for Mr. Thiam's concern. In English, however, the word "control" would seem rather to obscure the real point, which was the laws of the State which might suffer the loss really had no means of making themselves effective in relation to the danger. He was, however, aware that "danger" was not normally a word which attracted the word "jurisdiction".

39. Mr. YANKOV suggested that both ideas might be included and a reference made to "jurisdiction or control", as in paragraph 14.

40. Mr. RIPHAGEN suggested that the matter might be clarified by referring to the "cause of danger" rather than the "danger".

41. Sir Francis VALLAT said that in his opinion, it would be preferable to indicate that it was a question of an act of a State and not merely of any danger. He therefore suggested that the last sentence of paragraph 12 should read: "The topic is of practical importance precisely because the act of the State giving rise to the danger is not within the jurisdiction of the State which may suffer the harm".

It was so decided.

Paragraph 12, as amended, was approved.

Paragraph 14

42. Mr. THIAM said there was some contradiction between the words "they are not exposed to charges of unlawful conduct", in the penultimate sentence of paragraph 14, and paragraph 11 which accepted that the liability being considered did not arise from wrongfulness.

43. Mr. QUENTIN-BAXTER (Special Rapporteur) said he did not believe that there was any conflict in meanings in that part of paragraph 14. What was suggested was that any question of unlawful conduct could be avoided by the taking of measures in agreement with other States.

Paragraph 14 was approved.

Paragraph 17

44. Mr. YANKOV said it seemed to him that the notion of "physical environment" used in paragraph

17, and also in paragraph 9, needed some clarification, as it might seem to depart from the more comprehensive notion of environment, which was not always confined to the physical. He would prefer the term "environment" unqualified, at least at that stage. He was not, however, pressing for the text to be amended.

45. Mr. QUENTIN-BAXTER (Special Rapporteur) said that he understood Mr. Yankov's concern and that his was not the only expression of doubt about the correct limitation of the expression. It was intended to convey that most actions with which recent international activity had been concerned had involved the physical use of the environment—not merely what might be called the policy of a particular country, but the actual use of its territory for some purpose. It was not implied either in his report or in the draft report of the Commission that the consequences of such action were in any way limited to the physical environment. He believed there was an element of appreciation still to be made, but had understood the sense of the Commission to be that the subject should not be narrowed at the current session.

46. Sir Francis VALLAT said it seemed quite clear to him that the Commission's intention was to read the word "environment" in as wide a sense as possible, having regard, at that stage, to the physical environment, though not necessarily excluding other aspects at a later stage.

Paragraph 17 was approved.

Paragraph 20

47. The CHAIRMAN informed the Commission that the Special Rapporteur wished to propose a new sentence to become the penultimate sentence of paragraph 20. That sentence read: "Several speakers noted that this entailed a trend towards stricter standards of liability, and it was recognized that the question of attribution would need further study".

It was so decided.

Paragraph 20, as amended, was approved.

Chapter VII, as amended, was approved.

CHAPTER IX. Other decisions and conclusions (concluded)

48. The CHAIRMAN proposed that the Commission consider the text of section A (A/CN.4/L.325/Add.1), concerning the report on the Planning Group on the programme and methods of work of the Commission, which had just been distributed.

A. Programme and methods of work of the Commission (A/CN.4/L.325/Add.1)

Paragraph 18

49. Mr. USHAKOV said it was unnecessary to draw the attention of the General Assembly yet again to the question of the honoraria of members of the Commission; by doing so, the Commission might lay itself

open to criticism. He therefore proposed that paragraph 18 be deleted.

Paragraph 18 was approved.

Paragraph 19

50. Sir Francis VALLAT suggested that, in order to avoid the rather frequent repetition of the words “wishes to bring to the attention of the General Assembly”, the first sentence of the paragraph might read: “The Commission also noted that it is sometimes necessary for Special Rapporteurs to provide their own research and other assistance out of their own resources”.

It was so decided.

Paragraph 19, as amended, was approved.

Section A, as amended, was approved.

A bis. Publication of the third edition of the handbook *The Work of the International Law Commission*

51. Sir Francis VALLAT suggested that the wording of the last line, which referred to “scientific institutions and the public at large” might be put into conformity with a similar reference suggested by Mr. Verosta, bringing in all scientific and university entities.

It was so decided.

Subject to that amendment, section A bis was approved.

A ter. Tribute to the Deputy Secretary of the Commission

Section A ter was approved.

C. Co-operation with other bodies

4. ARAB COMMISSION FOR INTERNATIONAL LAW

Section C.4 was approved.

Chapter IX as a whole, as amended, was approved.

CHAPTER V. *The law of the non-navigational uses of international watercourses* (A/CN.4/L.321 and Add.1)

A. Introduction

Paragraph 39

52. Sir Francis VALLAT said he thought the last sentence might be made to express the thought more fully. He suggested that it might read: “It is also useful to prepare a provisional draft of draft article X . . .”.

53. Mr. SCHWEBEL (Special Rapporteur) agreed that the sentence might be rephrased.

54. Mr. USHAKOV said he must emphasize that all draft articles were adopted provisionally on first reading.

55. The CHAIRMAN said that, in the absence of any objection, he took it that the last sentence of paragraph 39 would be rephrased by the Special Rapporteur, bearing in mind Mr. Ushakov’s comment.

It was so decided.

On that understanding, paragraph 39 was approved.

Section A, as amended, was approved.

B. Draft articles on the law of the non-navigational uses of international watercourses.

Commentary to Article 1 (Scope of the present articles)

Paragraph (1)

56. Mr. ŠAHOVIĆ suggested that a foot-note be added to indicate the passage in the Special Rapporteur’s report where the meaning to be given to the word “uses” was discussed.

57. Mr. SCHWEBEL (Special Rapporteur) said he believed it would be possible to make a reference to “uses” in paragraph (1), which would cover Mr. Šahović’s point.

It was so decided.

Subject to that addition, paragraph (1) was approved.

The commentary to article 1, as amended, was approved.

Commentary to article 2 (System States)

The commentary to article 2 was approved.

Commentary to article 3 (System agreements)

58. Mr. USHAKOV said that from paragraph (4) onwards the commentary did not correspond to article 3, because it dealt with system agreements in general, whereas article 3 related only to agreements that applied and adjusted the provisions of the draft articles. Such agreements did not yet exist, because there were not yet any articles to apply or adjust. Hence it was incorrect to say that there was a customary rule obliging States to negotiate with a view to concluding such agreements, since the articles calling for those agreements had not yet been drafted. It was equally incorrect to say that the rules to be stated in those agreements must be residuary rules, since that would mean that the States parties to system agreements could not only adapt the articles, but also derogate from them.

The commentary to article 3 was approved.

Commentary to article 4 (Parties to the negotiation and conclusion of system agreements)

The commentary to article 4 was approved.

Commentary to article 5 (Use of waters which constitute a shared natural resource)

Paragraphs (3)–(5)

59. Mr. ŠAHOVIĆ proposed that paragraph (4) should be deleted, as he did not see the need to discuss the validity of an instrument as important as the Charter of Economic Rights and Duties of States. In

his opinion it was too serious a matter to be dealt with in haste.

60. Mr. SCHWEBEL (Special Rapporteur) said he would prefer paragraph (4) to be retained. It was correct in law, since it could not be maintained that a General Assembly resolution, or portions of it, against which a substantial number of members had voted was declaratory of international law. The important reason for including the paragraph was that certain influential States—Brazil, for example—had felt strongly about the issue and voted against. If the matter was passed over lightly in the commentary and the impression given that it was on the same legal plane as, for example, a treaty or arbitral award, there might be a severe reaction. It would be prudent to recognize that the article had been a source of controversy.

61. Mr. DÍAZ GONZÁLEZ said he agreed with Mr. Šahović. In his opinion, paragraph (4) did not say anything significant about article 5. It was true that General Assembly resolutions did not in themselves create obligations. He believed, however, that the significance of the paragraph might be taken as being the contrary of what Mr. Schwebel had said, since there had been 120 votes in favour of the resolution and only six against, while the article itself had received 100 votes in favour and only eight against. He considered that the opinion quoted at the end of the paragraph was not useful as an indication of importance of the subject and that it would be more prudent, and more in keeping with the agreement reached within the Commission, to delete paragraph (4).

62. Mr. FRANCIS said that the Commission should not attempt, at that stage, to evaluate the legal significance of article 3 of the Charter of Economic Rights and Duties of States, but should make use of the element contained in it, which was very relevant to the topic. He wished to make a reservation on the approach adopted in paragraphs (3) and (4).

63. Mr. RIPHAGEN said he thought it important to make a distinction between article 3 of the Charter of Economic Rights and Duties of States, which was relevant in the present context, and other articles of the same Charter which were not relevant. He suggested that paragraphs (4) and (5) should be combined and should be amended to start: "This article was a source of controversy. Nevertheless the article is of high interest. In the first place . . ."

64. Mr. ŠAHOVIĆ said that he found that suggestion acceptable.

65. The CHAIRMAN suggested that a foot-note might be inserted after the word "controversy", to show the voting in the General Assembly.

66. Sir Francis VALLAT suggested that the reference to voting be deleted from paragraphs (3) and (4) and that paragraphs (4) and (5) be combined, starting as suggested by Mr. Riphagen.

67. Mr. SCHWEBEL (Special Rapporteur) said he did not agree with Sir Francis Vallat that the vote was not of interest. Since the Commission was dealing with legal issues and presumably referred to General Assembly resolutions because they might be of legal relevance, it could make a considerable difference whether a resolution had been adopted unanimously or whether there had been opposing votes. In the case in question, he believed that the fact that the resolution had not been adopted unanimously was of considerable importance.

68. The CHAIRMAN suggested that paragraphs (4) and (5) should be combined, starting as proposed by Mr. Riphagen, and that a foot-note should be inserted after the word "controversy" to show the voting in the General Assembly.

It was so decided.

Paragraphs (3)–(5), as amended, were approved.

Paragraph (7)

69. Mr. YANKOV asked whether the reference to voting could not be treated in the same way in paragraph (7). It seemed to him unusual to refer to votes.

70. Mr. VEROSTA said there was some merit in including the votes, because the Commission was trying to identify possible trends in international relations and to find out how large numbers of States were thinking on certain subjects.

71. Mr. RIPHAGEN observed that the voting mentioned in paragraph (7) was 128-0-9; as there had been no votes against, it did not seem important to include those figures.

72. The CHAIRMAN suggested that the penultimate sentence of paragraph (7) should be amended to read: "The General Assembly adopted without dissent the report of the United Nations Water Conference . . .".

It was so decided.

Paragraph (7), as amended, was approved.

Paragraph (10)

73. Mr. SCHWEBEL (Special Rapporteur) suggested that the first sentence of paragraph (10) should be amended to read: "The striking support resolution 3129 (XXVIII) gives to themes of these articles is clear."

It was so decided.

Paragraph (10), as amended, was approved.

Paragraph (18)

74. Mr. SCHWEBEL (Special Rapporteur) suggested that the word "now" should be deleted from the third sentence, so that it would read: "The operative paragraphs as proposed by Pakistan read: . . .". He also pointed out that the word "so" should be added in

the last sentence so that it would read: "... amending paragraph 2 of the resolution so as to substitute ...".

Paragraph (18), as amended, was approved.

Sub-headings

75. Mr. SCHWEBEL (Special Rapporteur) said that in drafting the commentaries he had not inserted any sub-headings, as he had been under the impression that they were not used in such reports. It would be useful, for example, to insert a sub-heading such as "Navigational uses", before paragraph (33). He suggested that the Secretariat should be requested to insert sub-headings throughout the commentary, as appropriate.

76. The CHAIRMAN agreed that the Secretariat might insert sub-headings, preferably employing phrases from the text as it stood and provided the expressions used were chosen with due caution.

It was so decided.

Paragraph (77)

77. Mr. SCHWEBEL (Special Rapporteur) suggested that the last part of the last sentence be amended to read: "... their use in one system State affects a use in another system State—is carried through in this article as well".

Paragraph (77), as amended, was approved.

Paragraph (79)

78. Mr. ŠAHOVIĆ said he regretted that the principle of the permanent sovereignty of States over their natural resources had not been mentioned in the draft report in connexion with article 5, because he thought one could not speak of shared natural resources without taking that principle into account.

79. The CHAIRMAN said that, in view of Mr. Šahović's comment, the Commission might wish to consider the insertion of an additional sentence to indicate that the view had been expressed that the absence of any mention of that principle was an omission.

80. Mr. SCHWEBEL (Special Rapporteur) said that the Commission should bear in mind that the point raised was a very controversial one. He himself considered that it was not relevant in the present context. He recognized that there had been a difference of opinion on the matter, but did not think it vital to the operative conclusions. There was a fleeting mention of permanent sovereignty over natural resources in the quotation from General Assembly resolution 34/186 in paragraph (19) of the commentary to article 5, which would seem to confirm the principle. It was not through an oversight, however, that there was no further mention of that principle, but because he had thought it might lead to a discussion which would not be productive at that stage.

81. He did not see the merit of discussing permanent sovereignty in general in the present context. It was a controversial principle and might prejudice the possibility of reaching agreement on the topic under consideration. It was true, however, that the principle had been referred to in the Commission's discussions, and if it was considered necessary, he would be agreeable to mentioning it; but he would wish any reference to be balanced. It might perhaps be stated that some members believed that the principle of permanent sovereignty over natural resources had a bearing on the evolution of articles in the field under consideration and that another member did not.

82. The CHAIRMAN suggested that an additional paragraph (80) should be inserted along these lines.

It was so decided.

Paragraph (79) was approved.

83. Sir Francis VALLAT said that, as some concern had already been expressed about the length of the commentary, he wondered whether it would be possible to insert, as a new paragraph (2), a short summary to serve as an index to what followed. Such a summary would facilitate the reading of the report.

84. Mr. SCHWEBEL (Special Rapporteur) said that he appreciated Sir Francis's point and that he himself was rather concerned about the question of the length of commentaries, particularly the commentary to article 5. He wondered whether in future it might be desirable to adopt a policy of taking only a few examples to illustrate comments and referring, for other examples, to the relevant report of the Special Rapporteur.

The commentary to article 5, as amended, was approved.

Commentary to article X (Relationship between the present articles and other treaties in force)

The commentary to article X was approved.

Chapter V, as amended, was approved.

The meeting rose at 6.05 p.m.

1642nd MEETING

Friday, 25 July 1980, at 10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

Draft report of the Commission on the work of its thirty-second session (concluded)

CHAPTER III (State responsibility) (concluded)*

Commentary to article 33 (State of necessity) (A/CN.4/L.320/Add.1/Parts I and II)

The commentary to article 33 was approved.

Commentary to article 34 (Self-defence) (A/CN.4/L.320/Add.2)

1. Mr USHAKOV said that the Commission should be wary of interpreting or explaining the concept of self-defence as it had done in paragraphs (1) to (22) of the commentary. In his view, those paragraphs were unnecessary, and the commentary should start at paragraph (23), in which the Commission noted the existence of a "primary" rule on self-defence.

2. Mr. AGO pointed out that Mr. Ushakov's position was duly recorded in paragraphs (26) and (27).

3. Mr VEROSTA referring to the phrase "or, to put it another way, in the exercise of what the Charter called the 'inherent right of self-defence'", at the end of paragraph (1), said that it might give the impression that the Commission subscribed to Mr. Ago's view that self-defence as an inherent right did not exist. If that phrase was retained, it would be sure to provoke criticism by those who regarded the United Nations Charter as an instrument of positive public international law, one provision of which qualified self-defence as an inherent right.

4. Further, the words "Another premise", in the second sentence of paragraph (2), should be replaced by "Another element", since a premise that was not indispensable" was not a premise.

5. Mr. USHAKOV proposed that paragraph (27) should be worded as follows: "In the view of one member of the Commission, who of course approved of the substance of the article, the text could not possibly begin with a reference to 'an act of a State not in conformity with an international obligation of that State'; for an act of a State which constitutes a measure of self-defence is not contrary to any international obligation." In addition, the words "*un recours*" in the French text of foot-note 37 should be replaced by the words "*ce recours*".

6. Mr. AGO said he was surprised by Mr. Verosta's first comment, since the phrase in question had been added precisely to allay his misgivings; however, it could be deleted. He also agreed that the word "premise" could well be replaced by the word "element".

7. The amendments proposed by Mr. Ushakov should also be taken into account, since they were designed to make his position clearer.

It was so decided.

The commentary to article 34, as amended, was approved.

Chapter III as amended, was approved.

8. The CHAIRMAN put to the vote the draft report of the Commission on the work of its thirty-second session as a whole, as amended.

The draft report as a whole, as amended, was adopted.

Tribute to Mr. Ago

9. The CHAIRMAN said that at the end of the Second World War the subject of State responsibility had remained, as far as States were concerned, a loose collection of rules, without a recognized conceptual framework that would facilitate their clarification, systematic exposition and application. Although the topic had been among the first selected by the Commission for codification, in 1949, it had not been until 1955 that a Special Rapporteur, Mr. Garcia Amador, had been appointed for it. In 1960, after a series of six detailed reports had been submitted, the General Assembly and the Commission had decided that codification of the rules of State responsibility should be accorded priority and that the study should be undertaken *de novo*.

10. In 1962, the Commission had decided to entrust preliminary work on the study to a Sub-Committee on State Responsibility, under the chairmanship of Mr. Ago, and, at its fifteenth session, in 1963 having unanimously approved the general conclusions of the Sub-Committee, had appointed Mr. Ago Special Rapporteur for the topic. Mr. Ago had already won wide acclaim for his pioneering studies on State responsibility and had all the qualities of intellect and accomplishment required for leadership of the Commission in the monumental task that lay ahead. He had brought to his work a wealth of experience, meticulous scientific method and, most important of all, a commitment to the ideals of justice which the work must ultimately serve.

11. Beginning in 1969, in a series of brilliant reports that had won universal acclaim and admiration, not only in the Commission and the Sixth Committee of the General Assembly, but also among jurists and scholars everywhere, Mr. Ago had sketched the grand design for the work of the Commission. In considering the topic of international responsibility, the Commission would concentrate on a study of State responsibility and, within that subject, on a study of the responsibility of States for internationally wrongful acts. The study would not seek to define the so-called "primary" rules of international law, which imposed specific obligations on States, but would concentrate on the elaboration of "secondary" rules determining the legal consequences of failure to fulfil the obligations established by "primary" rules. The work would involve studies, first, of the origin of international responsibility of a State; secondly, of the

* Resumed from the 1640th meeting.

content, forms and degrees of that responsibility; and thirdly, of the settlement of disputes and the "implementation" stage of international responsibility. Mr. Ago had asked the Commission to undertake, in the first instance, the essential task of establishing the fundamental rules for determining State responsibility and to take as a starting point the concept of the internationally wrongful act as a source of international responsibility. He had then undertaken to guide the Commission's work in completing the all-important fundamental study.

12. Since 1972, at the request of the General Assembly the Commission had accorded the topic the highest priority, and Governments had received the draft articles submitted by the Special Rapporteur in instalments for comment. The Commission's adoption, at the current session, of the commentaries to draft articles 33 (State of necessity), 34 (Self-defence) and 35 (Reservation as to compensation for damage) completed on first reading the entire series of draft articles comprising the first phase of the work. Many of the features of the draft represented outstanding and innovative contributions to legal science and to the progressive development of international law. The set of draft articles ranked among the greatest creative achievements of the Commission and would be acclaimed not only as a legislative framework of exceptional merit and as a highly original systematic exposition of the fundamentals of a complex subject, but also for the profound scholarship of its commentaries, which, in themselves, formed a modern treatise on State responsibility.

13. There were few countries whose philosophers had so dedicated themselves to the achievement of an ordered world as had those of Italy. Judge Ago's work must take its place with the work of others conceived and created in that noble tradition, inspired not merely by a fascination with science, but also by a love of justice.

14. Mr. TSURUOKA, speaking on behalf of the Asian members of the Commission, heartily congratulated Mr. Ago. In completing the study of a subject of capital importance for international law, the Commission had laid the foundations for a new monument of codification. It could be proud of that work, which had only been successfully accomplished thanks to the experience, knowledge, advice and devotion of such a personality as Mr. Ago.

15. Mr. THIAM, speaking on behalf of the African members of the Commission, associated himself with the tributes paid to Mr. Ago and expressed the admiration of African jurists for the immense contribution he had made to international law. Since he had become a member of the International Court of Justice, Mr. Ago had, over and above all his other well-known qualities, shown great affection for the Commission. Not only had he continued to give it the benefit of his knowledge in the study of State

responsibility, but as before, he had shown a keen interest in all its work.

16. Where others had failed, Mr. Ago had succeeded in completing a project which would mark a memorable date in the history of international law. The clarity and simplicity with which he had always presented even the most difficult questions had sometimes made them look easy. He hoped Mr. Ago would return for the second reading of the draft articles and that the Commission would long continue to benefit from his wise counsel.

17. Mr. FRANCIS said that Mr. Ago had served the Commission for many long years and had, in a sense, become an institution in himself. A renowned scholar and eminent jurist, he had made an outstanding contribution to the codification process and would go down in the annals of the Commission as a colossus of his time.

18. Speaking also on behalf of Mr. Barboza, Mr. Calle y Calle, Mr. Castañeda and Mr. Díaz González, he expressed the hope that Mr. Ago's contacts with the Commission would continue and that his work in his new field of endeavour would also be crowned with success.

19. Mr. USHAKOV, speaking also on behalf of Mr. Šahović and Mr. Yankov, congratulated Mr. Ago and thanked him warmly for his great work. Mr. Ago had needed great boldness to attack the task entrusted to him and great ability to bring it to a successful conclusion. The work he had accomplished would undoubtedly be a peak in his scientific life, for he had studied the problem of State responsibility for nearly fifty years. Mr. Ago's devotion was shown by the fact that after becoming a member of the International Court of Justice he had taken such pains to complete the task he had begun. Not only would his efforts enrich the science of contemporary international law, they would also benefit States, particularly if the draft articles one day became a convention. The task of a Special Rapporteur was a thankless one, for he was constantly exposed to the criticism of his colleagues; but Mr. Ago had acquitted himself with patience and in an atmosphere of friendship which his departure could not diminish.

20. Mr. QUENTIN-BAXTER, speaking on behalf of Mr. Reuter, Mr. Schwebel, Sir Francis Vallat and Mr. Verosta, said that all the members of the Commission had a sense of a vast work accomplished, and of an association that carried special meaning for each one of them.

21. The great contribution of law to international affairs was that it provided the means whereby an appeal could be made to something beyond mere partisan interests, and shared ideals could be brought into play; no one of his generation had contributed to that aspect of the law more fully than Mr. Ago.

22. He expressed his gratitude to Mr. Ago for his outstanding contribution to the work of the Commission and to the cause of international peace and goodwill in general. He also paid a tribute to Miss Spinedi, who had done so much to assist Mr. Ago in his great work.

23. Mr. RIPHAGEN said that the Commission owed an immense debt of gratitude to Mr. Ago and would continue to be imbued with the spirit that had pervaded his work. Members took their leave of Mr. Ago with a sense of awe, but knew that they could always count on him for assistance in their further work on the topic of State responsibility.

24. The CHAIRMAN invited the Commission to adopt the following draft resolution:

“The International Law Commission,

“Having adopted, provisionally, draft articles on the origin of international responsibility, constituting Part 1 of the draft on the responsibility of States for internationally wrongful acts,

“Desires to express to the former Special Rapporteur, Judge Roberto Ago, its deep appreciation for the extraordinarily valuable contribution he has made to the preparation of the draft throughout these past years by his tireless devotion and incessant labour, which have enabled the Commission to bring the first reading of these draft articles to a successful conclusion.”

The draft resolution was adopted.

25. Mr. AGO said that he was both surprised and moved by all the compliments paid him. He felt as though the umbilical cord between a set of draft articles in gestation and the person responsible for drafting them had just been cut. The work on which he had spent more than ten years had been no ordinary task for him; it had enabled him to reflect in his work many ideas which he had formulated over the long years of his scientific life. Like a conductor, however, he had not been alone in shaping success: every member of the orchestra had contributed to it, and under the baton of his successor they would have to continue the work begun. After codifying diplomatic law, the law of treaties and other important matters under study, the Commission would certainly deserve well of the international community when it had also completed codification of the subject of the international offence and its consequences. He assured the members of the Commission that he would remain at their disposal.

Closure of the session

26. After an exchange of congratulations and thanks, the CHAIRMAN declared the thirty-second session of the International Law Commission closed.

The meeting rose at 12.30 p.m.

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