

YEARBOOK  
OF THE  
INTERNATIONAL  
LAW COMMISSION  
1981

*Volume I*

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

*4 May-24 July 1981*

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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 . . . 1976*, 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*.

A/CN.4/SER.A/1981

UNITED NATIONS PUBLICATION

*Sales No. E.82.V.3*

02000P

## CONTENTS

	Page		Page
<b>Members of the Commission</b> .....	xii	Article 2 (Use of terms), subparas. 1 (c) ("full powers") and (c bis) ("powers") .....	18
<b>Officers</b> .....	xii	Article 8 (Subsequent confirmation of an act performed without authorization),	
<b>Agenda</b> .....	xiii	Article 9 (Adoption of the text),	
<b>Abbreviations</b> .....	xiv	Article 10 (Authentication of the text),	
<b>Check list of documents of the thirty-third session</b> .....	xv	Article 11 (Means of establishing consent to be bound by a treaty), <i>and</i>	
<b>1643rd meeting</b>		Article 2 (Use of terms), subparas. 1 (b) ("ratification"), (b bis) ("act of formal confirmation") and (b ter) ("acceptance", "approval" and "accession") .....	19
<i>Monday, 4 May 1981, at 3.35 p.m.</i>			
Opening of the session .....	1		
Statement by the outgoing Chairman .....	1		
Election of officers .....	2		
Adoption of the agenda .....	2		
Organization of work .....	2		
<b>1644th meeting</b>		<b>1647th meeting</b>	
<i>Tuesday, 5 May 1981, at 10.15 a.m.</i>		<i>Friday, 8 May 1981, at 10.10 a.m.</i>	
Question of treaties concluded between States and international organizations or between two or more international organizations .....	2	Question of treaties concluded between States and international organizations or between two or more international organizations ( <i>continued</i> )	
Introductory statement by the Special Rapporteur ...	2	Draft articles adopted by the Commission: second reading ( <i>continued</i> )	
Draft articles adopted by the Commission: second reading		Articles 12–18 and article 2, subparas. 1 (e) and (f) .....	21
Article 1 (Scope of the present articles) <i>and</i>		Article 12 (Signature as a means of establishing consent to be bound by a treaty) .....	21
Article 2 (Use of terms), subparas. 1 (a) ("treaty") and (i) ("international organization") .....	5	Article 13 (An exchange of instruments constituting a treaty as a means of establishing consent to be bound by a treaty) .....	21
		Drafting Committee .....	26
<b>1645th meeting</b>		<b>1648th meeting</b>	
<i>Wednesday, 6 May 1981, at 10.30 a.m.</i>		<i>Monday, 11 May 1981, at 3.10 p.m.</i>	
Filling of casual vacancies in the Commission (article 11 of the Statute) .....	8	Question of treaties concluded between States and international organizations or between two or more international organizations ( <i>continued</i> )	
Question of treaties concluded between States and international organizations or between two or more international organizations ( <i>continued</i> )		Draft articles adopted by the Commission: second reading ( <i>continued</i> )	
Draft articles adopted by the Commission: second reading ( <i>continued</i> )		Articles 12–18 and article 2, subparas. 1 (e) and (f) ( <i>concluded</i> ) .....	26
Article 2 (Use of terms), subpara. 1 (j) ("rules of the organization") and para. 2 ( <i>concluded</i> ) ....	8	Article 14 (Ratification, act of formal confirmation, acceptance or approval as a means of establishing consent to be bound by a treaty)	
		Article 15 (Accession as a means of establishing consent to be bound by a treaty) .....	26
<b>1646th meeting</b>		Article 16 (Exchange, deposit or notification of instructions of ratification, formal confirmation, acceptance, approval or accession) ..	27
<i>Thursday, 7 May 1981, at 10.10 a.m.</i>		Article 17 (Consent to be bound by part of a treaty and choice of differing provisions) ....	28
Question of treaties concluded between States and international organizations or between two or more international organizations ( <i>continued</i> )		Article 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force) .....	28
Draft articles adopted by the Commission: second reading ( <i>continued</i> )		Article 2 (Use of terms), subparas. 1 (e) ("negotiating State" and "negotiating organization") and (f) ("contracting State" and "contracting organization") .....	28
Article 3 (International agreements not within the scope of the present articles),		Article 19 (Formulation of reservations in the case of treaties between several international organizations) <i>and</i>	
Article 4 (Non-retroactivity of the present articles) <i>and</i>			
Article 2 (Use of terms), subpara. 1 (g) ("party")			
Article 6 (Capacity of international organizations to conclude treaties) .....	16		
Article 7 (Full powers and powers) <i>and</i>			

	Page		Page
Article 19 <i>bis</i> (Formulation of reservations by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States) . . . . .	29	Article 20 (Acceptance of reservations in the case of treaties between several international organizations) <i>and</i>	
<b>1649th meeting</b>		Article 20 <i>bis</i> (Acceptance of reservations in the case of treaties between States and one or more international organizations or between international organizations and one or more States) ( <i>concluded</i> ) . . . . .	51
<i>Tuesday, 12 May 1981, at 10.05 a.m.</i>		Article 21 (Legal effects of reservations and of objections to reservations),	
Question of treaties concluded between States and international organizations or between two or more international organizations ( <i>continued</i> )		Article 22 (Withdrawal of reservations and of objections to reservations),	
Draft articles adopted by the Commission: second reading ( <i>continued</i> )		Article 23 (Procedure regarding reservations in treaties between several international organizations), <i>and</i>	
Article 19 (Formulation of reservations in the case of treaties between several international organizations) <i>and</i>		Article 23 <i>bis</i> (Procedure regarding reservations in treaties between States and one or more international organizations or between international organizations and one or more States) . . . . .	54
Article 19 <i>bis</i> (Formulation of reservations by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States) ( <i>continued</i> ) . . . . .	33	Article 24 (Entry into force of treaties between international organizations),	
<b>1650th meeting</b>		Article 24 <i>bis</i> (Entry into force of treaties between one or more States and one or more international organizations),	
<i>Wednesday, 13 May 1981, at 11.05 a.m.</i>		Article 25 (Provisional application of treaties between international organizations), <i>and</i>	
Question of treaties concluded between States and international organizations or between two or more international organizations ( <i>continued</i> )		Article 25 <i>bis</i> (Provisional application of treaties between one or more States and one or more international organizations) . . . . .	55
Draft articles adopted by the Commission: second reading ( <i>continued</i> )		<b>1653rd meeting</b>	
Article 19 (Formulation of reservations in the case of treaties between several international organizations) <i>and</i>		<i>Monday, 18 May 1981, at 3.10 p.m.</i>	
Article 19 <i>bis</i> (Formulation of reservations by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States) ( <i>concluded</i> ) . . . . .	40	Jurisdictional immunities of States and their property . .	55
Organization of work ( <i>continued</i> ) . . . . .	44	Draft articles submitted by the Special Rapporteur . .	55
<b>1651st meeting</b>		Article 7 (Rules of competence and jurisdictional immunity) . . . . .	58
<i>Thursday, 14 May 1981, at 10.10 a.m.</i>		Question of treaties concluded between States and international organizations or between two or more international organizations ( <i>continued</i> )	
Statement by the Chairman . . . . .	44	Draft articles adopted by the Commission: second reading ( <i>continued</i> ) . . . . .	60
Question of treaties concluded between States and international organizations or between two or more international organizations ( <i>continued</i> )		<b>1654th meeting</b>	
Draft articles adopted by the Commission: second reading ( <i>continued</i> )		<i>Tuesday, 19 May 1981, at 10.05 a.m.</i>	
Article 19 <i>ter</i> (Objection to reservations) . . . . .	44	Jurisdictional immunities of States and their property ( <i>continued</i> )	
Article 20 (Acceptance of reservations in the case of treaties between several international organizations) <i>and</i>		Draft articles submitted by the Special Rapporteur ( <i>continued</i> )	
Article 20 <i>bis</i> (Acceptance of reservations in the case of treaties between States and one or more international organizations or between international organizations and one or more States) . . . . .	49	Article 7 (Rules of competence and jurisdictional immunity) ( <i>continued</i> ) . . . . .	60
<b>1652nd meeting</b>		<b>1655th meeting</b>	
<i>Friday, 15 May 1981, at 10.05 a.m.</i>		<i>Wednesday, 20 May 1981, at 10.10 a.m.</i>	
Question of treaties concluded between States and international organizations or between two or more international organizations ( <i>continued</i> )		Jurisdictional immunities of States and their property ( <i>continued</i> )	
Draft articles adopted by the Commission: second reading ( <i>continued</i> )		Draft articles submitted by the Special Rapporteur ( <i>continued</i> )	
<b>1653rd meeting</b>		Article 7 (Rules of competence and jurisdictional immunity) ( <i>continued</i> ) . . . . .	65
<i>Monday, 18 May 1981, at 3.10 p.m.</i>		<b>1656th meeting</b>	
Jurisdictional immunities of States and their property . .	55	<i>Thursday, 21 May 1981, at 10 a.m.</i>	
Draft articles submitted by the Special Rapporteur . .	55	Jurisdictional immunities of States and their property ( <i>continued</i> )	
Article 7 (Rules of competence and jurisdictional immunity) . . . . .	58	Draft articles submitted by the Special Rapporteur ( <i>continued</i> )	
Question of treaties concluded between States and international organizations or between two or more international organizations ( <i>continued</i> )		Article 7 (Rules of competence and jurisdictional immunity) ( <i>continued</i> ) . . . . .	60
Draft articles adopted by the Commission: second reading ( <i>continued</i> ) . . . . .	60		

	Page		Page
Article 7 (Rules of competence and jurisdictional immunity) ( <i>concluded</i> ) . . . . .	69	<b>1662nd meeting</b>	
<b>1657th meeting</b>		<i>Friday, 29 May 1981, at 10.20 a.m.</i>	
<i>Friday, 22 May 1981, at 10.10 a.m.</i>		Succession of States in respect of matters other than treaties ( <i>continued</i> )	
Jurisdictional immunities of States and their property ( <i>continued</i> )		Draft articles adopted by the Commission: second reading ( <i>continued</i> )	
Draft articles submitted by the Special Rapporteur ( <i>continued</i> )		Article 13 (Separation of part or parts of the territory of a State) <i>and</i>	
Article 8 (Consent of State),		Article 14 (Dissolution of a State) . . . . .	107
Article 9 (Voluntary submission),			
Article 10 (Counter-claims), <i>and</i>		<b>1663rd meeting</b>	
Article 11 (Waiver) . . . . .	75	<i>Monday, 1 June 1981, at 3.10 p.m.</i>	
<b>1658th meeting</b>		Jurisdictional immunities of States and their property ( <i>continued</i> )	
<i>Monday, 25 May 1981, at 3.10 p.m.</i>		Draft articles submitted by the Special Rapporteur ( <i>continued</i> )	
Expression of sympathy to the Government and people of Ecuador . . . . .	81	Article 8 (Consent of State),	
Succession of States in respect of matters other than treaties . . . . .	81	Article 9 (Voluntary submission),	
Introductory statement by the Special Rapporteur . .	81	Article 10 (Counter-claims) <i>and</i>	
Draft articles adopted by the Commission: second reading . . . . .	81	Article 11 (Waiver) ( <i>continued</i> ) . . . . .	110
Article 1 (Scope of the present articles) and title of the draft . . . . .	81	Expression of sympathy on the death of Lady Waldock .	114
<b>1659th meeting</b>			
<i>Tuesday, 26 May 1981, at 10.05 a.m.</i>		<b>1664th meeting</b>	
Succession of States in respect of matters other than treaties ( <i>continued</i> )		<i>Tuesday, 2 June 1981, at 10.05 a.m.</i>	
Draft articles adopted by the Commission: second reading ( <i>continued</i> )		Jurisdictional immunities of States and their property ( <i>continued</i> )	
Article 1 (Scope of the present articles) and title of the draft ( <i>concluded</i> ) . . . . .	85	Draft articles submitted by the Special Rapporteur ( <i>continued</i> )	
Article 2 (Use of terms) . . . . .	87	Article 8 (Consent of State),	
Article 3 (Cases of succession of States covered by the present articles) . . . . .	89	Article 9 (Voluntary submission),	
		Article 10 (Counter-claims), <i>and</i>	
		Article 11 (Waiver) ( <i>continued</i> ) . . . . .	115
<b>1660th meeting</b>			
<i>Wednesday, 27 May 1981, at 10.05 a.m.</i>		<b>1665th meeting</b>	
Succession of States in respect of matters other than treaties ( <i>continued</i> )		<i>Wednesday, 3 June 1981, at 10.10 a.m.</i>	
Draft articles adopted by the Commission: second reading ( <i>continued</i> )		Jurisdictional immunities of States and their property ( <i>concluded</i> )	
Article 3 (Cases of succession of States covered by the present articles) ( <i>concluded</i> ) . . . . .	92	Draft articles submitted by the Special Rapporteur ( <i>concluded</i> )	
Article 4 (Scope of articles in the present Part) <i>and</i>		Article 8 (Consent of State),	
Article 5 (State property) . . . . .	94	Article 9 (Voluntary submission),	
Article 6 (Rights of the successor State to State property passing to it) . . . . .	98	Article 10 (Counter-claims), <i>and</i>	
Article 7 (Date of the passing of State property) . .	98	Article 11 (Waiver) ( <i>concluded</i> ) . . . . .	120
Article 8 (Passing of State property without compensation) . . . . .	99		
<b>1661st meeting</b>		<b>1666th meeting</b>	
<i>Thursday, 28 May 1981, at 10.05 a.m.</i>		<i>Thursday, 4 June 1981, at 10.10 a.m.</i>	
Succession of States in respect of matters other than treaties ( <i>continued</i> )		Visit by a member of the International Court of Justice .	124
Draft articles adopted by the Commission: second reading ( <i>continued</i> )		State responsibility	
Article 9 (Absence of effect of a succession of States on third party State property) . . . . .	99	Content, forms and degrees of international responsibility (Part 2 of the draft articles)	
Article 10 (Transfer of part of the territory of a State) . . . . .	103	Draft articles submitted by the Special Rapporteur .	126
Article 11 (Newly independent State) . . . . .	104		
Article 12 (Uniting of States) . . . . .	107	<b>1667th meeting</b>	
		<i>Friday, 5 June 1981, at 10.15 a.m.</i>	
		State responsibility ( <i>continued</i> )	
		Content, forms and degrees of international responsibility (Part 2 of the draft articles) ( <i>continued</i> )	
		Draft articles submitted by the Special Rapporteur .	
		( <i>continued</i> )	
		Articles 1, 2 and 3 . . . . .	130

Page	Page
<b>1668th meeting</b>	
<i>Tuesday, 9 June 1981, at 3.05 p.m.</i>	
State responsibility ( <i>continued</i> )	
Content, forms and degrees of international responsibility (Part 2 of the draft articles) ( <i>continued</i> )	
Draft articles submitted by the Special Rapporteur ( <i>continued</i> )	
Articles 1, 2 and 3 ( <i>continued</i> ) . . . . .	132
<b>1669th meeting</b>	
<i>Wednesday, 10 June 1981, at 10.10 a.m.</i>	
State responsibility ( <i>continued</i> )	
Content, forms and degrees of international responsibility (Part 2 of the draft articles) ( <i>continued</i> )	
Draft articles submitted by the Special Rapporteur ( <i>continued</i> )	
Articles 1, 2 and 3 ( <i>continued</i> ) . . . . .	136
<b>1670th meeting</b>	
<i>Thursday, 11 June 1981, at 10.10 a.m.</i>	
State responsibility ( <i>continued</i> )	
Content, forms and degrees of international responsibility (Part 2 of the draft articles) ( <i>continued</i> )	
Draft articles submitted by the Special Rapporteur ( <i>continued</i> )	
Articles 1, 2 and 3 ( <i>continued</i> ) . . . . .	141
<b>1671st meeting</b>	
<i>Monday, 15 June 1981, at 3.05 p.m.</i>	
Succession of States in respect of matters other than treaties ( <i>continued</i> )	
Draft articles adopted by the Commission: second reading ( <i>continued</i> )	
Article 15 (Scope of the articles in present Part) <i>and</i>	
Article 16 (State debt) . . . . .	144
<b>1672nd meeting</b>	
<i>Tuesday, 16 June 1981, at 10 a.m.</i>	
Succession of States in respect of matters other than treaties ( <i>continued</i> )	
Draft articles adopted by the Commission: second reading ( <i>continued</i> )	
Article 15 (Scope of the articles in the present Part) <i>and</i>	
Article 16 (State debt) ( <i>concluded</i> ) . . . . .	149
Article 17 (Obligations of the successor State in respect of State debts passing to it),	
Article 17 <i>bis</i> (Date of the passing of State debts),	
Article 18 (Effects of the passing of State debts with regard to creditors), <i>and</i>	
Article 19 (Transfer of part of the territory of a State) . . . . .	154
<b>1673rd meeting</b>	
<i>Wednesday, 17 June 1981, at 10.05 a.m.</i>	
Question of treaties concluded between States and international organizations or between two or more international organizations ( <i>continued</i> )	
Draft articles adopted by the Commission: second reading ( <i>continued</i> )	
Article 26 ( <i>Pacta sunt servanda</i> ) . . . . .	157
Article 27 (Internal law of a State, rules of an international organization and observance of treaties) . . . . .	157
<b>1674th meeting</b>	
<i>Thursday, 18 June 1981, at 10.10 a.m.</i>	
Question of treaties concluded between States and international organizations or between two or more international organizations ( <i>continued</i> )	
Draft articles adopted by the Commission: second reading ( <i>continued</i> )	
Article 27 (Internal law of a State, rules of an international organization and observance of treaties) ( <i>continued</i> ) . . . . .	162
Article 28 (Non-retroactivity of treaties),	
Article 29 (Territorial scope of treaties between one or more States and one or more international organizations), <i>and</i>	
Article 30 (Application of successive treaties relating to the same subject-matter) . . . . .	166
Article 31 (General rule of interpretation),	
Article 32 (Supplementary means of interpretation), <i>and</i>	
Article 33 (Interpretation of treaties authenticated in two or more languages) . . . . .	168
<b>1675th meeting</b>	
<i>Friday, 19 June 1981, at 10.10 a.m.</i>	
Question of treaties concluded between States and international organizations or between two or more international organizations ( <i>continued</i> )	
Draft articles adopted by the Commission: second reading ( <i>continued</i> )	
Article 34 (General rule regarding third States and third international organizations),	
Article 35 (Treaties providing for obligations for third States or third international organizations),	
Article 36 (Treaties providing for rights for third States or third international organizations), <i>and</i>	
Article 36 <i>bis</i> (Effects of a treaty to which an international organization is party with respect to third States members of that organization) . .	
Succession of States in respect of matters other than treaties ( <i>continued</i> )	
Draft articles adopted by the Commission: second reading ( <i>continued</i> )	
Article 18 (Effects of the passing of State debts with regard to creditors) <i>and</i>	
Article 19 (Transfer of part of the territory of a State) ( <i>concluded</i> ) . . . . .	169
<b>1676th meeting</b>	
<i>Monday, 22 June 1981, at 3.10 p.m.</i>	
Question of treaties concluded between States and international organizations or between two or more international organizations ( <i>continued</i> )	
Draft articles adopted by the Commission: second reading ( <i>continued</i> )	
Article 34 (General rule regarding third States and third international organizations),	
Article 35 (Treaties providing for obligations for third States or third international organizations),	
Article 36 (Treaties providing for rights for third States or third international organizations), <i>and</i>	

	Page
Article 36 <i>bis</i> (Effects of a treaty to which an international organization is party with respect to third States members of that organization) ( <i>continued</i> ), and	
Article 2 (Use of terms), subpara. 1 ( <i>h</i> ) ("third States", "third international organization") . . . .	175
<b>1677th meeting</b>	
<i>Tuesday, 23 June 1981, at 11.25 a.m.</i>	
Question of treaties concluded between States and international organizations or between two or more international organizations ( <i>continued</i> )	
Draft articles adopted by the Commission: second reading ( <i>continued</i> )	
Article 36 <i>bis</i> (Effects of a treaty to which an international organization is party with respect to third States members of that organization) ( <i>continued</i> ) . . . . .	180
<b>1678th meeting</b>	
<i>Wednesday, 24 June 1981, at 10.10 a.m.</i>	
Question of treaties concluded between States and international organizations or between two or more international organizations ( <i>continued</i> )	
Draft articles adopted by the Commission: second reading ( <i>continued</i> )	
Article 36 <i>bis</i> (Effects of a treaty to which an international organization is party with respect to third States members of that organization) ( <i>continued</i> ) . . . . .	183
<b>1679th meeting</b>	
<i>Thursday, 25 June 1981, at 10.05 a.m.</i>	
Question of treaties concluded between States and international organizations or between two or more international organizations ( <i>continued</i> )	
Draft articles adopted by the Commission: second reading ( <i>concluded</i> )	
Article 36 <i>bis</i> (Effects of a treaty to which an international organization is party with respect to third States members of that organization) ( <i>concluded</i> ) . . . . .	190
Article 37 (Revocation or modification of obligations or rights of third States or third international organizations) . . . . .	191
Article 38 (Rules in a treaty becoming binding on third States or third international organizations through international custom) . . . . .	194
Article 39 (General rule regarding the amendment of treaties),	
Article 40 (Amendment of multilateral treaties), and	
Article 41 (Agreements to modify multilateral treaties between certain of the parties only) . . . .	195
<b>1680th meeting</b>	
<i>Monday, 29 June 1981, at 3.20 p.m.</i>	
Tribute to Mr. Pierre Raton . . . . .	195
Co-operation with other bodies	
Welcome to the Observer for the Inter-American Juridical Committee . . . . .	197

	Page
<b>1681st meeting</b>	
<i>Tuesday, 30 June 1981, at 10.15 a.m.</i>	
Question of treaties concluded between States and international organizations or between two or more international organizations ( <i>continued</i> )	
Draft articles proposed by the Drafting Committee . .	197
Article 1 (Scope of the present articles) and	
Article 2 (Use of terms) . . . . .	198
Article 3 (International agreements not within the scope of the present articles) . . . . .	199
Article 4 (Non-retroactivity of the present articles) .	199
Article 6 (Capacity of international organizations to conclude treaties) . . . . .	199
Article 7 (Full powers and powers) . . . . .	199
Article 8 (Subsequent confirmation of an act performed without authorization) . . . . .	200
Article 9 (Adoption of the text) . . . . .	200
Article 10 (Authentication of the text) . . . . .	201
Article 11 (Means of expressing consent to be bound by a treaty) . . . . .	201
Article 12 (Consent to be bound by a treaty expressed by signature) . . . . .	201
Article 13 (Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty) . . . . .	202
Article 14 (Consent to be bound by a treaty expressed by ratification, act of formal confirmation, acceptance or approval) . . . . .	202
Article 15 (Consent to be bound by a treaty expressed by accession) . . . . .	203
Article 16 (Exchange or deposit of instruments of ratification, formal confirmation, acceptance, approval or accession) . . . . .	203
Article 17 (Consent to be bound by part of a treaty and choice of differing provisions) . . . . .	204
Article 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force) .	204
<b>1682nd meeting</b>	
<i>Wednesday, 1 July 1981, at 10.10 a.m.</i>	
Question of treaties concluded between States and international organizations or between two or more international organizations ( <i>continued</i> )	
Draft articles proposed by the Drafting Committee ( <i>continued</i> )	
Article 2, subpara. 1 ( <i>c</i> ), and articles 7, 9, 10 and 17 ( <i>continued</i> ) . . . . .	205
State responsibility ( <i>continued</i> )	
Content, forms and degrees of international responsibility (Part 2 of the draft articles) ( <i>continued</i> )	
Draft articles submitted by the Special Rapporteur ( <i>continued</i> )	
Articles 4 and 5 ( <i>continued</i> ) . . . . .	206
<b>1683rd meeting</b>	
<i>Thursday, 2 July 1981, at 10.10 a.m.</i>	
Relations with the International Court of Justice . . . . .	207
State responsibility ( <i>continued</i> )	
Content, forms and degrees of international responsibility (Part 2 of the draft articles) ( <i>continued</i> )	
Draft articles submitted by the Special Rapporteur ( <i>continued</i> )	
Articles 4 and 5 ( <i>continued</i> ) . . . . .	208

	Page
<b>1684th meeting</b>	
<i>Friday, 3 July 1981, at 10.10 a.m.</i>	
State responsibility ( <i>concluded</i> )	
Content, forms and degrees of international responsibility (Part 2 of the draft articles) ( <i>concluded</i> )	
Draft articles submitted by the Special Rapporteur ( <i>concluded</i> )	
Articles 4 and 5 ( <i>concluded</i> ) . . . . .	212
<b>1685th meeting</b>	
<i>Monday, 6 July 1981, at 3.30 p.m.</i>	
International liability for injurious consequences arising out of acts not prohibited by international law . . . . .	217
Draft article submitted by the Special Rapporteur . . . . .	
Article 1 (Scope of these articles) . . . . .	
<b>1686th meeting</b>	
<i>Wednesday, 8 July 1981, at 10.10 a.m.</i>	
International liability for injurious consequences arising out of acts not prohibited by international law ( <i>continued</i> )	
Draft article submitted by the Special Rapporteur ( <i>continued</i> )	
Article 1 (Scope of these articles) ( <i>continued</i> ) . . . . .	221
<b>1687th meeting</b>	
<i>Thursday, 9 July 1981, at 10.10 a.m.</i>	
International liability for injurious consequences arising out of acts not prohibited by international law ( <i>continued</i> )	
Draft article submitted by the Special Rapporteur ( <i>continued</i> )	
Article 1 (Scope of these articles) ( <i>continued</i> ) . . . . .	226
Co-operation with other bodies ( <i>continued</i> )	
Statement by the representative of the European Committee on Legal Co-operation . . . . .	230
<b>1688th meeting</b>	
<i>Friday, 10 July 1981, at 10.20 a.m.</i>	
Resignation of a member of the Commission . . . . .	233
Succession of States in respect of matters other than treaties ( <i>continued</i> )	
Draft articles adopted by the Commission: second reading ( <i>continued</i> )	
Article 20 (Newly independent State),	
Article 21 (Uniting of States),	
Article 22 (Separation of part or parts of the territory of a State), <i>and</i>	
Article 23 (Dissolution of a State) . . . . .	233
Article G (Scope of the articles in the present Part) [State archives] <i>and</i>	
Article A (State archives) . . . . .	236
<b>1689th meeting</b>	
<i>Monday, 13 July 1981, at 3.10 p.m.</i>	
Succession of States in respect of matters other than treaties ( <i>continued</i> )	
Draft articles adopted by the Commission: second reading ( <i>continued</i> )	
Article H (Rights of the successor State to State archives passing to it),	
Article I (Date of the passing of State archives),	
Article J (Passing of State archives without compensation), <i>and</i>	

	Page
Article K (Absence of effect of a succession of States on third party State archives) . . . . .	239
Article B (Newly independent State) . . . . .	241
Co-operation with other bodies ( <i>continued</i> )	
Statement by the observer for the Inter-American Juridical Committee . . . . .	244
<b>1690th meeting</b>	
<i>Tuesday, 14 July 1981, at 10.10 a.m.</i>	
Succession of States in respect of matters other than treaties ( <i>continued</i> )	
Draft articles adopted by the Commission: second reading ( <i>concluded</i> )	
Article C (Transfer of part of the territory of a State),	
Article D (Uniting of States),	
Article E (Separation of part or parts of the territory of a State), <i>and</i>	
Article F (Dissolution of a State) . . . . .	247
International liability for injurious consequences arising out of acts not prohibited by international law ( <i>concluded</i> )	
Draft article submitted by the Special Rapporteur ( <i>concluded</i> )	
Article 1 (Scope of these articles) ( <i>concluded</i> ) . . . . .	250
<b>1691st meeting</b>	
<i>Wednesday, 15 July 1981, at 10.05 a.m.</i>	
Status of the diplomatic courier and the diplomatic bag not accompanied by the diplomatic courier . . . . .	255
Draft articles submitted by the Special Rapporteur . . . . .	255
Article 1 (Scope of the present articles),	
Article 2 (Couriers and bags not within the scope of the present articles),	
Article 3 (Use of terms),	
Article 4 (Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags),	
Article 5 (Duty to respect international law and the laws and regulations of the receiving and transit State), <i>and</i>	
Article 6 (Non-discrimination and reciprocity) . . . . .	255
<b>1692nd meeting</b>	
<i>Thursday, 16 July 1981, at 10.05 a.m.</i>	
Question of treaties concluded between States and international organizations or between two or more international organizations ( <i>concluded</i> )	
Draft articles proposed by the Drafting Committee ( <i>concluded</i> )	
Article 2, subpara. 1 (c), and articles 7, 9 and 17 ( <i>concluded</i> ) . . . . .	261
Article 2, subpara. 1 (d), article 5, and articles 19 to 26 . . . . .	261
Article 5 (Treaties constituting international organizations and treaties adopted within an international organization) . . . . .	261
Article 2 (Use of terms), subpara. 1 (d) ("reservation") . . . . .	262
Article 19 (Formulation of reservations) . . . . .	263
Article 20 (Acceptance of and objection to reservations) . . . . .	263
Article 21 (Legal effects of reservations and of objections to reservations) . . . . .	264
Article 22 (Withdrawal of reservations and of objections to reservations) . . . . .	265

	Page
Article 23 (Procedure regarding reservations) . . . .	265
Article 24 (Entry into force) <i>and</i>	
Article 25 (Provisional application) . . . . .	265
Article 26 ( <i>Pacta sunt servanda</i> ) . . . . .	266
Succession of States in respect of matters other than treaties ( <i>continued</i> )	
Draft articles proposed by the Drafting Committee . .	266
Title and structure of the draft articles; titles of parts and sections . . . . .	266
Article 1 (Scope of the present articles) . . . . .	266
Article 2 (Use of terms) . . . . .	266
Article 3 (Cases of succession of States covered by the present articles) . . . . .	266
Article 3 <i>bis</i> (Temporal application of the present articles) . . . . .	266
Article 3 <i>ter</i> (Succession in respect of other matters) . . . . .	267
Article 4 (Scope of the articles in the present Part) .	267
Article 5 (State property) . . . . .	267
Article 6 (Effects of the passing of State property) .	267
Article 7 (Date of the passing of State property) . .	268
Article 8 (Passing of State property without compensation) . . . . .	268
Article 9 (Absence of effect of a succession of States on the property of a third State) . . . . .	268
Article 10 (Transfer of part of the territory of a State) . . . . .	268
Article 11 (Newly independent State) . . . . .	268
Article 12 (Uniting of States) . . . . .	269
Article 13 (Separation of part or parts of the territory of a State) . . . . .	269
Article 14 (Dissolution of a State) . . . . .	270
Article 15 (Scope of the articles in the present Part)	270
Article 16 (State debt) . . . . .	270
Article 17 (Effects of the passing State debts) . . . .	272
Article 17 <i>bis</i> (Date of the passing of State debts) .	272
Article 18 (Effects of the passing of State debts with regard to creditors) . . . . .	272
Article 19 (Transfer of part of the territory of a State) . . . . .	272
Article 20 (Newly independent States) . . . . .	273
Article 21 (Uniting of States) . . . . .	273
Article 22 (Separation of part or parts of the territory of a State) . . . . .	273
Article 23 (Dissolution of a State) . . . . .	273

**1693rd meeting**

*Friday, 17 July 1981, at 10.30 a.m.*

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier ( <i>continued</i> )	
Draft articles submitted by the Special Rapporteur ( <i>continued</i> )	
Article 1 (Scope of the present articles),	
Article 2 (Couriers and bags not within the scope of the present articles),	
Article 3 (Use of terms),	
Article 4 (Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags),	
Article 5 (Duty to respect international law and the laws and regulations of the receiving and transit State), <i>and</i>	
Article 6 (Non-discrimination and reciprocity) ( <i>continued</i> ) . . . . .	273
Succession of States in respect of matters other than treaties ( <i>continued</i> )	
Draft articles proposed by the Drafting Committee ( <i>continued</i> ) . . . . .	277

**1694th meeting**

*Monday, 20 July 1981, at 3.15 p.m.*

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier ( <i>concluded</i> )	
Draft articles submitted by the Special Rapporteur ( <i>concluded</i> )	
Article 1 (Scope of the present articles),	
Article 2 (Couriers and bags not within the scope of the present articles),	
Article 3 (Use of terms),	
Article 4 (Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags),	
Article 5 (Duty to respect international law and the laws and regulations of the receiving and transit State), <i>and</i>	
Article 6 (Non-discrimination and reciprocity) ( <i>concluded</i> ) . . . . .	278
Succession of States in respect of matters other than treaties ( <i>concluded</i> )	
Draft articles proposed by the Drafting Committee ( <i>concluded</i> )	
Article G (Scope of the articles in the present Part [State archives]),	
Article H (Effects of the passing of State archives),	
Article I (Date of the passing of State archives),	
Article J (Passing of State archives without compensation), <i>and</i>	
Article K (Absence of effect of succession of States on the archives of a third State) . . . . .	281
Article A (State archives) . . . . .	282
Article 3 <i>quater</i> (Rights and obligations of natural or juridical persons) . . . . .	282
Article L (Preservation of the unity of State archives) . . . . .	282
Article B (Newly independent State) . . . . .	283
Article C (Transfer of part of the territory of a State) . . . . .	284
Article D (Uniting of States) . . . . .	284
Article E (Separation of part or parts of the territory of a State) . . . . .	284
Article F (Dissolution of a State) . . . . .	285
Statement by the Chairman of the Drafting Committee . . . . .	285

**1695th meeting**

*Tuesday, 21 July 1981, at 11.05 a.m.*

Draft report of the Commission on the work of its thirty-third session . . . . .	286
Chapter I. Organization of the session . . . . .	286
Chapter III. Question of treaties concluded between States and international organizations or between two or more international organizations	
A. Introduction . . . . .	287
B. Draft articles on treaties concluded between States and international organizations or between international organizations	
Part I (Introduction) and Part II (Conclusion and entry into force of treaties)	
Commentaries to article 1 (Scope of the present articles) and article 2 (Use of terms) . . . . .	287
Commentary to article 3 (International agreements not within the scope of the present articles) . . . . .	288

	Page
Commentaries to article 4 (Non-retroactivity of the present articles), article 6 (Capacity of international organizations to conclude treaties), article 7 (Full powers and powers), article 8 (Subsequent confirmation of an act performed without authorization), article 9 (Adoption of the text), article 10 (Authentication of the text), article 11 (Means of expressing consent to be bound by a treaty), article 12 (Consent to be bound by a treaty expressed by signature), article 13 (Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty), article 14 (Consent to be bound by a treaty expressed by ratification, act of formal confirmation, acceptance or approval) and article 15 (Consent to be bound by a treaty expressed by accession) .	288
Commentary to article 16 (Exchange or deposit of instruments of ratification, act of formal confirmation, acceptance, approval or accession) .	288
Commentaries to article 17 (Consent to be bound by part of a treaty and choice of differing provisions) and article 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force) .	288
Chapter IV. State responsibility	
A. Introduction .	288
B. Commencement of consideration of Part 2 of the draft articles (content, forms and degrees of international responsibility) .	288
C. Consideration of the topic at the present session .	288
Chapter VI. Jurisdictional immunities of States and their property .	288

#### 1696th meeting

*Wednesday, 22 July 1981, at 10.05 a.m.*

Draft report of the Commission on the work of its thirty-third session ( <i>continued</i> ) .	289
Chapter III. Question of treaties concluded between States and international organizations or between two or more international organizations ( <i>concluded</i> )	
B. Draft articles on treaties concluded between States and international organizations or between international organizations ( <i>concluded</i> )	
Part I (Introduction) ( <i>concluded</i> )	
Commentary to article 2 (Use of terms) ( <i>concluded</i> ) .	290
Commentary to article 5 (Treaties constituting international organizations and treaties adopted within an international organization) .	290
Part II (Conclusion and entry into force of treaties) ( <i>concluded</i> )	
Section 2 (Reservations)	
Commentary to Section 2 .	290
Commentary to article 19 (Formulation of reservations) .	290
Commentary to article 20 (Acceptance of an objection to reservations) .	290
Commentary to articles 21 (Legal effects of reservations and of objections to reservations), 22 (Withdrawal of reservations and of objections to reservations)	

	Page
Programme and methods of work of the Commission .	290
Section 3 (Entry into force and provisional application of treaties)	
Commentary to articles 24 (Entry into force) and 25 (Provisional application) .	
Part III (Observance, application and interpretation of treaties)	
Section 1 (Observance of treaties)	
Commentary to article 26 ( <i>Pacta sunt servanda</i> ) .	290
Chapter VIII. Other decisions and conclusions	
Programme and methods of work of the Commission .	290
Relations with the International Court of Justice .	290
Co-operation with other bodies .	290
Date and place of the thirty-fourth session .	290
Representation at the thirty-sixth session of the General Assembly .	291
International Law Seminar .	291
Annex I. Comments of Governments on the draft articles on succession of States in respect of matters other than treaties, adopted by the International Law Commission at its thirty-first and thirty-second sessions, <i>and</i>	
Annex II. Comments of Governments and principal international organizations on articles 1 to 60 of the draft articles on treaties concluded between States and international organizations or between international organizations, adopted by the International Law Commission at its twenty-sixth, twenty-seventh, twenty-ninth, thirtieth and thirty-first sessions .	291
Chapter II. Succession of States in respect of matters other than treaties	
A. Introduction .	291
B. Recommendation of the Commission .	291
C. Resolution adopted by the Commission .	293
D. Draft articles on succession of States in respect of State property, archives and debts .	293
Part I (General provisions)	
Commentaries to article 1 (Scope of the present articles), article 2 (Use of terms) and article 3 (Cases of succession of States covered by the present articles) .	
Commentary to article [3 <i>bis</i> ] (Temporal application of the present articles) .	
Commentary to article [3 <i>ter</i> ] (Succession in respect of other matters) .	
Commentary to article [3 <i>quater</i> ] (Rights and obligations of natural or judicial persons) .	293
Part II (State property)	
Section 1 (Introduction)	
Commentaries to article [4] (Scope of the articles in the present Part), article [5] (State property), article [6] (Effects of the passing of State property), article [7] (Date of the passing of State property) and article [8] (Passing of State property without compensation) .	293
Commentary to article [9] (Absence of effect of a succession of States on the property of a third State) .	293
Section 2 (Provisions concerning specific categories of succession of States)	
Commentaries to article [10] (Transfer of part of the territory of a State), article [11] (Newly independent State), article [12] (Uniting of States) and articles [13]	

	<i>Page</i>		<i>Page</i>
(Separation of part or parts of the territory of a State) and [14] (Dissolution of a State) . . . . .	294	State), and article [L] (Preservation of the unity of State archives) . . . . .	294
Part IV (State debts)		Section 2 (Provisions concerning specific categories of succession of States)	
Section 1 (Introduction)		Commentaries to article [B] (Newly independent State), article [C] (Transfer of part of the territory of a State), article [D] (Uniting of States) and articles [E] (Separation of part or parts of the territory of a State) and [F] (Dissolution of a State) . . . . .	295
Commentary to [15] (Scope of the articles in the present Part) . . . . .	294	Part IV (State debts) ( <i>concluded</i> )	
Commentary to article [16] (State debt) . .		Section 2 (Provisions concerning specific categories of succession of States)	
Commentaries to article C (Definition of odious debts), article [17] (Effects of the passing of State debts), article [17 <i>bis</i> ] (Date of the passing of State debts) and article [18] (Effects of the passing of State debts with regard to creditors) . . .	294	Commentary to Section 2 . . . . .	295
		Commentary to article [19] (Transfer of part of the territory of a State) . . . . .	295
<b>1697th meeting</b>		Commentaries to article [20] (Newly independent State), article [21] (Uniting of States) and articles [22] (Separation of part or parts of the territory of a State) and [23] (Dissolution of a State) . . . . .	295
<i>Friday, 24 July 1981, at 10.05 a.m.</i>		Chapter V. International liability for injurious consequences arising out of acts not prohibited by international law	
Co-operation with other bodies ( <i>concluded</i> )		A. Introduction . . . . .	295
Statement by the Observer for the Arab Commission for International Law . . . . .	294	B. Consideration of the topic at the present session	
Draft report of the Commission on the work of its thirty-third session ( <i>concluded</i> ) . . . . .	294	Chapter VII. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier	
Chapter II. Succession of States in respect of matters other than treaties ( <i>concluded</i> ) . . . . .	294	A. Introduction . . . . .	296
D. Draft articles on succession of States in respect of State property, archives and debts ( <i>concluded</i> )		B. Consideration of the topic at the present session	
Part III (State archives)		Chapter VII. Other decisions and conclusions ( <i>concluded</i> )	
General commentary . . . . .	294	A. Relations between States and international organizations (second part of the topic) . . . . .	296
Section 1 (Introduction)		D. Co-operation with other bodies ( <i>concluded</i> ) . . .	297
Commentaries to article [G] (Scope of the articles in the present Part), article [A] (State archives), articles [H] (Effects of the passing of State archives), [I] (Date of the passing of State archives), [J] Passing of State archives without compensation) and [K] (Absence of effect of a succession of States on the archives of a third		4. Arab Commission for International Law . . .	297
		Closure of the session . . . . .	297

## MEMBERS OF THE COMMISSION

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<i>Rapporteur:</i>	Mr. Laurel B. FRANCIS

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*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 1643rd meeting, held on 4 May 1981:

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

ASEAN	Association of South East Asian Nations
CMEA	Council for Mutual Economic Assistance
EEC	European Economic Community
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
<i>I.C.J. Reports</i>	International Court of Justice, <i>Reports of Judgments, Advisory Opinions and Orders</i>
ILO	International Labour Organisation
IMCO	Inter-Governmental Maritime Consultative Organization
ITU	International Telecommunications Union
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
OAU	Organization of African Unity
<i>P.C.I.J.</i> , Series A/B	Permanent Court of International Justice, <i>Judgments, Orders and Advisory Opinions</i>
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNITAR	United Nations Institute for Training and Research
UPU	Universal Postal Union
WHO	World Health Organization
WIPO	World Intellectual Property Organization

## CHECK LIST OF DOCUMENTS OF THE THIRTY-THIRD SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/336	Provisional agenda	Mimeographed. For the agenda as adopted, see p. xiii above.
A/CN.4/337	Filling of casual vacancies. Note by the Secretariat	Reproduced in volume II (Part One).
A/CN.4/337/Add.1	<i>Idem.</i> Addendum to the note by the Secretariat: List of candidates and <i>curriculum vitae</i> of candidates	Mimeographed.
A/CN.4/338 and Add.1-4	Comments of Governments on the draft articles on succession of States in respect of matters other than treaties, adopted by the Commission at its thirty-first and thirty-second sessions	Reproduced as Annex I to A/36/10 (vol. II (Part Two)).
A/CN.4/339 and Add.1-8	Comments of Governments and principal international organizations on draft articles 1 to 60 on treaties concluded between States and international organizations or between international organizations, adopted by the Commission at its twenty-sixth, twenty-seventh, twenty-ninth, thirtieth and thirty-first sessions	Reproduced as Annex II to A/36/10 (vol. II (Part Two)).
A/CN.4/340 [and Corr.1] and Add.1 [and Add.1/Corr.1]	Third report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur	Reproduced in volume II (Part One).
A/CN.4/341 and Add.1 [and Add.1/Corr. 1]	Tenth 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>Idem.</i>
A/CN.4/342 and Add.1-4	Comments of Governments on Part I of the draft articles on State responsibility for internationally wrongful acts	<i>Idem.</i>
A/CN.4/343	Jurisdictional immunities of States and their property. Information and materials submitted by Governments. Part I: Government replies to the questionnaire	} Reproduced in the United Nations Legislative Series under the symbol ST/LEG/SER.B/20.
A/CN.4/343/Add.1	<i>Idem.</i> Part II: Materials submitted by Governments together with their replies to the questionnaire	
A/CN.4/343/Add.2	<i>Idem.</i> Part III: Materials submitted by Governments who have not replied to the questionnaire	
A/CN.4/343/Add.3 and 4	<i>Idem.</i> Part I: Addenda	
A/CN.4/344 [and Corr.1 and 2]	Second report on the content, forms and degrees of international responsibility (Part 2 of the draft articles), by Mr. Willem Ripphagen, Special Rapporteur	Reproduced in volume II (Part One).
A/CN.4/345 and Add.1-3	Thirteenth report on succession of States in respect of matters other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur	<i>Idem.</i>
A/CN.4/346 and Add.1 and 2	Second 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.4/347 [and Corr.1 and 2] and Add.1 and 2	Second 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>

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.326	Topical summary, prepared by the Secretariat, of the discussion on the report of the International Law Commission in the Sixth Committee during the thirty-fifth session of the General Assembly	Mimeographed.
A/CN.4/L.327	Draft articles on treaties concluded between States and international organizations or between international organizations. Texts proposed by the Drafting Committee: articles 1, 2 (except for para. 1, subparas. (d) and (h)), articles 3, 4 and 6–18	Texts reproduced in the summary record of the 1681st meeting, paras. 6 <i>et seq.</i>
A/CN.4/L.327/Add.1	<i>Idem.</i> Revised texts of article 2, para. 1, subpara. (c), and articles 7, 9 and 17	See summary record of the 1692nd meeting, paras. 1–8.
A/CN.4/L.327/Add.2	<i>Idem:</i> article 2, para. 1, subpara. (d), and articles 5 and 19–26	Texts reproduced in the summary record of the 1692nd meeting, paras. 10 <i>et seq.</i>
A/CN.4/L.328	Draft articles on succession of States in respect of State property, archives and debts. Texts proposed by the Drafting Committee: articles 1–3, 3 <i>bis</i> , 3 <i>ter</i> , 4–17, 17 <i>bis</i> and 18–23	<i>Idem</i> , 1692nd meeting, paras. 50 <i>et seq.</i>
A/CN.4/L.328/Add.1	<i>Idem:</i> articles G–K and A	<i>Idem</i> , 1694th meeting, paras. 29 and 32.
A/CN.4/L.328/Add.2	<i>Idem:</i> articles 3 <i>quater</i> , L, and B–F	<i>Idem</i> , paras. 34 <i>et seq.</i>
A/CN.4/L.329	Draft report of the International Law Commission on the work of its thirty-third session: Chapter I	Mimeographed. For the final text, see A/36/10 (vol. II (Part Two)).
A/CN.4/L.330 and Add.1–6	<i>Idem:</i> Chapter II	<i>Idem.</i>
A/CN.4/L.331 and Add.1 [and Add.1/Corr, 1] and Add.2–3	<i>Idem:</i> Chapter III	<i>Idem.</i>
A/CN.4/L.332	<i>Idem:</i> Chapter IV	<i>Idem.</i>
A/CN.4/L.333	<i>Idem:</i> Chapter V	<i>Idem.</i>
A/CN.4/L.334	<i>Idem:</i> Chapter VI	<i>Idem.</i>
A/CN.4/L.335	<i>Idem:</i> Chapter VII	<i>Idem.</i>
A/CN.4/L.336 [and Corr. 1] and Add.1 and 2	<i>Idem:</i> Chapter VIII	<i>Idem.</i>
A/CN.4/L.337	Jurisdictional immunities of States and their property: Texts of articles 7–10 proposed by the Special Rapporteur on 9 June 1981	Reproduced in A/36/10 (Vol. II (Part II)), para. 226.
A/CN.4/L.338	Draft report of the Commission on the work of its thirty-third session: annexes	Mimeographed. For the final text, see A/36/10 (vol. II, (Part Two)).
A/CN.4/SR.1643–SR.1697	Provisional summary records of the 1643rd to 1697th meetings of the International Law Commission	Mimeographed. The final text appears in the present volume.

# INTERNATIONAL LAW COMMISSION

## SUMMARY RECORDS OF THE THIRTY-THIRD SESSION

*Held at Geneva from 4 May to 24 July 1981*

### 1643rd MEETING

*Monday, 4 May 1981, at 3.35 p.m.*

*Chairman: Mr. C. W. PINTO*

*later: Mr. Doudou THIAM*

*Present: Mr. Barboza, Mr. Boutros Ghali, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.*

#### Opening of the session

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

#### Statement by the outgoing Chairman

2. The CHAIRMAN, reporting on developments since the Commission's thirty-second session, said that in his capacity as the Commission's representative at the thirty-fifth session of the General Assembly he had introduced, in the Sixth Committee, the report of the International Law Commission on the work of its thirty-second session.<sup>1</sup> There had been two innovations in the Sixth Committee's treatment of that report. First, he had been able to introduce the report about two weeks in advance of the appointed date, in order to enable delegations to study issues of importance before submitting their observations; secondly, the Sixth Committee had decided to consider the report by topics or by groups of topics, in a predetermined order. Some delegations had favoured that method; others had considered that it would simply prolong the debate. As a temporary measure, delegations had been permitted to deal with groups of topics, either in a single statement or in a series of statements. His own view, as expressed in the Sixth Committee, was that the new method ought to be given a fair trial before a final decision was taken on its adoption.

3. During the debate, some delegations had criticized the Commission's recent performance as compared

with its past achievements. The judgment of one delegation—that the Commission's work was slow and inefficient—had been reflected in its written comments on the multilateral treaty-making process, and deserved due consideration by the Commission. He had felt bound to reply to that criticism in his concluding statement to the Sixth Committee, and copies of his statement would be distributed to members of the Commission.

4. He also wished to draw attention to a study undertaken under the auspices of UNITAR and entitled "The International Law Commission: a new approach". He was arranging for copies of the draft of that study to be sent to all members of the Commission, and he understood that its two authors would shortly be in Geneva, when they would like to meet the members of the Commission.

5. The General Assembly's recommendations regarding the Commission's programme of work for its thirty-third session, as set out in General Assembly resolution 35/163 of 15 December 1980, were summarized, together with related decisions, in the Secretariat's Information Circular No. 169. Among other resolutions adopted by the General Assembly, three deserved special mention: Resolution 35/49 of 4 December 1980, which recommended the further action to be taken in regard to the draft Code of Offences against the Peace and Security of Mankind; Resolution 35/161 of 15 December 1980, relating to the draft articles on the most-favoured-nation clause; and Resolution 35/162 of the same date, on the review of the multilateral treaty-making process. The Commission might wish to consider whether any further comments were necessary before those three items came up for discussion at the thirty-sixth session of the General Assembly.

6. As authorized by the Commission,<sup>2</sup> he had also raised the question of the level of the honoraria paid to members of the Commission, including its Special Rapporteurs, both in his introductory statement to the Sixth Committee and with senior United Nations officials. The majority of members of the Sixth Committee had been sympathetic, and it had been decided to raise the matter in the Fifth Committee, by a letter addressed to the Chairman of that committee by the Chairman of the Sixth Committee.<sup>3</sup> He had

<sup>1</sup> *Yearbook . . . 1980*, vol. II (Part Two) (*Official Records of the General Assembly, Thirty-Fifth Session, Supplement No. 10 (A/35/10)*).

<sup>2</sup> *Ibid.*, p. 170, para. 194.

<sup>3</sup> A/C.5/35/L.20, reproduced in document A/CN.4/L.326, footnote 4.

negotiated the terms of that letter and prepared the way for a debate in talks with the Chairman of the Fifth Committee, the Chairman of the Advisory Committee on Administrative and Budgetary Questions, and certain influential delegations, such as those of Egypt and Trinidad and Tobago. As a result, a substantial increase in the level of honoraria had been approved in the Fifth Committee by a vote of 53 to 11, with 19 abstentions. The corresponding resolution (35/218 of 17 December 1980) was adopted at a plenary meeting of the General Assembly by 111 votes to 12 with 13 abstentions. The text of that resolution was set out in paragraph 17 of Information Circular No. 169: the honorarium of a member had been raised from \$1,000 to \$3,000, and that of a Special Rapporteur increased by \$1,000. The additional honorarium payable to the Chairman had been increased from \$1,500 to \$2,000, and the requirement that he should be paid that sum only upon presentation of a "Specific Report" had been lifted. For the achievement of that result, credit was due to the efforts of his predecessors, to the delegations of Egypt, Mexico and Trinidad and Tobago, and to the Commission's secretariat.

7. The General Assembly's views on the length and cycle of the Commission's sessions and on the Commission's records and documentation were set out in paragraphs 20-25 of the Information Circular. There had been no apparent reduction in the facilities afforded the Commission. The Committee on Conferences, however, might wish to propose, pursuant to General Assembly resolution 35/10 of 3 November 1980, that the Commission's sessions be shortened, although such a step could only be taken after "due consultation" with the Commission.

8. As to co-operation with other bodies, he had attended the session of the Inter-American Juridical Committee held early in 1981. It had not, however, been possible to send an observer to attend the meeting of the European Committee on Legal Co-operation. The meeting of the Asian-African Legal Consultative Committee had been postponed until May 1981. One matter which the Commission might wish to discuss in its Planning Group was ways and means of ensuring more effective co-operation between the Commission and the Inter-American Juridical Committee. That suggestion had been made not only by the Committee's representative at the Commission's preceding session,<sup>4</sup> but also by the Deputy Secretary-General of the League of Arab States in charge of legal affairs and the observer for the Arab Commission for International Law. His own view was that the Commission's reaction should be positive.

9. Lastly, speaking on behalf of all members of the Commission, he paid a tribute to Mr. Pierre Raton, who was shortly due to retire.

<sup>4</sup> See *Yearbook ... 1980*, vol. I, p. 148, 1611th meeting, para. 31.

### Election of officers

*Mr. Thiam was elected Chairman by acclamation.*

*Mr. Thiam took the Chair.*

10. Mr. THIAM thanked the members of the Commission for the confidence they had shown in him and assured them that, inspired by the example of his eminent predecessors, he would do his best to further the progress of the Commission's work with the help of all its members.

*Mr. Quentin-Baxter was elected first Vice-Chairman by acclamation.*

*Mr. Šahović was elected second Vice-Chairman by acclamation.*

*Mr. Tsuruoka was elected Chairman of the Drafting Committee by acclamation.*

*Mr. Francis was elected Rapporteur by acclamation.*

### Adoption of the agenda (A/CN.4/336)

*The provisional agenda (A/CN.4/336) was adopted unanimously.*

### Organization of work

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

*The meeting rose at 5.25 p.m.*

## 1644th MEETING

*Tuesday, 5 May 1981, at 10.15 a.m.*

*Chairman: Mr. Doudou THIAM*

*Present: Mr. Barboza, Mr. Boutros Ghali, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, 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.4/339 and Add.1-4, A/CN.4/341 and Add.1)**

[Item 3 of the agenda]

INTRODUCTORY STATEMENT BY THE SPECIAL  
RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his tenth report on the question of treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/341 and Add.1), prepared for the Commission's second reading of the draft articles it had adopted on the topic at its thirty-first session.<sup>1</sup>

2. Mr. REUTER (Special Rapporteur) reminded the Commission that it had requested States and interested international organizations to submit comments and observations on the draft articles it had adopted on first reading. In preparing his tenth report, he had taken account of the fact that the Commission had decided to settle certain points on second reading, when it had a better general view of the draft; he had also taken the recent discussions in the Sixth Committee into consideration. With regard to Governments and international organizations, it was only on draft articles 1 to 60 that they had been asked to submit their comments by 1 February 1981; they had been given until 1 February 1982 to comment on articles 61 to 80. He had assumed that the Commission would be able to examine half the draft articles at the current session, and had therefore dealt only with articles 1 to 41 in his tenth report. Despite the valuable assistance of the Secretariat, which had enabled him to delay drafting his report until the last possible moment, he had been unable to take account of all the comments of States and international organizations, some of which had been submitted too late. So far, ten Governments and four international organizations had submitted comments;<sup>2</sup> two other organizations had merely intimated that they would do so in due course. In addition, Mr. Suy, Under-Secretary-General for Legal Affairs, the Legal Counsel, had submitted a number of provisional observations, which did not constitute official comments by the United Nations.

3. In introducing his report, he thought it advisable to begin with three general comments, two of which would require decisions by the Commission. He believed that it would probably be wise to confirm the positions taken when preparing the draft, but that would be for the Commission to decide.

4. His first general comment related to two trends of opinion which had appeared both in the Commission and in the observations of Governments and international organizations. To reconcile them, the Commission had resorted to compromises which it must now re-examine to decide whether they were reasonable and understandable. Some critics had maintained that they were not. The Commission would therefore have to make a number of choices, and if it could not reach agreement as usual, but a majority appeared, it would have to take note of that fact. However, it should avoid dwelling on matters which had already been discussed at length.

<sup>1</sup> For the text of the articles, see *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.*, arts. 1 to 60.

<sup>2</sup> See A/CN.4/339 and Add.1-4.

5. The trends in question related primarily to the precise nature of the differences between States and organizations and, secondarily, to the differences that could result in regard to treaties concluded either between one or more States and one or more international organizations, or between several international organizations. The differences between States and international organizations were undeniable. It was because those differences necessarily appeared in all matters connected with the capacity and constitutional status of international organizations that draft article 6 restricted the competence of organizations as compared with that of States. It had been accepted that, in regard to internal procedures for the conclusion of agreements, international organizations were so different from States that reference must be made to the particular rules of each organization. On the other hand, there had been differences of opinion in the Commission—and also in the written comments received—concerning the status of an agreement once it had been concluded. Did it imply a fundamental equality between the parties? In his opinion, it would be no use discussing that question at length in the abstract.

6. It seemed to be generally agreed that, for reasons of clarity, the two categories of treaty to which the draft articles applied should be examined separately. Nevertheless, besides drafting problems, the existence of those two categories sometimes raised questions of substance. For example, treaties between international organizations were, paradoxically, more akin to treaties between States than to treaties between one or more States and one or more international organizations, since they involved entities of a similar nature and standing. That was another point on which there should not be any general discussion. Where specific cases were concerned, the Commission should only take a position if a problem of substance arose.

7. His second general comment concerned the independence of the draft articles from the Vienna Convention on the Law of Treaties.<sup>3</sup> Both the Commission and the States and international organizations that had submitted comments thought it necessary to follow the text of the Vienna Convention as closely as possible. There remained the problem of the relationship between the draft articles and the Vienna Convention, which depended on what the General Assembly decided to do with the draft. Some Governments and international organizations had already submitted opinions on that point which could not be ignored. The Commission must prepare a draft adapted to the maximalist solution, namely, the elaboration of a convention; that was why it had given its work the form of draft articles. Some people had

<sup>3</sup> 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 publications, Sales No. E.70.V.5), p. 287. The Convention is hereinafter called "Vienna Convention".

therefore raised the question of the relationship between the draft articles and the Vienna Convention. There were two possibilities.

8. The first would be to harmonize the texts of the draft convention and the Vienna Convention so as to form a coherent whole. If such harmonization were decided on, the most radical solution would be to make the draft articles a protocol to the Vienna Convention. Various drafting questions would then have to be settled at the outset; for instance, that of the term "treaty", which appeared very frequently in both texts and which in one case would apply to treaties concluded between one or more States and one or more international organizations or between international organizations and in the other case to treaties concluded between States. Furthermore, it would not be possible fully to conserve the provisions of article 3 (c) of the Vienna Convention, according to which that instrument could apply to the relations of States as between themselves under international agreements to which other subjects of international law, such as international organizations, were also parties. The Vienna Convention itself would have to be amended. To be supplemented, it would have to be revised; but since it contained no revision clause, it was article 40 that would apply, so that the initiative for revision would lie with the Contracting States. Hence it was hard to see how the draft articles could be integrated with the Convention while respecting the rights of the States Parties to that instrument. That being so, it seemed preferable to keep to an instrument independent of the Vienna Convention to which other States could become parties. Furthermore, if the General Assembly decided to convene a conference of plenipotentiaries, that conference could, if necessary, undertake the task of harmonization. If, on the other hand, the General Assembly opted for a resolution giving the draft a status different from that of the Vienna Convention, it would be better for the draft to be independent of that Convention. At least one Government and one international organization considered the latter approach to have certain advantages.

9. The second possibility would be to make the draft less independent in substance, but more so in form. It was in that spirit that he had suggested to the Sixth Committee that the text should be simplified by using the method of "*renvoi*". By way of example, he had prepared a draft article containing a *renvoi* to those rules of the Vienna Convention which had exactly the same wording as the corresponding provisions of the draft (see A/CN.4/341 and Add.1, para. 11). Other draft articles could be similarly formulated. The method was not, however, one which the Commission had previously employed. Thus in the four conventions on privileges and immunities elaborated on the basis of drafts prepared by the Commission, namely, the 1961 Vienna Convention on Diplomatic Relations,<sup>4</sup> the

1963 Vienna Convention on Consular Relations,<sup>5</sup> the 1969 Convention on Special Missions<sup>6</sup> and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character,<sup>7</sup> not a single *renvoi* was to be found. There were probably two reasons why the Commission had refrained from using that method. First, a *renvoi* to a convention entitled the States Parties to that convention to interpret its text and, in consequence, implied acceptance of their interpretation. Secondly, there was the question whether, in the event of amendment of the convention to which a *renvoi* related, it should be deemed to refer to the original or to the amended text. Personally, he did not recommend the method of *renvoi*, but the question would, of course, be for the Commission to decide.

10. His third general comment concerned the drafting of the articles as such. Some considered it unnecessarily heavy and complicated. When drafting the articles examined on first reading, he had aimed at clarity rather than concision. In view of the comments subsequently made, he had endeavoured, in the report under discussion, to simplify the text wherever possible; but when a question of substance was involved, the substantive difficulty must be overcome before the drafting could be clear. Moreover, even when there was no problem of substance and it seemed that the wording could be simplified, clarity might be incompatible with elegance. In preparing the draft articles in his tenth report, he had sometimes gone so far as to sacrifice clarity for brevity. For the moment, the Commission should not dwell too much on the general problem of drafting. It should, however, decide in principle either to retain the former wording in all cases, or to simplify it as much as possible.

11. The CHAIRMAN congratulated the Special Rapporteur on the brilliant presentation of his tenth report.

12. He invited the members of the Commission to state their views on the three general comments the Special Rapporteur had made.

13. Mr. TABIBI said that he had always agreed with the Special Rapporteur's general approach to his topic. There was, of course, no doubt that States and international organizations were different, but the creation, through the collective will of States, of a large number of international organizations had ushered in a new era, and account must be taken of that fact in formal international law.

14. In view of the importance of the topic and the relatively small number of States and international

<sup>5</sup> *Ibid.*, vol. 596, p. 261.

<sup>6</sup> General Assembly resolution 2530 (XXIV), annex.

<sup>7</sup> *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".

<sup>4</sup> United Nations, *Treaty Series*, vol. 500, p. 95.

organizations that had submitted written comments on the Commission's draft articles, he thought the Special Rapporteur should make a further request to those concerned to state their opinions on his work.

15. Mr. BOUTROS GHALI said that, for purely practical reasons, he supported the Commission's approach of making the draft an independent whole containing no references to the Vienna Convention. It was far more convenient in practice not to have to consult several instruments.

16. Mr. VEROSTA also thought that whatever the General Assembly decided to do with the draft, it should be independent and not contain any "*renvois*".

17. With regard to the two trends to which the Special Rapporteur had referred, he maintained that, although international organizations differed from States in many ways, they could have the capacity to conclude treaties. The texts so far drafted by the Special Rapporteur and the Commission appeared to bear out that fact.

18. The Commission should devote its forthcoming meetings to drafting problems. As appeared from the Commission's discussions and the observations of Governments and international organizations, the wording of many of the draft articles could be simplified. That phase of the Commission's work would only begin when it began to examine the draft article by article.

19. Sir Francis VALLAT said he believed that the most efficient way for the Commission to discuss such fundamental questions as the status of international organizations relative to States would be to do so in connection with specific articles. He therefore suggested that the Commission should proceed forthwith to discuss the draft article by article.

20. He further believed that the Commission had been right to draw up a series of draft articles, rather than a set of amendments or some kind of protocol to the Vienna Convention. It was, indeed, because the latter course had been rejected by the United Nations Conference on the Law of Treaties that the General Assembly had entrusted the topic to the Commission, asking it, in effect, to devise an adaptation of the Vienna Convention to the needs of international organizations.

21. Mr. REUTER (Special Rapporteur) said he had made a point of speaking to the Commission about the observations on the draft articles made by States and international organizations.

22. Mr. USHAKOV said that the fate of the draft would certainly depend on the decision taken by States in the General Assembly, but that it was usual for the Commission to make a recommendation upon concluding its work. At present, it was too soon to take a position, even in the form of a recommendation.

23. The question of the possible participation of international organizations in the convention which might result from the draft articles had been raised

several times. That question, too, depended on what the General Assembly decided to do with the draft. It was only if the draft served as the basis for a convention that it would be necessary, in due course, to find some means of making that convention binding on international organizations.

24. There was no denying the differences in nature between States and international organizations. In paragraph 5 of his report, the Special Rapporteur pointed out that those differences were sometimes reflected in matters of vocabulary. In that connection, he observed that it was necessary to take account of questions of substance. It was not possible to settle, in a general way, the problem of the legal equality of the parties. States and international organizations were in principle on an equal footing as parties to a treaty, but that could not be so in all cases. In the matter of reservations, for instance, an international organization could not commit itself tacitly in the same way as a State.

25. With regard to the drafting of the articles as a whole, it was necessary to avoid producing a draft that was easy to read but difficult to interpret and apply. For a draft to be easy to read, it was better for it to be concise; for it to be easy to interpret and apply it was better to reproduce all the provisions borrowed from other instruments. Thus the Commission's task was to simplify the text of the draft articles without complicating their interpretation and application.

26. Lastly, he questioned whether it was sufficient to define an international organization as being an "intergovernmental organization", as the Commission had done in article 2, paragraph 1 (*i*). Some entities were of a kind which made them sometimes resemble States and sometimes international organizations: for example the European Communities, or subsidiary bodies of international organizations such as UNCTAD and GATT.

27. The CHAIRMAN invited the members of the Commission to examine the draft article by article and, if necessary, to give their views on the three general observations made by the Special Rapporteur.

#### DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 1 (Scope of the present articles) *and*

ARTICLE 2 (Use of terms), subparas. 1 (*a*) ("treaty") and (*i*) ("international organization")

28. The CHAIRMAN invited the Special Rapporteur to present article 1, which was worded as follows:

#### *Article 1. Scope of the present articles*

The present articles apply to:

(*a*) treaties concluded between one or more States and one or more international organizations, and

(*b*) treaties concluded between international organizations.

29. The corresponding provisions of the article that contains the definitions read as follows:

*Article 2. Use of terms*

1. For the purpose of the present articles:

(a) "treaty" means an international agreement governed by international law and concluded in written form:

- (i) between one or more States and one or more international organizations, or
- (ii) between international organizations,

whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation;

...

(i) "international organization" means an intergovernmental organization;

30. Mr. REUTER (Special Rapporteur) said that article 1 made the basic distinction between the two kinds of treaty to which the draft applied—a distinction which was necessary whatever might happen later.

31. With regard to article 2, subpara. 1 (a), it had been suggested that the special category of treaties concluded with an international organization by a State which was a member of it should also be distinguished. That case did indeed raise theoretical problems. At the beginning of his work, he had questioned a number of international organizations about it, but they had concluded that the question was of no practical importance. He therefore considered that the Commission could safely ignore such a marginal case; after all, no rule could fit every imaginable situation perfectly.

32. Several members of the Commission had commented on article 2, subpara. 1 (i), which defined an international organization as an "intergovernmental organization". It had been suggested that that definition should be expanded by specifying that for the purposes of the draft the expression "international organization" meant an intergovernmental organization "having the capacity to conclude treaties". In his view that was unnecessary. Either an international organization did not have the capacity to conclude treaties or it had that capacity, if only for a single treaty (for example, a treaty with another organization or a headquarters agreement), and that would be enough to make the draft articles applicable to it.

33. Mr. Ushakov had raised the question of entities which were international organizations in some respects, but in others were not or claimed not to be. He had expressly mentioned the European Communities. If the draft articles served as the basis for a treaty, the final provisions of that instrument would have to specify which international organizations came within its scope. At a certain stage in the work, he had himself proposed that the United Nations should be excluded from the field of application of the draft.

34. Mr. Ushakov had also raised the problem of agreements concluded by subsidiary bodies of international organizations, expressly mentioning the case of UNCTAD. If the question of competence—which came under the internal rules of the organization—were excluded, it was indeed necessary to determine whether an agreement concluded by a subsidiary body was binding on that body alone or also on the organization itself. On that point he [the Special Rapporteur] had consulted the United Nations Secretariat at the beginning of his work. He had then thought it better to leave the matter aside because it could not be settled absolutely, but would have to be examined in the particular case of each organization considered, since it was a question of institutional law and must therefore be judged by each international organization, which would itself have to decide its position on what might be called the decentralization of international personality.

35. In conclusion, he proposed that the texts of draft article 1 and of draft article 2, paragraph 1, subparagraphs (a) and (i) should be left as they stood.

36. The CHAIRMAN said that, if there were no objections, he would take it that the Commission wished to refer the texts of draft article 1 and of the draft article 2, paragraph 1, subparagraphs (a) and (i) to the Drafting Committee.

*It was so agreed.*<sup>8</sup>

ARTICLE 2 (Use of terms), subpara. 1 (j) ("rules of the organization") and para. 2

37. The CHAIRMAN invited the Special Rapporteur to present article 2, subpara. 1, (j) and paragraph 2, which read as follows:

*Article 2. Use of terms*

1. For the purpose of the present articles:

...

(j) "rules of the organization" means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the organization.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meaning which may be given to them in the internal law of any State or by the rules of any international organization.

38. Mr. REUTER (Special Rapporteur) said that the other provisions of draft article 2 would be examined subsequently, with the articles to which they directly related.

39. He reminded the Commission that the definition of the expression "rules of the organization" in draft article 2, subparagraph 1 (j) had been formulated in connection with the text of draft article 27, in 1977.<sup>9</sup> It

<sup>8</sup> For consideration of the texts proposed by the Drafting Committee, see 1681st meeting, paras. 6–14.

<sup>9</sup> See *Yearbook* . . . 1977, vol. II (Part Two), p. 119.

had been taken from article 1, paragraph 1 (34) of the 1975 Vienna Convention.<sup>10</sup> The Commission had stated at the time that the adoption of that definition was only a provisional solution. Perhaps the time had come to re-examine that choice.

40. He pointed out that the text of the draft articles contained some variations in terminology, as indicated in paragraph 27 of his tenth report (A/CN.4/341 and Add.1, para. 27). Three expressions were used, the most general (“rules of the organization”) being the one used in the provision under consideration; in other cases, only part of the rules were referred to—and there the expression was “relevant rules”—or the subject-matter of the rules was designated precisely, as in article 46, which referred to “rules of the organization regarding competence to conclude treaties”.

41. These differences made it necessary to consider whether the definition covered all the rules of an organization, whether a general definition of the rules of the organization need be retained in the draft, and whether the reference to the “relevant rules”, which appeared in some articles was adequate.

42. The expression “relevant rules” was perfectly suited to the 1975 Vienna Convention, which applied only to specific subject-matter. It did not, however, cover all the rules of an international organization since, besides the constituent instruments and established practice of an organization, it referred only to the organization’s relevant decisions and resolutions, thus using very precise terms of limited scope. However, in the text under consideration the words “in particular” gave the subsequent enumeration the value of examples only. An expression such as “normative instruments” would have a wider scope, but the wording adopted hitherto nevertheless seemed adequate.

43. He believed it would be useful to retain the definition of “rules of the organization” in the draft articles, for besides the constituent instruments and relevant decisions and resolutions, it had the advantage of mentioning the “established practice of the organization”, which was an essential source of its law. Some international organizations, in their comments, had regretted that “established practice” had been included in the definition, since they did not find that expression sufficiently innovative. It should be pointed out, however, that the Commission had never intended in any way to freeze an international organization’s possibilities of establishing new practices.

44. In conclusion, he proposed that the text of article 2, subpara. 1 (*j*) should be retained without change. He pointed out, however, that since that provision was intended to define an expression in a very general sense, it might be more logical to delete the adjective “relevant” from the definition, since in fact all the rules of an organization should be covered.

45. The text of paragraph 2 of the same draft article could also be retained as it stood.

46. Mr. USHAKOV said that where a definition had already been formulated, it was better to leave it as it was, since the deletion of only one word could change the whole meaning.

47. The relevant decisions and resolutions referred to in subparagraph (*j*) were obviously those that concerned certain internal rules of the organization. If the adjective “relevant” were deleted, all decisions and resolutions of an international organization would have to be considered as establishing rules of the organization. However, in that provision, the Commission intended to refer only to the decisions and resolutions which established internal rules of an international organization. Hence, the inclusion of the adjective “relevant” was useful, since it showed that the reference was to decisions and resolutions concerning the internal law of the organization, for example, the functions and powers of organs of the organization or of the organization itself.

48. At that stage in the work, the Commission seemed to have a choice only between adopting the Vienna Convention definition without change and trying to formulate a new definition for the draft articles which would be perfectly suited to them, just as the former definition was suited to the Vienna Convention.

49. It seemed to be too early to determine the best choice, but in any case the Commission should not lose sight of the fact that it was the international organization itself to decide what constituted its rules.

50. Mr. VEROSTA said that the inclusion of the adjective “relevant” in the English text appeared to be no more indispensable than that of the adjective “*pertinentes*” in the French text. In preparing its draft, the Commission was not bound by the text of the 1975 Vienna Convention, though it was endeavouring to follow that of the Vienna Convention on the Law of Treaties.

51. Mr. REUTER (Special Rapporteur) said that he had no objection to the Commission’s deciding to retain the adjective “relevant”.

52. Sir Francis VALLAT said his first inclination would be to delete subparagraph 1 (*j*) of article 2, first, because it laid down the kind of definition that was not really a definition, inasmuch as it did not define the limits of the concept, and, secondly, because, by introducing a number of terms, it complicated the issues that might arise in the course of interpretation. He reminded the Commission of the experience of the International Court of Justice in the *Aegean Sea Continental Shelf* case, when the words “*et, notamment,*” in the reservation of Greece, had constituted a very serious stumbling block in the reasoning developed by the Court.<sup>11</sup> That expression immediately

<sup>10</sup> See footnote 7 above.

<sup>11</sup> See *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978, pp. 20 et seq.*

raised the question how much was to be included in the definition. An element of doubt was also present in that the definition did not actually mention the rules expressly adopted by the organization. Moreover, the expression used initially, for instance, in article 6, was "relevant rules of the organization"; that concept was then extended to cover "relevant decisions", which raised the question what was meant, in the particular case, by "relevant".

53. Since the differences in drafting already created enough difficulty, he considered that, if there was to be a definition, that adopted in article 1, paragraph 1 (34) of the 1975 Vienna Convention should not be altered. Rather than creating fresh doubts about new language, it would be better to leave well alone and let time work out a solution of the problem.

*The meeting rose at 1 p.m.*

## 1645th MEETING

*Wednesday, 6 May 1981, at 10.30 a.m.*

*Chairman: Mr. Doudou THIAM*

*Present: Mr. Barboza, Mr. Dadzie, Mr. Diaz González, Mr. Francis, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.*

### Filling of casual vacancies in the Commission (article 11 of the Statute) (A/CN.4/377 and Add.1)

[Item 1 of the agenda]

1. The CHAIRMAN said that at a private meeting the Commission had selected Mr. George H. Aldrich to fill the vacancy left by the resignation of Mr. Schwebel, who had been elected a judge of the International Court of Justice.

2. A telegram had been sent to Mr. Aldrich inviting him to take part in the work of the Commission as soon as possible.

### Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/339 and Add.1-4, A/CN.4/341 and Add.1)

[Item 3 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:  
SECOND READING (*continued*)

ARTICLE 2 (Use of terms), subpara. 1 (*j*) ("rules of the organization"), and para. 2<sup>1</sup> (*concluded*)

3. Mr. ŠAHOVIĆ said that, after hearing the Special Rapporteur, he thought it would be preferable, in the definition in article 2, subpara. 1 (*j*), to retain the adjective "relevant", the presence of which was in fact justified by the Commission's decision on first reading to define the "rules of the Organization". Without that adjective, the formula adopted would be too broad, since the word defined the nature of the decisions and resolutions to be taken into consideration as delimiting the field of application of the draft. The expression "relevant rules of the organization" was as it were the parallel, *mutatis mutandis*, of the formula "internal law of the State".

4. Although the content of articles 6 and 27 of the draft<sup>2</sup> might seem to militate in favour of retaining the definition of the expression "rules of the organization", he pointed out that it was perhaps only the novelty of the expression that had made the Commission wish to define it, whereas the expression "internal law of the State" did not need to be defined. The Commission would probably be better able to take a final position on that point when it had examined all the articles and had been able to study the use of the expression in the various texts forming the draft. For his part, he was inclined to favour the inclusion of a definition of that expression in the draft.

5. As to the question whether the mention of "relevant rules" in numerous articles of the draft was sufficient, the final answer would also depend on the consideration of each provision as the Commission's work advanced. On the whole, however, the present text appeared to be satisfactory in that respect.

6. With regard to draft article 2, paragraph 2, he observed that the expression "rules of any international organization" must clearly be interpreted in accordance with subpara. 1 (*j*) of the same article. He pointed out, however, that the 1975 Vienna Convention<sup>3</sup> did not refer, in its article 1, paragraph 2, to the rules of international organizations but to "other international instruments". The Commission should perhaps consider what latitude it had in regard to that formula, for its draft introduced a set of new notions resulting from the special situation of international organizations and originating in documents of the most diverse kinds.

7. Mr. SUCHARITKUL said he supported Mr. Šahović. He noted that article 2, subpara. 1 (*j*) listed three kinds of sources of rules and that the concept of constituent instruments was somewhat imprecise. The draft defined an international organization as an intergovernmental organization, and thus excluded non-governmental organizations such as the Inter-

<sup>1</sup> For the text, see 1644th meeting, para. 37.

<sup>2</sup> See 1644th meeting, footnote 1.

<sup>3</sup> *Ibid.*, footnote 7.

national Red Cross. Agreements concluded between States and organizations of that kind would therefore be outside the field of application of the draft.

8. The Commission should also be aware that the rules of international organizations were not always clear when they were first established. For example, in the case of Association of South-East Asian Nations (ASEAN), which was an intergovernmental organization for co-operation, the constituent instrument itself was difficult to identify since it consisted of a series of declarations (Bangkok, Manila, Jakarta, etc.). A situation of that kind certainly justified mentioning "established practice" in the definition of sources of the "rules of the organization".

9. In his opinion, the inclusion of the adjective "relevant" in subparagraph (j) was essential in order to make it clear that the reference was to the decisions and resolutions of the organization that related to its administration or management. Mr. Verosta was certainly quite justified in saying, as he had at the previous meeting that the Commission was not bound to follow closely the text of article 1, paragraph 1 (34) of the 1975 Vienna Convention. Nevertheless, after re-examining the matter, he thought it very useful to adopt a definition including the adjective "relevant", which meant relating to the structure or constitution of the organization.

10. As the Special Rapporteur had shown, international organizations expressed themselves by various kinds of instruments: constituent instruments, but also headquarters agreements, conventions on the privileges and immunities of organizations, and even the conclusion of agreements with States, as in the case of the World Bank. The obligations which derived from those different instruments were obligations subject to law of treaties.

11. He supported the Special Rapporteur's position on the independence of the draft articles. He only wished to stress that when the text was submitted to the General Assembly it should be accompanied by the necessary explanations and justifications to avoid any misunderstandings.

12. The form of subparagraph (j) was perfectly acceptable, and the phrase "in particular" gave the flexibility necessary for a provision of that type, since, in the practice of international organizations, official documents of all kinds were to be found, which were difficult to qualify, but nevertheless contained rules relating to the constitution or operation of the organization.

13. Mr. PINTO, commenting generally on the Special Rapporteur's tenth report (A/CN.4/341 and Add.1), said he noted that the Special Rapporteur had stated that there were two schools of thought: one held that international organizations should be assimilated to States so far as treaty-making was concerned; the other considered that there were fundamental differences between States and

organizations, which should be recognized and provided for.

14. His own view was that the Commission should not be unduly concerned about such conceptual questions as equality between the parties since, in an absolute sense, States and international organizations could never be on an equal footing. In that connection, he had read elsewhere the phrase "congruent inequalities", which would seem apt in the present context. International organizations should perhaps rather be seen as the "robots" of the international community, inasmuch as they could only do what they had been programmed to do by Member States. The Commission must therefore adopt a practical approach while endeavouring to be fair to both sides. The treaty-making capacity of international organizations was clearly limited, each organization being entrusted with the performance of certain specific tasks. All the Commission needed to do, therefore, was to make sure that international organizations were enabled to perform those tasks adequately. The draft prepared thus far reflected that approach and, accordingly, he endorsed it. One matter that would have to be taken into account, however, was public accountability, since Member States subjected the actions of international organizations to a measure of scrutiny.

15. On the methodology of the draft, he agreed that it should be self-contained, autonomous and independent of the Vienna Convention<sup>4</sup> and of any other convention, if only for ease of reference. In addition, however, if the wording of the draft articles was precisely the same as that used in the Vienna Convention or other conventions, legal advisers would be bound to look to the origin of such wording and would no doubt search for inherent meanings, with a resultant constant reference to parent treaties. Conversely, any slight change in wording would inevitably raise questions, if not problems. It would, however, be helpful to know whether a particular formulation in the draft was the same as that used in the Vienna Convention or some other parent convention.

16. One minor point arose in regard to the third sentence of paragraph 14 of the Special Rapporteur's report. While he (Mr. Pinto) had some sympathy with the idea that the draft articles should be given legal force by, for example, a declaration of the General Assembly, he wondered whether that was the general view, and whether the sentence in question was not too condensed.

17. Turning to points of drafting, he said that, while he agreed with the Special Rapporteur on the need to "lighten" the draft, he also agreed with Mr. Ushakov (1644th meeting) that what was important was clarity for the purpose of application, rather than for the convenience of the reader.

18. One question which had not been raised by the Special Rapporteur concerned the definition of a

<sup>4</sup> *Ibid.*, footnote 3.

treaty as laid down in subpara. 1 (a) of article 2. He doubted whether an agreement between international organizations could be called an "international agreement", and wondered whether it would not suffice to say simply "an agreement governed by international law".

19. With regard to the definition of an "international organization" laid down in subpara. 1 (i) of article 2, he realized that the Commission had not wished to define the status of an international organization as such, but it might be necessary to determine whether the articles applied to a group of States that concluded a treaty. Possibly, therefore, it might be advisable to refer to the special characteristics of an organization, rather than to its intergovernmental nature. If, for example, three or four States acting as a group concluded an agreement with another State or with an organization, could they claim that they were acting as an international organization, or did an international organization have some special characteristic which that group must also have for the articles to apply? If so, it might be necessary to say something to the effect that the group was more than the sum of its separate parts, or, possibly, that it had a separate personality.

20. He had been in two minds about the inclusion of the word "relevant" in the expressions "relevant rules of the organization" and "relevant decisions". On balance, he would prefer to omit that word, since the relevance of such rules or decisions would be clear in any practical context, and it would be advisable to have the broadest possible framework in order to avoid loose interpretation.

21. With regard to the definition of "rules of the organization" as laid down in article 2, subpara. 1 (j), it might be necessary to refer also to the organization's rules of procedure; possibly, however, the inclusion of the words "in particular" was enough.

22. Mr. BARBOZA welcomed the fact that, for its second reading of the draft articles, the Commission had chosen the method of article-by-article consideration, which appeared to be a compromise solution that also offered the advantage of practicality.

23. Referring to draft article 2, subpara. 1 (j), he said he had noted that the term "rules of the organization" had been used in three ways in the draft: first, in a general way, corresponding to the concept of the internal law of the State; secondly, with the addition of the adjective "relevant", which referred to certain specific rules relating expressly to the aspect concerned; and, thirdly, in a specific sense, in draft article 46.

24. The Special Rapporteur had himself described the disadvantage of the definition given in subparagraph (j), but he (Mr. Barboza) thought the list of sources was useful, particularly because of the express mention of "established practice", which was of special importance in the case of international organizations. It should nevertheless be noted, in regard to method-

ology, that sources which were not on the same level were brought together in a single provision. He could, however, accept the solution proposed by the Special Rapporteur, though not without questioning whether the formulation adopted was effective enough and whether it would not be desirable to draft a separate definition for a term that was so important in the draft articles. He considered it highly desirable for the Commission to give further thought to the choice of terms. The use of the adjective "relevant" to qualify the rules of the organization in provisions covering certain specific cases seemed to him to be superfluous, because there was, in fact, no doubt about the precise rules referred to, which formed the internal law of the organization.

25. He would also like the Commission to give careful consideration to the proposal made by Mr. Pinto that the definition in article 2, subpara. 1 (i), should be expanded to take account of the different types of international organizations, mentioning, for example, the criterion of international personality or that of centralization, in order to distinguish international organizations proper from groups of States which joined together to conclude a treaty.

26. Mr. FRANCIS said he subscribed to the view that the Commission should prepare an autonomous set of draft articles, rather than a direct adjunct to the Vienna Convention. By so doing, it would avoid limiting the General Assembly's freedom to choose the final form to be given to its proposals.

27. He also agreed that it would be advantageous to maintain some degree of uniformity between draft article 2, subparagraph 1 (j) and article 1, paragraph 1 (34) of the 1975 Vienna Convention. For that reason, and because an international organization could take many decisions—such as those by the United Nations on *apartheid* and racial discrimination—which had no bearing on its rules of conduct, he believed that it was very important to retain the word "relevant" in article 2, subpara. 1 (j). That word should also be retained in article 6, where it served to make it clear that the rules referred to were not the rules of an international organization in general, but those relating to the organization's capacity to conclude treaties.

28. Mr. DÍAZ GONZÁLEZ urged that, in view of the written comments submitted by States and international organizations and the views expressed in the Sixth Committee, it was necessary for the draft articles to be so worded that they were easy to read.

29. In article 2, subpara. 1 (j), he thought the word "relevant", which qualified the words "decisions and resolutions", could be deleted, since any decisions and resolutions of an international organization that were not relevant would simply not be adopted by the competent organs. The essential elements of the definition of the term "rules of the organization" were the constituent instruments of the organization, which governed not only its capacity to conclude treaties, but also all its legal activities and, as the Special Rapporteur

teur had emphasized, constituted the constitutional law of the organization. It was the constituent instrument of an organization that established its legal capacity and defined its purposes. Hence it was not necessary to ask whether an international organization was an inter-governmental organization or whether its constituent instrument was based on a declaration or on an agreement. A constituent instrument was what gave an organization its status as an international organization, and that instrument took precedence over all the rules or decisions and resolutions that might emanate from its competent organs. Since decisions and resolutions that were not relevant were inconceivable, the word "relevant" could be deleted. As Mr. Ushakov had pointed out, it was also necessary to ensure that the wording of article 2, subparagraph 1 (j) was fairly general.

30. Mr. VEROSTA said he thought the provisions under consideration must be read in conjunction with article 46. As Mr. Pinto had pointed out, every formulation employed by the Commission would be critically examined by international law experts. There appeared to be some support in the Commission for the deletion of the word "relevant" in article 2, subparagraph 1 (j). The deletion of that rather vague word seemed especially necessary in the light of article 46.

31. The definition of the expression "rules of the organization" covered both constituent instruments and the decisions, resolutions and established practice derived therefrom. There was no doubt that an international organization was always established by the will of a certain number of States. Even the organizations mentioned by Mr. Sucharitkul, which did not have a specific constituent instrument, had been established as a result of an expression of their will by a group of States. It should be noted that the expression "rules of the organization" had no counterpart for States; the "rules of the State" were, in fact, its internal law. According to the Commission's definition, the "rules of the organization" were really the constituent instruments, in other words, the treaties between States establishing international organizations. The States which thus set up international organizations could give the organs of those organizations some freedom of action.

32. In his opinion, the draft articles covered all international organizations, and no hierarchy need be established for them. He did not regard the International Committee of the Red Cross as an international organization, because there had been no expression of will by the States concerned; they had not intended to establish an international humanitarian law organization, but had concluded international agreements and entrusted certain tasks to an association under Swiss law: the International Committee of the Red Cross. The States which had signed the General Agreement on Tariffs and Trade had not intended to establish an international trade

organization; GATT remained a treaty, which had no organs of its own, even though conferences were regularly organized by the States Parties.

33. It was also important to consider the relationship between the rules of the organization and its internal law; for it might be thought that the rules of procedure of an organization came under its internal law, even though, in the last resort, they were also adopted by States. The members of the Commission should therefore reflect on that problem, especially if they wished to harmonize article 2, subpara. 1 (j) with article 46.

34. Mr. REUTER (Special Rapporteur), referring to Mr. Pinto's comments on the superfluity of the word "international" in the definition of the term "treaty" in article 2, subparagraph 1 (a), said that that definition was taken word for word from the Vienna Convention. The word "international" could, of course, be deleted, but since it contributed only a slight shade of meaning, some people might be surprised if it were.

35. The various comments made concerning the definition of the term "international organization" (art. 2, subpara. 1 (i)) were quite justified. For the time being, there was no completely general and exhaustive definition of that term. The Commission had opted for the definition given in the 1975 Vienna Convention, which referred only to the intergovernmental nature of the organizations concerned. There were, of course, institutions which Governments called international organizations, but which could not act at the level of international law. As Mr. Pinto had emphasized, the draft should obviously not apply to those organizations; so far, however, the Commission had not considered it desirable to say so.

36. The use of the term "international personality" did not seem wise. In its 1949 advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*,<sup>5</sup> the International Court of Justice had noted that that was a doctrinal expression which had sometimes given rise to controversy. In reality, the concept of international personality did not exist—or, at least, its content was not clearly defined. If the Commission referred to it, it would tip the balance in favour of the capacity of international organizations to conclude treaties, which was the subject of article 6.

37. For the purposes of the draft articles, what counted was that an international organization should be able to conclude at least one treaty. The draft would apply to an organization whose statute provided that it could not conclude any treaties, except for its headquarters agreement. That approach exempted the Commission from having to work out a more complicated definition of the term "international organization". As some members of the Commission had pointed out, an international organization could be established without a treaty; it could be the result of

<sup>5</sup> *I.C.J. Reports 1949*, p. 178.

unilateral acts whose combined effect led to recognition of the existence of an international entity. Thus, the Pan-American Union seemed to have been established without a constituent instrument, since the Pact of Bogotá had been concluded subsequently.

38. With regard to article 2, subparagraph 1 (i) and paragraph 2, he agreed that, as Mr. Šahović had stressed, no final decision could be taken on those two provisions before other articles, such as articles 6 and 46, had been considered.

39. In article 2, paragraph 2, the Commission had not referred to the "internal law" of the organization, because it had had in mind the organization's whole legal system, in other words, its own law. But the adjective "internal" had a legal connotation: it was the converse of "international". Some people took the view that the law of an international organization was, in part at least, subject to international law, whereas others regarded it as internal law. That was the problem that had been at issue in the advisory opinion of the International Court of Justice on the *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*.<sup>6</sup> In every international organization, there was a law relating to officials that could be characterized as internal law. But was that law related to the various national laws of States or to international law? In the case in question, it had been a matter of determining whether or not the theory of *ultra vires* action by the arbitrator applied to acts governed by the internal legal system of the organization. The Court had again dealt with that question in connection with the *Judgments of the Administrative Tribunal of the ILO upon Complaints made against UNESCO*. It had declared in its advisory opinion that the Administrative Tribunal was indeed an international tribunal but that, in fact, it formed part of the legal system of the organization, which had the character of international law.<sup>7</sup> The Judgments of that Tribunal were therefore final in the same way as those of the Supreme Court of a State. In the case of an international arbitrator, the theory of *ultra vires* action could have been invoked. It followed that the Commission could not use the term "internal law" of an international organization. What it had in mind was therefore clear: the whole of the law of the organization, in the broadest sense. It remained to be seen whether the expression "rules of the organization" was satisfactory.

40. In subparagraph 1 (j), the Commission meant to cover the whole of the law of the international organization. However, the word "rules" applied to general instruments, whereas in fact individual decisions also formed part of the law of the organization. A Security Council decision characterizing a State as an aggressor was not a rule, but a decision. It was a decision forming part of what the Commission

regarded as constituting the law of the organization. Mr. Ushakov had rightly pointed out (1644th meeting) that at first sight it seemed that the word "relevant" could be deleted, but that it had been taken from another instrument and was not superfluous, because it did not qualify the rules, but the decisions and resolutions of the organization. A decision or resolution, however, might not have any legal consequences and might therefore not form part of the law of the organization. What was encompassed by the French concept of "*actes*" often had no legal effects. But the draft covered only "*actes*" which had legal effects and which constituted the law or rules of the organization. The term "relevant rules" contained in other articles of the draft designated the rules relating to the matter at issue in each article.

41. Article 27 was bound to give rise to difficulties. It was intended to enable an international organization to invoke its own law as justification for its failure to perform a treaty it had concluded. Subject to the second reading, the formulation adopted on first reading certainly applied to the whole of the law of the organization. If the Security Council took a decision and authorized the Secretary-General to conclude an agreement with a State for the implementation of that decision, it was not prohibited from subsequently changing its decision. That was why article 27 provided that an international organization was bound by its undertakings, unless a treaty had been concluded for the execution of a decision, not a rule, and the organization considered itself entitled to change that decision. Thus article 27 did cover all the law of the organization. In article 2, subparagraph 1 (j), the expression "rules of the organization" must therefore be understood to apply to acts having legal effect. In other articles, however, the expression "rules of the organization" was of more limited scope and covered, for example, only the rules relating to the conclusion of treaties; such rules were usually written, but could derive from practice. Thus decisions of the Security Council, which required an affirmative vote of the permanent members, could be adopted if one of the permanent members abstained. Their validity had been established by the International Court of Justice as a practice forming part of the constitutional law of the United Nations.

42. In the present circumstances, the Commission could replace the words "the rules of any international organization" in article 2, paragraph 2, by the words "the law of any international organization", since it was precisely that law which it had in mind; but that change would not solve the problem raised by the definition of the term "rules of the organization", in subparagraph 1 (j) of article 2. Of course, that definition could be deleted, but it should be borne in mind that the text of article 6 was the result of a delicate compromise, which had required the inclusion of the concept of "established practice" in the definition of the "rules of the organization".

<sup>6</sup> *I.C.J. Reports 1954*, p. 47.

<sup>7</sup> *I.C.J. Reports 1956*, p. 97.

43. Consequently, it would probably be appropriate to refer article 2, subparagraph 1 (j) and paragraph 2, to the Drafting Committee. Moreover, even if the Drafting Committee was soon able to propose wording for those provisions, the Commission would probably not be able to adopt them before it had considered certain other articles of the draft.

44. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article 2, subparagraph 1 (j) and paragraph 2, to the Drafting Committee.

*It was so decided.*<sup>8</sup>

*The meeting rose at 12.55 p.m.*

<sup>8</sup> For consideration of the texts proposed by the Drafting Committee, see 1681st meeting, paras. 6–14.

## 1646th MEETING

*Thursday, 7 May 1981, at 10.10 a.m.*

*Chairman:* Mr. Doudou THIAM

*Present:* Mr. Barboza, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, 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.4/339 and Add.1–5, A/CN.4/341 and Add.1)

[Item 3 of the agenda]

#### DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

ARTICLE 3 (International agreements not within the scope of the present articles),

ARTICLE 4 (Non-retroactivity of the present articles),  
*and*

ARTICLE 2 (Use of terms), subpara. 1 (g) (“party”)

1. The CHAIRMAN invited the Special Rapporteur to introduce articles 3 and 4 and article 2, subparagraph 1 (g), which read:

*Article 3. International agreements not within the scope of the present articles*

The fact that the present articles do not apply

- (i) to international agreements to which one or more international organizations and one or more entities other than States or international organizations are [parties];

- (ii) or to international agreements to which one or more States, one or more international organizations and one or more entities other than States or international organizations are [parties];

- (iii) or to international agreements not in written form concluded between one or more States and one or more international organizations, or between international organizations,

shall not affect:

- (a) the legal force of such agreements;

- (b) the application to such agreements of any of the rules set forth in the present articles to which they would be subject under international law independently of the articles;

- (c) the application of the present articles to the relations between States and international organizations or to the relations of international organizations as between themselves, when those relations are governed by international agreements to which other entities are also [parties].

#### *Article 4. Non-retroactivity of the present articles*

Without prejudice to the application of any rules set forth in the present articles to which treaties between one or more States and one or more international organizations or between international organizations would be subject under international law independently of the articles, the articles apply only to such treaties after the [entry into force] of the said articles as regards those States and those international organizations.

#### *Article 2. Use of terms*

1. For the purpose of the present articles:

...

- (g) “party” means a State or an international organization which has consented to be bound by the treaty and for which the treaty is in force;

2. Mr. REUTER (Special Rapporteur) said that articles 3 and 4 had not attracted any substantive comments. During the first reading, in article 3 the word “parties” had been placed in square brackets pending adoption of the definition of that term. Since that definition, which appeared in article 2, subparagraph 1 (g), had not given rise to any comments, the Commission could adopt it on second reading and delete the square brackets around the word “parties” in article 3, subparagraphs (i), (ii) and (c).

3. With regard to the words “entry into force”, in square brackets in article 4, there were two possible solutions. The Commission, which must not prejudge what would happen to the draft articles, could either adopt a cautious approach and leave those words in square brackets, explaining in the commentary that “entry into force” could only be referred to if the draft were to become a convention; or it could go further and replace that term by one which would be valid whatever happened to the draft. For lack of a better solution, he suggested the term “application”, which would nevertheless have the disadvantage of being rather too strong if the General Assembly decided only to recommend the draft articles as a guide to practice. In that connection, it should perhaps be pointed out, in reply to a comment made at the previous meeting by Mr. Pinto, that the General Assembly did not play the role of a legislator empowered to impose a text on States by means of a resolution. The General Assem-

bly might be expected to state that the draft articles reflected an emerging practice. When writers studied the legal effect of General Assembly resolutions, they generally concluded that those resolutions established an important customary precedent; but if the draft articles were regarded as establishing a precedent, the term "application" would again not be very felicitous. In the end, the simplest solution would be to keep the term "entry into force" in square brackets and provide the necessary explanations in the commentary.

4. With a view to the second reading of the draft, he had endeavoured, wherever possible, to lighten the wording of the articles. Since the wording of article 3 had given rise to much criticism, he suggested that subparagraphs (i) and (ii) should be merged, which would in no way alter their substance.

5. Sir Francis VALLAT suggested that, if there were no speaker, the articles be referred to the Drafting Committee immediately.

6. Mr. USHAKOV said he was in favour of deleting the square brackets around the word "parties". It was, of course, not yet known how international organizations would be able to become parties to a future convention, but draft article 11<sup>1</sup> expressly stated how they could become parties to other treaties.

7. In article 3, for a reason that he could not remember, the Commission had decided to substitute the words "entities other than States or international organizations" for the words "subjects of international law" contained in the corresponding provision of the Vienna Convention.<sup>2</sup> That new wording nevertheless raised difficulties, because the word "entities" had a broader meaning than the words "subjects of international law" and could, for example, apply to entities governed by the internal law of a country.

8. He was not really in favour of merging subparagraphs (i) and (ii) of article 3, for he found a provision that was easy to apply preferable to one that was easy to read.

9. He thought the square brackets around the words "entry into force" in article 4 could be deleted. That provision concerned the non-retroactivity of the articles, which implied that they would have legal effect, so that if the articles did not enter into force article 4 would be superfluous. The Commission had drafted article 4 because it had envisaged the case in which the articles would have legal effect, which meant that they would enter into force. It could therefore delete the square brackets and provide the necessary explanations in the commentary.

10. In the light of those comments, the articles under consideration could be referred to the Drafting Committee.

11. Mr. REUTER (Special Rapporteur), speaking on a point of order, said that the Commission could decide either to refer all the draft articles to the Drafting Committee or only those that it did not immediately approve on second reading.

12. Speaking as a member of the Commission, he would prefer the Commission not to refer to the Drafting Committee the articles that it was prepared to adopt on second reading. Since it appeared that the definition in article 2, subparagraph 1 (g), could be adopted immediately, he did not see why it should be referred to the Drafting Committee, as Sir Francis Vallat had suggested, unless the Commission explained its reasons for doing so.

13. Referring to a comment made by Mr. Ushakov, he said that it had been as a result of a discussion that the Commission had decided to use the term "entities" instead of the term "subjects of international law",<sup>3</sup> which had been considered rather too doctrinal and strong. For there could be non-governmental entities which were not international organizations as defined in the draft, but which could be parties to treaties. That was the case of the Catholic Church, for example, which was referred to in United Nations conventions as the Vatican City State or the Holy See, but it would probably be going rather too far to describe the Catholic Church as a subject of international law. The same was true of the International Committee of the Red Cross, which was an association under Swiss law and thus not an international organization, but which was certainly a party to agreements governed by public international law. That was why the Commission had preferred to use a neutral term.

14. Mr. VEROSTA, referring to the Special Rapporteur's point of order, stressed the need to give the Drafting Committee precise instructions concerning the articles referred to it.

15. The term "*mise en application*" would probably be appropriate in the French text of article 4, but as it would be difficult to translate into English, it would be better to retain the term "entry into force". Moreover, from the viewpoint of Mr. Ushakov, who had drawn attention to the title of article 4, the term "*mise en application*" might not be satisfactory, because it had a temporal aspect.

16. Mr. SUCHARITKUL said he saw no objection to deleting the square brackets around the word "parties" in article 3, since the definition of that term had not raised any difficulties. Article 3 could be referred to the Drafting Committee.

<sup>1</sup> See 1644th meeting, footnote 1.

<sup>2</sup> *Ibid.*, footnote 3.

<sup>3</sup> See *Yearbook ... 1974*, vol. I, pp. 132 *et seq.*, 1275th meeting, paras. 25 *et seq.*; pp. 144 *et seq.*, 1277th meeting; pp. 162 *et seq.*, 1279th meeting, paras 50 *et seq.*; pp. 233-234, 1291st meeting, paras. 31-40. See also *ibid.*, vol. II (Part One), pp. 298, document A/9610/Rev.1, chap. IV, sect. B, art. 3, para. (6) of the commentary.

17. In article 4, he thought the term “*mise en application*” would probably be preferable to the term “*entrée en vigueur*”, but that it would be difficult to translate into English. At the United Nations Conference on the Law of the Sea,<sup>4</sup> it had been translated as “enforcement”, which was hardly satisfactory.

18. Mr. ŠAHOVIĆ considered that most of the Special Rapporteur’s proposals should be referred to the Drafting Committee.

19. The definition contained in article 2, subparagraph 1 (g), should not be difficult to adopt. The square brackets which had been placed around the word “parties” in article 3 should be deleted. In article 4, the term “entry into force” could very well be retained; it was only because he was so meticulous that the Special Rapporteur had proposed its replacement by another term. The words “entry into force” were logically appropriate in the text, and the reasons given by the Special Rapporteur for their replacement by the term “application” were not very convincing.

20. It was probably because the Commission had been too anxious to follow the model of the Vienna Convention that it had decided to use the term “entities”. In article 3 of that convention, the term “subjects of international law” automatically suggested international organizations. Since the draft articles specifically applied to international organizations, it had been necessary to find another term. It should be pointed out that the term “entities” could apply to cases other than those mentioned by the Special Rapporteur. For instance, national liberation movements recognized by the international community could become parties to international treaties. In his opinion there was no objection to retaining the term “entities”, especially as it had not attracted any comments by States or the international organizations.

21. Mr. QUENTIN-BAXTER supported the deletion of the square brackets from the articles concerned and the retention, in article 4, of the phrase “entry into force”, which, at least in English, was far more appropriate than the word “application”.

22. With regard to article 3, he was in favour of retaining the existing wording. Unlike others, that article did not seem to him to be one in which it was possible to combine precision and concision, for it was essentially a technical provision aimed at precluding all possibility of perverse interpretations of the draft as a whole.

23. As to the Special Rapporteur’s point of order, he himself would be very much opposed to sending all the articles to the Drafting Committee if the only result would be to retard the Committee’s work. In fact, however, difficulties were more likely to arise if the Drafting Committee did not have all the articles before

it when it came to finalize a draft instrument: it would be unable, for example, immediately to ensure the consistent use of terminology throughout the text.

24. Mr. PINTO said that, of the suggestions which had been made, he favoured the removal of the square brackets from articles 3 and 4 and, in particular, the retention in article 4 of the expression “entry into force”. To replace that expression by the term “application” would create more problems than it would solve, for the word would then appear twice, with two different meanings, in the same article. While it was true that, like the use in article 3 of the term “parties”, which the Commission had already defined in article 2 as covering only States and international organizations, the use in article 4 of the expression “entry into force” might not be entirely accurate, there could be no doubt, in either article 3 or article 4, as to the meaning the Commission intended to convey.

25. Mr. BARBOZA said that, for the reasons given by the Special Rapporteur and the members of the Commission, the square brackets in the text of article 3 could be deleted.

26. With regard to the term “entry into force” in article 4, the Special Rapporteur was probably being too scrupulous. The Commission had already decided to draft the articles from a maximalist viewpoint, as though they would one day become a convention. That argument was supplemented by the point made by Mr. Ushakov; that the question of retroactivity arose only in connection with the effects the draft articles might have on prior legal obligations, which could be affected only by a treaty, not by a recommendation. In the last analysis, it was not the term “entry into force” that should be placed in square brackets, but the whole of article 4. He therefore preferred the term “entry into force” to the term “application”.

27. As to drafting, the Commission was not dealing with a literary work, but with a legal text, which must be as clear as possible. Of course, form must not be entirely sacrificed, but clarity should take precedence if necessary, even at the cost of repetitions or heaviness.

28. Sir Francis VALLAT, referring to his earlier suggestion, said he would not wish to see the Commission adopt the practice of sending only some articles to the Drafting Committee. It was highly desirable for all articles to go before the Committee, since that would not only save time—the minor drafting points not normally discussed in the Commission often proving very difficult to resolve—but would avoid problems of the kind mentioned by Mr. Quentin-Baxter.

29. He agreed that no change should be made to article 2, subparagraph 1 (g), that the square brackets should be removed from articles 3 and 4, and that the words “entry into force” should be retained in the latter provision. He had originally thought that subparagraphs (i) and (ii) of article 3 could be merged, but having heard the arguments put forward by other

<sup>4</sup> See “Draft Convention on the Law of the Sea (Informal text)” (A/CONF.62/WP.10/Rev.3 and Corr.1 and 3), part XII, sect. 6.

speakers, he now thought that they should be left as they stood.

30. Mr. USHAKOV said that all the articles should be systematically referred to the Drafting Committee. It was, for example, quite clear that the merging of subparagraphs (i) and (ii) of article 3 would depend on the wording of other draft articles.

31. With regard to the word "entities", he observed that if it applied not only to subjects of international law but also to other entities, article 3 would be difficult to accept. That article related to international agreements to which subjects of international law other than States could be parties, but not entities other than subjects of international law. In the latter case, the agreements would not be international agreements within the meaning of international law. Article 3, subparagraph (i), applied in particular to agreements between an international organization and an entity other than a State or an international organization, in other words, to private law contracts. The use of different terms in the Vienna Convention and the draft under consideration was sure to give rise to problems of interpretation. The "other subjects of international law" referred to in article 3 of the Convention were primarily international organizations, but could be other entities. If the Commission used another term in the draft, it would have to explain why it had not thought that it could use the term contained in the Vienna Convention. The Commission had always tried to avoid the unnecessary use of terms and expressions that were synonymous. If no convincing explanations were forthcoming, he would be inclined to favour the wording of the Vienna Convention.

32. Mr. REUTER (Special Rapporteur) said that the Commission seemed ready to take a number of decisions. First, to refer all the articles systematically to the Drafting Committee, which would take account of the fact that some of them had already been approved as they stood; second, to refer to the Drafting Committee the provisions which had given rise to the current discussion; and third, to delete the square brackets around the word "parties" in article 3 and the words "entry into force" in article 4. With regard to the latter expression, it would have to be explained in the commentary that the Commission was thinking in terms of a draft that would become a convention. If that were not to be the case, the General Assembly, at the appropriate time, would either have to replace the term "entry into force" by another term or, possibly, delete article 4.

33. Speaking as a member of the Commission, he wished to point out that, if the General Assembly recommended the draft articles as a guide to practice and deleted article 4, it would be going further than it had done in the Vienna Convention; for it would be emphasizing the fact that a number of the articles already reflected practice, and the authority of its resolution might lead to the application of some of them to treaties already concluded. In that connection,

it might be noted that, in the advisory opinion which the International Court of Justice had given in 1980 in connection with a headquarters agreement concluded by WHO and Egypt, it had, in its *ratio decidendi*, referred to an article drawn on the lines of a draft elaborated by the Commission,<sup>5</sup> which some judges had regarded as a reflection of an already existing rule. If, following the second reading, the Commission did not confine itself to recommending the adoption of a convention based on the draft articles, it would have to draw attention to the risk that some articles might be applied to treaties already concluded.

34. The expression "subjects of international law", used in the Vienna Convention, could apply only to international organizations. If the Commission now used that same expression in the draft as opposed both to States and to international organizations, it would have to be concluded that it applied to at least one entity which was not an international organization, but was a subject of international law. Personally, he was prepared to take that step and agree that, for example, national liberation movements recognized by the United Nations were subjects of international law. It should, however, be borne in mind that the Commission had originally considered it wiser not to go further than the Vienna Convention.

35. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to proceed as indicated by the Special Rapporteur concerning the various points he had mentioned.

*It was so decided.*<sup>6</sup>

ARTICLE 6 (Capacity of international organizations to conclude treaties)

36. The CHAIRMAN invited the Special Rapporteur to introduce article 6, which read:

*Article 6. Capacity of international organizations to conclude treaties*

*The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization.*

37. Mr. REUTER (Special Rapporteur) suggested that article 6 should remain unchanged. It had been the subject of long discussion in the Commission, and very conflicting views had been expressed on it in the Sixth Committee; any change in the provision would raise considerable difficulties.

38. Even after the discussion at the 1644th and 1645th meetings on the expression "rules of the organization", it would be better not to change the

<sup>5</sup> See Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, *I.C.J. Reports 1980*, p. 73.

<sup>6</sup> For consideration of the texts proposed by the Drafting Committee, see 1681st meeting, paras. 15-18 and *ibid.*, paras. 6-14.

words “relevant rules of the organization” in article 6—provided, of course, that the definition of the expression “rules of the organization” in article 2, subpara. 1 (*j*), was retained.

39. Mr. ŠAHOVIĆ said he shared the opinion expressed by the Special Rapporteur, but would like to know whether article 6 was to become article 5.

40. Mr. REUTER (Special Rapporteur) said that, so far, the Commission had kept the numbering of the articles of the draft and the numbering of the corresponding provisions in the Vienna Convention absolutely parallel. After it had completed the second reading and made a recommendation on what was to be done with the draft, the Commission would be obliged to renumber the articles.

41. Mr. USHAKOV said that he too was in favour of keeping article 6 as it stood, but wondered whether an equivalent of article 5 of the Vienna Convention should not be included in the draft. Under the terms of that article, the Vienna Convention applied, *inter alia*, to “any treaty adopted within an international organization”. Were treaties adopted within an international organization between States and one or more international organizations or between international organizations therefore excluded from the draft? Perhaps an article 5 should be drafted to cover agreements of that kind.

42. Mr. REUTER (Special Rapporteur) drew a distinction between two cases. First, there was the case—which seemed never to have arisen—of an international organization that included another international organization as a member. Admittedly, the United Nations was a member of the International Telecommunication Union and of the Universal Postal Union, but with a special status. The Commission had already considered those two cases and reached the conclusion that it could not take account of every conceivable possibility. Besides, if it devoted a provision to that case, the inference could be drawn that it considered the United Nations to be a full member of those organizations, which it was not.

43. In the second case, a treaty was drawn up within an international organization: for instance, the Convention on Special Missions<sup>7</sup> had been drawn up within the United Nations. But it was difficult to see how an international organization could be associated with the drawing-up of a treaty within an international organization of which it was not a member. Since the Commission had noted that at the present time no international organization was really a member of another international organization, it was not conceivable that an organization could participate in the drawing-up of a treaty within another organization. In that respect, it should be remembered that the International Bank for Reconstruction and Development had appended its signature to the 1965 Con-

vention on the Settlement of Investment Disputes between States and Nationals of Other States<sup>8</sup> merely to lend its support to that convention; it had never become a party to the instrument.

44. The CHAIRMAN suggested that the Commission should refer the question of drafting an article 5 to the Drafting Committee.

*It was so decided.*<sup>9</sup>

45. Mr. VEROSTA said that, in his opinion, draft article 6 should be retained without any change.

46. The CHAIRMAN suggested that the Commission should refer article 6 to the Drafting Committee.

*It was so decided.*<sup>10</sup>

ARTICLE 7 (Full powers and powers) and ARTICLE 2 (Use of terms), para. 1, subpara. (c) (“full powers”) and (*c bis*) (“powers”)

47. The CHAIRMAN invited the Special Rapporteur to introduce article 7 and article 2, paragraph 1, subparagraphs (c) and (*c bis*), which read:

*Article 7. Full powers and powers*

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty between one or more States and one or more international organizations or for the purpose of expressing the consent of the State to be bound by such a treaty if:

(a) he produces appropriate full powers; or

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

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty between one or more States and one or more international organizations;

(b) heads of delegations of States to an international conference, for the purpose of adopting the text of a treaty between one or more States and one or more international organizations;

(c) heads of delegations of States to an organ of an international organization, for the purpose of adopting the text of a treaty between one or more States and that organization;

(d) heads of permanent missions to an international organization, for the purpose of adopting the text of a treaty between one or more States and that organization;

(e) heads of permanent missions to an international organization, for the purpose of signing, or signing *ad referendum*, a treaty between one or more States and that organization, if it appears from practice or from other circumstances that those heads of permanent missions are considered as representing their States for such purposes without having to produce full powers.

<sup>8</sup> United Nations, *Treaty Series*, vol. 575, p. 159.

<sup>9</sup> For the decision of the Drafting Committee, see 1692nd meeting, paras. 10–12.

<sup>10</sup> For consideration of the text proposed by the Drafting Committee, see 1681st meeting, para. 20.

<sup>7</sup> See 1644th meeting, footnote 6.

3. A person is considered as representing an international organization for the purpose of adopting or authenticating the text of a 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 such purposes without having to produce powers.

4. 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.

#### Article 2. Use of terms

1. For the purpose of the present articles:

...

(c) "full powers" means a document emanating from the competent authority of a State and designating a person or persons to represent the State for the purpose of negotiating, adopting or authenticating the text of a treaty between one or more States and one or more international organizations, expressing the consent of the State to be bound by such a treaty, or performing any other act with respect to such a treaty;

(c bis) "powers" means a document emanating from the competent organ of an international organization and designating a person or persons to represent the organization for the purpose of negotiating, adopting or authenticating the text of a treaty, communicating the consent of the organization to be bound by a treaty, or performing any other act with respect to a treaty.

48. Mr. REUTER (Special Rapporteur) said that, among the comments of Governments on those provisions, the most important was certainly that of the Canadian Government (A/CN.4/339), which considered the possibility of providing, by analogy with the text adopted with regard to a State, that the executive head of an organization should be considered as having general powers to represent the organization.

49. A formulation of that kind would indeed have some advantages if it were generally applicable. However, the practice of the various international organizations did not rule out the possibility of general powers of representation being conferred on a collective organ and not on the head of the Secretariat. In the light of the comments by ILO (*ibid.*), he would be more inclined to think that the practice of the organizations was the best criterion for solving the problem. Hence, he was not in favour of seeking, at all costs, a symmetry which might well prove artificial. Personally, he thought it preferable to leave room for empiricism, and he urged the Commission not to intrude on a debate that should be confined to organizations themselves.

50. With regard to a comment by the Federal Republic of Germany (*ibid.*), suggesting that the word "communicating" should be replaced by the word "declaring", in article 7, paragraph 4, he pointed out that, notwithstanding the theory supported by some German writers that a treaty was constituted by a declaration of will, the Commission had decided on

first reading to retain the word "communicating", which was deliberately used to express a nuance.

51. As to drafting, he emphasized that he had purposely used the term "powers", rather than "full powers", for international organizations. That choice also conveyed a nuance deriving from the limited capacity of international organizations, and he proposed that the term should be retained.

52. In his report (A/CN.4/341 and Add.1, paras. 38 *et seq.*), he had discussed various other suggestions on drafting, in particular a proposal to delete the words "between one or more States and one or more international organizations" from article 7, paragraph 1. On that point, he thought the possible saving of words would be very small, but it was for the Commission to decide what ought to be done.

53. Lastly, he recognized that the merging of paragraphs 3 and 4 of article 7 to form a single provision, with the wording set out in paragraph 39 of his report, would raise no difficulties and could make the text of the article less cumbersome.

54. Mr. BARBOZA asked whether the Special Rapporteur considered that there were good grounds for the comment by ILO (A/CN.4/339) on article 7, subparagraph 2 (a), which pointed out that in ILO practice the Minister of Labour of each member State was considered as representing the State in its relations with that organization.

55. Mr. REUTER (Special Rapporteur) said that subparagraph 2 (a) of draft article 7 exactly followed the wording of article 7 of the 1969 Vienna Convention, which listed the persons in the State hierarchy who were not required to produce full powers in order to be considered as representing their State. Nevertheless, in its own practice, an international organization was free not to require powers to be produced by persons who did not fall within the categories mentioned. That attitude was to be found both in the practice of States and in that of the organizations concerned, and was explained by the fact that, in most States, it was the technical ministries which dealt, on a very frequent and almost daily basis, with the technical specialized agencies (for example, the ILO, FAO, ITU) in all matters relating to their sphere of competence. That practice was perfectly understandable, but was nevertheless common only to the particular organization involved and to the State that accepted it. Hence it was understandable that it had not been taken into account in the text of the Vienna Convention, which was very general. For the same reason, he had not mentioned that practice in the draft articles.

56. Mr. BARBOZA asked the Commission to refer consideration of the matter to the Drafting Committee and to examine the possibility of supplementing the text of draft article 7 in that respect.

57. Mr. USHAKOV said that, in the current practice of States, the head of a permanent delegation to an international organization was entitled, without pro-

ducing powers, to transmit the instruments of ratification of treaties ratified by the State he represented. That was the only possibility not covered by the enumeration in draft article 7, and he wondered whether the article should not be supplemented in that respect by an addition to the text of the Vienna Convention. For his part, he would prefer the text to remain unchanged.

58. With regard to paragraph 4, it was obvious that no official of an international organization was entitled by virtue of his duties to bind that organization. He could only be authorized to communicate the document confirming consent. Thus it was right that the power to communicate the consent of an organization to be bound by a treaty should be mentioned in article 7.

59. As to drafting, he proposed that, for greater precision, the word "such" should be inserted before the word "treaty" in paragraph 4.

60. The CHAIRMAN suggested that the texts of article 7 and of article 2, paragraph 1, subparagraphs (c) and (c bis), should be referred to the Drafting Committee.

*It was so decided.*<sup>11</sup>

ARTICLE 8 (Subsequent confirmation of an act performed without authorization),

ARTICLE 9 (Adoption of the text),

ARTICLE 10 (Authentication of the text),

ARTICLE 11 (Means of establishing consent to be bound by a treaty), and

ARTICLE 2 (Use of terms), para. 1, subparas. (b) ("ratification"), (b bis) ("act of formal confirmation") and (b ter) ("acceptance", "approval" and "accession")

61. The CHAIRMAN invited the Special Rapporteur to introduce articles 8, 9, 10 and 11, and article 2, paragraph 1, subparagraphs (b), (b bis) and (b ter), which read:

*Article 8. Subsequent confirmation of an act performed without authorization*

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State or an international organization for that purpose is without legal effect unless afterwards confirmed by that State or organization.

*Article 9. Adoption of the text*

1. The adoption of the text of a treaty takes place by the consent of all the participants in the drawing-up of the treaty except as provided in paragraph 2.

2. The adoption of the text of a treaty between States and one or more international organizations at an international conference in which one or more international organizations participate

takes place by the vote of two thirds of the participants present and voting, unless by the same majority the latter shall decide to apply a different rule.

*Article 10. Authentication of the text*

1. The text of a treaty between one or more States and one or more international organizations is established as authentic and definitive:

(a) by such procedure as may be provided for in the text or agreed upon by the States and international organizations participating in its drawing-up; or

(b) failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those States and international organizations of the text of the treaty or of the final act of a conference incorporating the text.

2. The text of a treaty between international organizations is established as authentic and definitive:

(a) by such procedure as may be provided for in the text or agreed upon by the international organizations participating in its drawing-up; or

(b) failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those international organizations of the text of the treaty or of the final act of a conference incorporating the text.

*Article 11. Means of establishing consent to be bound by a treaty*

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

2. The consent of an international organization to be bound by a treaty is established by signature, exchange of instruments constituting a treaty, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed.

*Article 2. Use of terms*

1. For the purpose of the present articles:

...

(b) "ratification" means the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(b bis) "act of formal confirmation" means an international act corresponding to that of ratification by a State, whereby an international organization establishes on the international plane its consent to be bound by a treaty;

(b ter) "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State or an international organization establishes on the international plane its consent to be bound by a treaty.

62. Mr. REUTER (Special Rapporteur) said that no substantive comments had been made on the provisions under discussion, except for criticisms in the Sixth Committee of the General Assembly of the use of the expression "act of formal confirmation" and of the parallelism created between this act of formal confirmation and ratification (see A/CN.4/341 and Add.1, para. 44).

63. Generally speaking, the word "ratification" was not used for international organizations. In that connection, he thanked the Secretariat for drawing his

<sup>11</sup> For consideration of the texts proposed by the Drafting Committee, see 1681st meeting, para. 21 and *ibid.* paras. 6–14. 1682nd meeting, paras. 2–9; and 1692nd meeting, paras. 1–8.

attention to a number of agreements, mentioned in footnote 30 to his report (A/CN.4/341 and Add.1), for which the General Assembly had established a special conclusion procedure. It provided that the agreement had legal effect only with the General Assembly's "concurrence", but the word "concurrence" was in fact merely a clumsy way of designating genuine confirmation. He proposed that the expression "act of formal confirmation" should be retained, and pointed out that the Vienna Convention spoke of "confirmation", in the general sense.

64. He proposed that draft article 10 should be amended as indicated in paragraph 42 of his report, by using the expression "participants in the drawing-up", which was not new, as it was already used in article 9. Such an innovation might none the less raise a question the settlement of which had been deferred, namely, whether the concept of "participants in the drawing-up" need be defined in article 2, paragraph 1.

65. He himself was not in favour of including such a definition, which, he thought, would be justified only if it made clear that the words meant only those who could participate in the drawing-up of the treaty until the end of the process (excluding experts, for example). That restriction appeared to be self-evident, however, and it would be for the Commission to decide on the value of such a definition.

66. Mr. USHAKOV said that the concept of "participants in the drawing-up" was not defined in the Vienna Convention, and the Commission would therefore meet with difficulties if it tried to define it; for the Commission would be obliged to define a State and an international organization participating in the drawing-up of a treaty, in other words, to interpret the Vienna Convention and to supplement it on that point, which might not be desirable. The authors of that convention had refrained from defining the expression because they had considered it to be clear enough.

67. He saw that as a sufficient reason to refrain from using the expression "participants in the drawing-up". Apart from that reservation, he thought the articles could be referred to the Drafting Committee.

68. Sir Francis VALLAT, referring first to the expression "act of formal confirmation" defined in article 2, subparagraph 1 (*b bis*), said that, in his view, the use of the words "formal confirmation", as distinct from "ratification", was fully justified by the facts of the situation; it did not involve any distinction based on equality or inequality as between States and international organizations, which seemed to him quite irrelevant in the context. It might be confusing to use the word "ratification" in regard to international organizations, for in the case of States that word was often used in a dual sense, to mean both international ratification and referral to the constitutional processes. So far as he was aware, the same did not apply to international organizations, irrespective of the procedure followed to express the will of the international

organization concerned to give its formal consent to be bound by a treaty. It was necessary to recognize that an international organization had internal procedures which differed from those of a State and thus justified the use of a more general term.

69. On draft article 9, he endorsed Mr. Ushakov's point. The Commission, in referring to participants within the context of a convention, was dealing with something that was not in itself very precise, although the area was one in which practice might be developing. He was thinking, for example, of the position of those persons who might be present at a conference as observers at a time when it was contemplated that the international organization in question might, or would, become a party to the treaty. Bearing that kind of situation in mind, it would be wiser to adhere to the existing text, which gave an indication of what was meant by participants without drawing too sharp a line. For that reason and the other reasons given, he would prefer not to attempt a definition of "participants".

70. Mr. ŠAHOVIĆ observed that article 2, subparagraph 1 (*e*) contained definitions of the terms "negotiating State" and "negotiating organization". It was difficult to see what difference there was between those two concepts and that of a State or an organization "participating in the drawing-up".

71. The CHAIRMAN suggested that the Commission should refer articles 8, 9, 10 and 11 and article 2, paragraph 1, subparagraphs (*b*), (*b bis*) and (*b ter*) to the Drafting Committee.

*It was so decided.*<sup>12</sup>

*The meeting rose at 12.55 p.m.*

<sup>12</sup> For consideration of the texts proposed by the Drafting Committee, see 1681st meeting, paras. 22-23; *ibid.*, paras. 24-31, 1682nd meeting, para. 5, 1692nd meeting, paras. 1-7; 1681st meeting, paras. 32-33, and 1682nd meeting, para. 7; 1681st meeting, paras. 34-35; and *ibid.*, paras. 6-14.

## 1647th MEETING

*Friday, 8 May 1981, at 10.10 a.m.*

*Chairman:* Mr. Doudou THIAM

*Present:* Mr. Barboza, Mr. Dadzie, Mr. Diaz González, Mr. Francis, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, 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.4/339 and Add.1–5, A/CN.4/341 and Add.1)

[Item 3 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:  
SECOND READING (*continued*)

ARTICLES 12–18 AND ARTICLE 2, PARA. 1, SUBPARAS.  
(e) AND (f)

1. The CHAIRMAN invited the Special Rapporteur to introduce articles 12 to 18 and article 2, paragraph 1, subparagraphs (e) and (f), which read:

*Article 12. Signature as a means of establishing consent to be bound by a treaty*

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by the signature of the representative of that State when:

- (a) the treaty provides that signature shall have that effect;
- (b) the participants in the negotiation were agreed that signature should have that effect; or
- (c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of an international organization to be bound by a treaty is established by the signature of the representative of that organization when:

- (a) the treaty provides that signature shall have that effect; or
- (b) the intention of that organization to give that effect to the signature appears from the powers of its representative or was established during the negotiation.

3. For the purposes of paragraphs 1 and 2:

- (a) the initialling of a text constitutes a signature when it is established that the participants in the negotiation so agreed;
- (b) the signature *ad referendum* by a representative of a State or an international organization, if confirmed by his State or organization, constitutes a full signature.

*Article 13. An exchange of instruments constituting a treaty as a means of establishing consent to be bound by a treaty*

1. The consent of States and international organizations to be bound by a treaty between one or more States and one or more international organizations constituted by instruments exchanged between them is established by that exchange when:

- (a) the instruments provide that their exchange shall have that effect; or
- (b) those States and those organizations were agreed that the exchange of instruments should have that effect.

2. The consent of international organizations to be bound by a treaty between international organizations constituted by instruments exchanged between them is established by that exchange when:

- (a) the instruments provide that their exchange shall have that effect; or
- (b) those organizations were agreed that the exchange of instruments should have that effect.

*Article 14. Ratification, act of formal confirmation, acceptance or approval as a means of establishing consent to be bound by a treaty*

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by ratification when:

- (a) the treaty provides for such consent to be expressed by means of ratification;
- (b) the participants in the negotiation were agreed that ratification should be required;
- (c) the representative of the State has signed the treaty subject to ratification; or
- (d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of an international organization to be bound by a treaty is established by an act of formal confirmation when:

- (a) the treaty provides for such consent to be established by means of an act of formal confirmation;
- (b) the participants in the negotiation were agreed that an act of formal confirmation should be required;
- (c) the representative of the organization has signed the treaty subject to an act of formal confirmation; or
- (d) the intention of the organization to sign the treaty subject to an act of formal confirmation appears from the powers of its representative or was established during the negotiation.

3. The consent of a State to be bound by a treaty between one or more States and one or more international organizations, or the consent of an international organization to be bound by a treaty, is established by acceptance or approval under conditions similar to those which apply to ratification or to an act of formal confirmation.

*Article 15. Accession as a means of establishing consent to be bound by a treaty*

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by accession when:

- (a) the treaty provides that such consent may be expressed by that State by means of accession;
- (b) the participants in the negotiation were agreed that such consent might be expressed by that State by means of accession; or
- (c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

2. The consent of an international organization to be bound by a treaty is established by accession when:

- (a) the treaty provides that such consent may be established by that organization by means of accession;
- (b) the participants in the negotiation were agreed that such consent might be given by that organization by means of accession; or
- (c) all the parties have subsequently agreed that such consent may be given by that organization by means of accession.

*Article 16. Exchange, deposit or notification of instruments of ratification, formal confirmation, acceptance, approval or accession*

1. Unless the treaty otherwise provides, instruments of ratification, formal confirmation, acceptance, approval or accession establish the consent of a State or of an international organization to be bound by a treaty between one or more States and one or more international organizations upon:

- (a) their exchange between the contracting States and the contracting international organizations;
- (b) their deposit with the depositary; or

(c) their notification to the contracting States and to the contracting international organizations or to the depositary, if so agreed.

2. Unless the treaty otherwise provides, instruments of formal confirmation, acceptance, approval or accession establish the consent of an international organization to be bound by a treaty between international organizations upon:

(a) their exchange between the contracting international organizations;

(b) their deposit with the depositary; or

(c) their notification to the contracting international organizations or to the depositary, if so agreed.

*Article 17. Consent to be bound by part of a treaty and choice of differing provisions*

1. Without prejudice to articles [19 to 23], the consent of a State or of an international organization to be bound by part of a treaty between one or more States and one or more international organizations is effective only if the treaty so permits or if the other contracting States and contracting international organizations so agree.

2. Without prejudice to articles [19 to 23], the consent of an international organization to be bound by part of a treaty between international organizations is effective only if the treaty so permits or if the other contracting international organizations so agree.

3. The consent of a State or of an international organization to be bound by a treaty between one or more States and one or more international organizations which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

4. The consent of an international organization to be bound by a treaty between international organizations which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

*Article 18. Obligation not to defeat the object and purpose of a treaty prior to its entry into force*

1. A State or an international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty between one or more States and one or more international organizations when:

(a) that State or that organization has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, an act of formal confirmation, acceptance or approval, until that State or that organization shall have made its intention clear not to become a party to the treaty; or

(b) that State or that organization has established its consent to be bound by the treaty pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

2. An international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty between international organizations when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to an act of formal confirmation, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has established its consent to be bound by the treaty pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

*Article 2. Use of terms*

1. For the purpose of the present articles:

...

(e) "negotiating State" and "negotiating organization" mean respectively:

(i) a State,

(ii) an international organization which took part in the drawing-up and adoption of the text of the treaty;

(f) "contracting State" and "contracting organization" mean respectively:

(i) a State

(ii) an international organization which has consented to be bound by the treaty, whether or not the treaty has entered into force.

2. Mr. REUTER (Special Rapporteur) said that the provisions under consideration had not elicited any comments, but they could still be the subject of drafting amendments. It seemed to him that the Commission was not in favour of shortening the texts, in particular by deleting the words "between one or more States and one or more international organizations". With regard to drafting, he was proposing the introduction of the expression "the participants in the negotiation" (A/CN.4/341 and Add.1, para. 46) and the expression "the contracting entities" (*ibid.*, para. 50), which should be defined in article 2. The use of those expressions would simplify the draft considerably.

3. The expression "the participants in the negotiation", which made its first appearance in the present wording of article 12, reappeared in draft articles 14 and 15. However, the terms "negotiating State" and "negotiating organization" had been defined in article 2, subparagraph 1 (e). It might be preferable simply to define the expression "the participants in the negotiation", since, in the whole draft, the terms defined in article 2, subparagraph 1 (e) appeared only in article 76.<sup>1</sup> If the Commission agreed to the proposed amendment, a single term could be used throughout the text and the present definition could be deleted.

4. With regard to article 16, the Commission would have to decide, also with a view to simplification, whether it wished to use the term "the contracting entities". It would then have to define that term too, in a provision of article 2. It should nevertheless be noted that such an amendment would affect other articles, in particular, articles 77 and 79.

5. The CHAIRMAN invited the members of the Commission to consider articles 12 to 18 and article 2, subparas. 1 (e) and (f), article by article.

<sup>1</sup> For the text of articles 1-80 adopted on first reading by the Commission, see *Yearbook . . . 1980*, vol. II (Part Two), pp. 65 *et seq.*

ARTICLE 12 (Signature as a means of establishing consent to be bound by a treaty)<sup>2</sup>

6. Mr. USHAKOV said he agreed that it would be better not to delete the words “between one or more States and one or more international organizations”. In his opinion, it would be preferable for the meaning of the articles to be clear enough not to require interpretation in the future.

7. In article 12, paragraph 1, the use of the expression “the participants in the negotiation” was not necessarily advisable, as it would be a departure from the terminology of the Vienna Convention,<sup>3</sup> which referred to the “the negotiating States”. The choice of terms proposed by the Special Rapporteur might complicate comparison of a future convention with the Vienna Convention, although the Commission had resolved to follow the latter instrument as closely as possible.

8. The parallelism that was rightly being sought might be better achieved if the Commission decided to refer to the “negotiating States and negotiating international organizations”. It would then not have to amend a term that had already been defined, and would remain closer to the wording of the Vienna Convention, thus making the relationship between the two texts clearer.

9. In draft article 12, he would also like the Commission to use the wording of article 12, subparagraph 1 (b), of the Vienna Convention, which read:

[... when:] it is otherwise established that the negotiating States were agreed that signature should have that effect.

It would thus be clearly indicated that consent to be bound by a treaty was not established by the treaty itself. It would also be preferable to add the words “through their representatives” after the words “were agreed”. That addition would be very useful, because it would leave the international organization free to choose the means of expressing its consent.

10. It should be emphasized that, in the case of a State, the power of the representative of the State to bind it by signature could be conferred on him in two ways: either *ex officio*, in the case of the Head of State, the Head of Government or the Minister for Foreign Affairs, or by full powers granted to him. The situation was different, however, in the case of an international organization, in which a person was authorized to negotiate a text stipulating that the organization could be bound by the signature of its representative, although he was not authorized to bind the organization definitively. He doubted whether it could be said that the representative of an organization, if he did not first have the corresponding powers, was authorized to establish in the text of a treaty that his signature would

bind the organization he represented. On the other hand, if the text of the treaty provided that the organization was bound by its consent, not by the signature of its representative, the wording of subparagraph 2 (a) was not appropriate. It might be better for that provision to read:

(a) the intention to give that effect to the signature appears from the powers of its representative.

That wording would cover the case in which the organization granted the necessary powers to its representative through its competent organ.

11. With regard to the words “or was established during the negotiation” in subparagraph 2 (b), he doubted whether the intention of the organization could be established without any formal expression of will by the competent organ. Conversely, when the competent organ had formally expressed its will, the intention must, *ex hypothesi*, be expressly mentioned in the powers of the organization’s representative.

12. He would like the Commission to make a detailed analysis of article 12, subparagraph 2, which was of capital importance, since its purpose was to determine how the organization could be bound by the signature of its representative.

13. Sir Francis VALLAT said that subparagraph 2 (b) caused him no difficulty. Article 12, as its title indicated, dealt with the procedure for establishing consent to be bound by a treaty. To see from where the authority derived—Mr. Ushakov’s point—it was necessary to refer back to article 7. Obviously, however, if a person did not have the necessary authority he could not sign a treaty.

14. He fully agreed with the Special Rapporteur’s suggestion that in article 12, in the introductory part of paragraph 1, the words “between one or more States and one or more international organizations” could be omitted (A/CN.4/341 and Add.1, para. 46). It was clear from the context that the paragraph did not refer solely to treaties between international organizations, and no major juridical principle was involved.

15. Subparagraph 1 (b) of that article, on the other hand, gave rise to a most confusing situation. For in the French text of article 2, subparagraph 1 (e), of the Vienna Convention, the expression defined (and used in article 12 of that Convention) was “*Etat ayant participé à la négociation*”, whereas the expression used in the corresponding parts of the English version of the Convention was “negotiating State”. It was therefore clear that in the case of the Vienna Convention there had been no intention to attribute a different meaning to the two expressions. At the same time, the Commission was not bound to adhere to the exact wording of that convention. It would be necessary to compare the different language versions of the draft before a satisfactory solution could be found. One possibility, however, would be to define “negotiating State” and “State participating in the

<sup>2</sup> For the text, see para. 1 above.

<sup>3</sup> See 1644th meeting, footnote 3.

negotiations” and attribute the same meaning to both expressions.

16. It would be better, however, for all the points he had raised to be considered by the Drafting Committee.

17. Mr. VEROSTA said that he, too, thought the terms “negotiating States” and “negotiating organizations” could be merged, possibly as proposed by Mr. Ushakov.

18. As to the wording of article 12, paragraph 2, the replacement of the word “or” by the word “and” could remove all doubt about the meaning of that provision, since if the organization was prepared to sign the treaty, the signature would have the effect of binding the organization and that effect would be provided for in the powers of its representative. The Drafting Committee might examine those suggestions.

19. Mr. SUCHARITKUL said he agreed with Mr. Verosta and noted that article 12 required, first, that the treaty should provide that signature would have the effect of binding the international organization and, secondly, that the intention of the organization to give that effect to its signature should be established.

20. Mr. PINTO agreed that the words “between one or more States and one or more international organizations” in the introductory part of article 12, paragraph 1, could be deleted. The term “treaty” had already been adequately defined and it was not being used in any unusual context.

21. He also agreed entirely with Sir Francis Vallat regarding article 12, paragraph 2, and the consent of an international organization to be bound. The origin of the authority to bind lay in article 7, and article 12 should be read in the light of that article. Otherwise, even the position of States might be open to question. Obviously, it was not the treaty which conferred authority to bind the parties, regardless of any possibility of signature by certain representatives of States who did not have special powers. Hence, he was not in favour of making any change in the wording of paragraph 2; to do so might well cause more problems than it would solve.

22. Mr. USHAKOV pointed out that draft article 7, paragraph 3, related not to authority to bind an organization by a treaty, but only to authority to adopt or authenticate the text of a treaty. He emphasized that the situation was entirely different in the case of a State, in which a number of persons were authorized *ex officio* to bind the State.

23. In the case of an international organization, it should be asked whether a representative authorized to adopt the text of a treaty was empowered to adopt such a text if it provided that the representative in question was authorized to sign the treaty and, by his signature, to bind the organization. He did not think that was the case and, in support of his view, he noted that draft article 12, paragraph 2, provided that the

powers of the representative of an international organization must specify that he was not only authorized to sign the treaty, but also to bind the organization.

24. He also noted that it might be advisable, in article 12, subparagraph 2 (b), to replace the word “established” by the word “expressed”, since only the organization could express its intention to be bound by the signature of its representative and the use of the word “established” left some doubt about the means of establishing the organization’s intention.

25. Sir Francis VALLAT said that in examining draft article 12 it was necessary to have regard to article 12 of the Vienna Convention, since the two articles had virtually the same purpose. The latter article had emerged from the long-standing difference of opinion among various States as to whether, on the face of the treaty, signature alone without subsequent ratification was sufficient to indicate consent to be bound. No direct solution had been found; instead, article 12 set out certain circumstances in which signature or initialling should be regarded as sufficient. Draft article 12, therefore, was concerned with the procedural stage of the expression or establishment of consent to be bound; it was not concerned with the source of the individual’s authority to bind his State or organization, which was to be found elsewhere. He had no doubt that, if one bore in mind the history and true purpose of article 12 of the Vienna Convention, Mr. Ushakov’s problem fell by the way.

26. Mr. ŠAHOVIĆ said he saw a direct relationship between draft article 12 and draft article 7. The powers of the representatives of international organizations must be understood in the light of article 7, and, in particular, of the content of the word “powers”, as defined in article 2, subparagraph 1 (c) *bis*. He thought that, taken in conjunction with the provisions of articles 7 and 12, that definition should dispel any doubts about the meaning of the latter provision.

27. Mr. USHAKOV pointed out that article 7 referred only to the situation in which a person was considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty, or for the purpose of communicating—not expressing—the consent of the organization to be bound by a treaty. Hence an international organization could be bound by the signature of its representative only if he was expressly authorized by his powers to sign the treaty and bind the organization.

28. Mr. REUTER (Special Rapporteur), summing up the discussion, said that a number of drafting points had been raised. The question of the simplification of article 12, paragraph 1, had come up again, and several members seemed to be in favour of it. The Drafting Committee would also have to consider whether the expression “the participants in the nego-

tiation” should be amended in accordance with Mr. Ushakov’s proposal.

29. The Commission had also raised a question of substance which was of capital importance, namely, the question whether, simply because there was generally no single person who fully represented the organization *ex officio* in all cases, no one could be given such powers in certain cases. But if it was agreed that an international organization could grant powers, it must also be agreed that there could be certain powers that were expressly given. On that point, he entirely disagreed with Mr. Ushakov. If Mr. Ushakov’s doubts were fully justified, the inevitable conclusion would be that no international organization could conclude a treaty by mere signature—but in practice there were hundreds, if not thousands of cases which disproved that assertion. He recognized that abuses did occur, but he was convinced that their prevention was a matter for the constitutional law of each organization concerned. He pointed out that the authors of the Vienna Convention had not wished to limit the rights of States, but that many South American States, which applied very restrictive rules to signature that could bind the State by a treaty, had, for that reason, made declarations on that point when signing that convention.

30. He would have no difficulty in agreeing to the introduction of a reservation referring to the relevant rules of the organization; but, on the other hand, he found it impossible to interpret the provisions of draft article 12 as invalidating all agreements concluded by mere signature.

31. Although articles 12 and 7 were indeed related, the expression “communicating the consent” in article 7, paragraph 4 had never been intended to signify that an international organization could not be bound by a treaty through signature alone. In any case, the Commission could not profess to draft a text that would be contrary to the current and established practice of international organizations. Article 7, paragraph 4, must certainly not be interpreted as obliging an international organization to have, in its constitutional law, a procedure preventing it from concluding agreements, in some cases, by signature alone. That was a matter for the internal law of each organization, and it was in that context that States must make any adjustments that they might consider necessary. To do otherwise and try to obtain the same result through a draft article would simply amount to preventing any action by international organizations.

32. He was in favour of referring the text of article 12 to the Drafting Committee.

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

*It was so decided.*<sup>4</sup>

ARTICLE 13 (An exchange of instruments constituting a treaty as a means of establishing consent to be bound by a treaty)<sup>5</sup>

34. Mr. USHAKOV said that he had the same reservations concerning article 13, subparagraphs 1 (a) and 2 (a), as concerning article 12. In his opinion, if a treaty was concluded by an exchange of notes, the representative of the international organization could not be authorized by the text of a mere note to affirm that he was binding the international organization. He doubted whether there were cases in which a person representing an international organization could himself assume powers to bind that organization. He acknowledged that, in practice, the situation in regard to authentication of instruments was not the same. The particular situation of international organizations in that respect should be given special consideration, even if a simplified practice was followed in some cases. In any event, the commentary to the article should mention the doubts which certain provisions might give rise to.

35. Sir Francis VALLAT said that draft article 13, like draft article 12, was concerned not with the source of authority or of power, but with the procedural mode by which consent was expressed or established internationally. The point which had been raised was in fact even less valid in the case of article 13 than in that of article 12.

36. He considered that the Commission should still endeavour to simplify and shorten the text of the draft articles where that was appropriate and worth while, and draft article 13 was a case in point. The suggestion put forward in paragraph 47 of the Special Rapporteur’s report merited further examination, but it undoubtedly raised problems, which were mainly of a drafting character. What struck him most about draft article 13 was that the wording of subparagraphs 1 (a) and 1 (b) was virtually identical to that of subparagraphs 2 (a) and 2 (b). He wondered what was to be gained by such repetition. The only point which draft article 13 should deal with (and with which the Commission should therefore be concerned), was how consent was expressed or established.

37. Mr. REUTER (Special Rapporteur) said that the comments he had made on article 12 also applied to article 13.

38. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article 13 to the Drafting Committee.

*It was so decided.*<sup>6</sup>

<sup>4</sup> For consideration of the text proposed by the Drafting Committee, see 1681st meeting, paras. 36–39.

<sup>5</sup> For the text, see para. 1 above.

<sup>6</sup> For consideration of the text proposed by the Drafting Committee, see 1681st meeting, paras. 40–41.

### Drafting Committee

39. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to appoint a Drafting Committee composed of the following members: Mr. Tsuruoka (Chairman), Mr. Aldrich, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Jagota, Mr. Njenga, Mr. Reuter, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat, Mr. Yankov and (*ex officio*) Mr. Francis, Rapporteur of the Commission.

*It was so decided.*

*The meeting rose at 11.40 a.m.*

### 1648th MEETING

*Monday, 11 May 1981, at 3.10 p.m.*

*Chairman:* Mr. Doudou THIAM

*Present:* Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, 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.4/339 and Add.1–5, A/CN.4/341 and Add.1)

[Item 3 of the agenda]

#### DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

#### ARTICLES 12–18 AND ARTICLE 2, SUBPARAS. 1 (e) AND (f) (*concluded*)

ARTICLE 14 (Ratification, act of formal confirmation, acceptance or approval as a means of establishing consent to be bound by a treaty)<sup>1</sup>

1. Mr. REUTER (Special Rapporteur) said that article 14 had not elicited any substantive comments, either in the written observations of Governments and international organizations or in the Sixth Committee. The Commission might simplify the wording of the article by deleting the words “between one or more States and one or more international organizations” in paragraphs 1 and 3.

<sup>1</sup> For text, see 1647th meeting, para. 1.

2. Mr. USHAKOV, referring to the terms “negotiating State” and “negotiating organization”, already defined in article 2, subparagraph 1 (e), and to the term “the participants in the negotiation”, which the Special Rapporteur, in the course of the discussion on article 12 (1647th meeting, paras. 2 and 3), had suggested as a replacement for those terms and had also proposed a definition in paragraph 46 of his report (A/CN.4/341 and Add.1), said that he preferred the two terms adopted on first reading, because some of the draft articles might relate not to “the participants in the negotiation”, but rather to a particular participating State or a particular participating organization. Moreover, just as the Vienna Convention<sup>2</sup> contained a definition of the term “negotiating State”, because the convention applied to treaties concluded between States, and States alone, the draft must also contain a definition of the term “negotiating State” and “negotiating organization”, because it applied to treaties concluded between these entities. According to article 3, the draft did not apply to international agreements to which one or more entities other than States or international organizations were parties, but the term “the participants in the negotiation” might give the impression of covering entities of that kind.

3. Mr. REUTER (Special Rapporteur) said that, if it was simply a matter of amending article 76,<sup>3</sup> which was the only article in the draft to contain the terms “negotiating States” and “negotiating organizations”, something would be gained by replacing them by the words “the participants in the negotiation”, because the article was particularly long. In addition to his comment on the use of the term “the participants in the negotiation” in the plural, however, Mr. Ushakov had pointed out that the reference in article 3 to entities other than States or international organizations might give rise to confusion. The Drafting Committee would have to settle that question—but in order to do so, it might have to wait until article 76 had been referred to it by the Commission.

4. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article 14 to the Drafting Committee.

*It was so decided.*<sup>4</sup>

ARTICLE 15 (Accession as a means of establishing consent to be bound by a treaty)<sup>5</sup>

5. Mr. REUTER (Special Rapporteur) said that article 15 had not given rise to any substantive comments. Since the two paragraphs of the article were nearly identical, they might be condensed into a single paragraph, which would read as follows (A/CN.4/341 and Add.1, para. 49):

<sup>2</sup> See 1644th meeting, footnote 3.

<sup>3</sup> See 1647th meeting, footnote 1.

<sup>4</sup> For consideration of the text proposed by the Drafting Committee, see 1681st meeting, paras. 42–45.

<sup>5</sup> For text, see 1647th meeting, para. 1.

“The consent of a State or of an international organization to be bound by a treaty is expressed by accession when:

“(a) the treaty provides that such consent may be expressed by means of accession;

“(b) the participants in the negotiation were agreed that such consent might be expressed by means of accession; or

“(c) all the parties have subsequently agreed that such consent may be expressed by means of accession.”

6. Mr. USHAKOV said he feared that the wording suggested by the Special Rapporteur might rule out the possibility of the treaty providing that consent to be bound could be expressed by all of the participants in the negotiation or by some of them.

7. Mr. REUTER (Special Rapporteur) said that, in the French version at least, the proposed wording did have the shade of meaning pointed out by Mr. Ushakov. The reference to the consent “of a State” or “of an international organization” and to the case in which the treaty provided that “such consent” could be expressed by means of accession covered both the case of a particular State or international organization and the case of all of the States and international organizations. From the point of view of substance, it was indeed the consent of the State or organization that opened up the possibility of acceding to the treaty. The Drafting Committee might consider it advisable to make it clear that article 15, subparagraphs (a), (b) and (c), referred to the “consent of that State or that organization”.

8. Mr. SUCHARITKUL said he wondered whether the simplification suggested by the Special Rapporteur might not have the effect of eliminating the distinction that had been drawn in paragraphs 1 and 2 between a State and an international organization. Subpara. 1 (a) referred to the consent “expressed” by the State, while subpara. 2 (a) referred to the consent “established” by the organization. Similarly, subparas. 1 (b) and (c) spoke of the consent “expressed”, while subparas. 2 (b) and (c) spoke of the consent that might “be given”.

9. Mr. REUTER (Special Rapporteur) said it was quite true that in article 7 the Commission had already made a distinction between the term “expressing the consent” of a State and the term “communicating the consent” of an organization. If it was insistent that an international organization could never “express” its consent, it would have to retain the words “such consent might be given” in the article under consideration. Indeed, on first reading, a slightly different wording had been chosen for paragraphs 1 and 2 of article 15 in order to meet that concern.

10. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article 15 to the Drafting Committee.

*It was so decided.*<sup>6</sup>

ARTICLE 16 (Exchange, deposit or notification of instruments of ratification, formal confirmation, acceptance, approval or accession)<sup>7</sup>

11. Mr. REUTER (Special Rapporteur) said that article 16 had not occasioned any substantive comments. If in article 2 the Commission added a definition of the term “the contracting entities” (see A/CN.4/341 and Add.1, para. 50), which would apply either to one or more States and one or more international organizations or to several international organizations which had consented to be bound by the treaty, regardless of whether the treaty had entered into force, the wording of article 16 could be made considerably less cumbersome. Consequently, article 17 and other articles of the draft, particularly articles 77 and 79, would also be simplified. However, the terms “contracting State” and “contracting organization”, which had already been defined, might have to be retained because they appeared in the articles relating to reservations. He therefore suggested that those two definitions should be retained for the time being and that a definition of the term “the contracting entities” should perhaps be adopted.

12. Mr. ŠAHOVIĆ said that, although he understood the reasons that prompted the Special Rapporteur to propose definitions of new terms, he was afraid that by simplifying the wording of the articles in that way the Commission might make them more difficult to understand. The danger was even greater in that the term to be defined was similar to one which had already been defined.

13. Sir Francis VALLAT said that his reaction in the matter under discussion was very similar to that of Mr. Šahović. Personally, he did not find either the English or the French version of the new term proposed by the Special Rapporteur satisfactory, but, other than for that problem of drafting, he could see no reason why article 16 should not be simplified along the lines proposed by the Special Rapporteur in his report.

14. Mr. USHAKOV cautioned the Commission about defining terms in the plural. If the term “the contracting entities” was defined, problems of interpretation were bound to arise in some cases—for example, in article 20, paragraph 1,<sup>8</sup> which contained the term “the other contracting organizations”, and article 20, paragraph 3, in which the term “another contracting organization” was used several times. Neither of those terms corresponded to the term for which a definition was now being proposed—a term which covered all of the contracting entities.

<sup>6</sup> For consideration of the text proposed by the Drafting Committee, see 1681st meeting, paras. 46–49.

<sup>7</sup> For text, see 1647th meeting, para. 1.

<sup>8</sup> See 1647th meeting, footnote 1.

15. Again, as he had already pointed out, it was not advisable to define a term which did not appear in the Vienna Convention and might, in the light of draft article 3, give rise to incorrect interpretations.

16. It would therefore be better to continue to use the terms "contracting State" and "contracting organization" and, if necessary, to define the term "the contracting entity" rather than "the contracting entities".

17. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article 16 to the Drafting Committee.

*It was so decided.*<sup>9</sup>

ARTICLE 17 (Consent to be bound by part of a treaty and choice of differing provisions)<sup>10</sup>

18. Mr. REUTER (Special Rapporteur) said that no comments had been made concerning article 17. The square brackets around the figures "19 to 23" could be deleted and, if the Commission adopted the term "the contracting entities", article 17 could be reduced to two paragraphs, which would read (A/CN.4/341 and Add.1, para. 51):

"1. Without prejudice to articles 19 to 23, the consent of a State or of an international organization to be bound by part of a treaty is effective only if the treaty so permits or if the other contracting entities so agree.

"2. The consent of a State or of an international organization to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates".

19. Article 17 could be referred to the Drafting Committee, which would take account of the comments some members of the Commission had made with regard to that simplification during the consideration of other articles of the draft.

20. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article 17 to the Drafting Committee.

*It was so decided.*<sup>11</sup>

ARTICLE 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force)<sup>12</sup>

21. Mr. REUTER (Special Rapporteur) said that article 18 had not elicited any comments and he proposed that it should be reduced to a single paragraph, which would read:

"A State or an international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

"(a) that State or that organization has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, an act of formal confirmation, acceptance or approval, until that State or that organization shall have made its intention clear not to become a party to the treaty; or

"(b) that State or that organization has established its consent to be bound by the treaty pending the entry into force of the treaty and provided that such entry is not unduly delayed".

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

*It was so decided.*<sup>13</sup>

ARTICLE 2 (Use of terms), subparas. 1 (e) ("negotiating State" and "negotiating organization") and (f) ("contracting State" and "contracting organization")<sup>14</sup>

23. The CHAIRMAN suggested that article 2, subparagraphs 1 (e) and 1 (f), should be referred to the Drafting Committee.

*It was so decided.*<sup>15</sup>

ARTICLE 19 (Formulation of reservations in the case of treaties between several international organizations) and

ARTICLE 19 bis (Formulation of reservations by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States)

24. The CHAIRMAN invited the Special Rapporteur to introduce articles 19 and 19 bis, which read:

*Article 19. Formulation of reservations in the case of treaties between several international organizations*

An international organization may, when signing, formally confirming, accepting, approving or acceding to a treaty between several international organizations, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

<sup>9</sup> For consideration of the text proposed by the Drafting Committee, see 1681st meeting, paras. 50-53.

<sup>10</sup> For text, see 1647th meeting, para. 1.

<sup>11</sup> For consideration of the text proposed by the Drafting Committee, see 1681st meeting, paras. 54-55, 1682nd meeting, para. 8; 1692nd meeting, paras. 1-8.

<sup>12</sup> For text, see 1647th meeting, para. 1.

<sup>13</sup> For consideration of the text proposed by the Drafting Committee, see 1681st meeting, paras. 56-68.

<sup>14</sup> For text, see 1647th meeting, para. 1.

<sup>15</sup> For consideration of the text proposed by the Drafting Committee, see 1681st meeting, paras. 6-14.

**Article 19 bis. Formulation of reservations by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States**

1. A State, when signing, ratifying, accepting, approving or acceding to a treaty between States and one or more international organizations or between international organizations and one or more States may formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

2. When the participation of an international organization is essential to the object and purpose of a treaty between States and one or more international organizations or between international organizations and one or more States, that organization, when signing, formally confirming, accepting, approving or acceding to that treaty, may formulate a reservation if the reservation is expressly authorized by the treaty or if it is otherwise agreed that the reservation is authorized.

3. In cases not falling under the preceding paragraph, an international organization, when signing, formally confirming, accepting, approving or acceding to a treaty between States and one or more international organizations or between international organizations and one or more States, may formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

25. Mr. REUTER (Special Rapporteur) said that the question of reservations to which articles 19 and 19 *bis* related had been discussed at length, and widely diverging points of view had been expressed on it both in the Sixth Committee and in the written observations of Governments and international organizations. The Commission itself had also paid a great deal of attention to the matter. In an earlier wording, the regime governing reservations formulated by international organizations, acceptance of such reservations and objections to them had been subject to the conditions laid down in the Vienna Convention; but the wording had been severely criticized, and the Commission had reached a compromise solution on first reading. That solution, however, had been considered unsatisfactory by one member of the Commission, who had proposed alternative wording.<sup>16</sup> Some Governments and one international organization had subsequently criticized the text adopted on first reading and expressed a preference for a more flexible solution. Many States had taken the view that, although a compromise solution was acceptable, the wording of the one that had been proposed was not satisfactory.

26. Since he was obliged to take account both of the observations of the members of the Commission and of those of Governments and international organizations, he had contacted Professor Imbert, an expert on reservations to treaties who was on secondment to the Directorate of Legal Affairs of the Council of Europe, who had brought his attention to instruments and documents that might constitute examples of reservations and, in particular, of objections to reservations, by international organizations. Like other members of the Commission, he had, until then, been of the opinion that such precedents did not exist, but the examples that had been brought to his notice might constitute such precedents.

27. The question of reservations could unquestionably give rise to practical problems, but as far as international organizations were concerned, such problems were rare. It should be borne in mind that the articles of the Vienna Convention, like those of the draft, were all residual provisions and applied only if the treaty in question did not specify what regime was applicable to reservations, acceptance of reservations and objection to reservations. In the case of treaties between States, the greatest number of difficulties arose in connection with treaties of a universal character. Such open multilateral treaties should be contrasted with two other categories of treaties, namely, bilateral treaties, to which objections could be made in principle (although reservations to such treaties in fact required the negotiations to be reopened, and they were thus of a very special nature), and closed plurilateral treaties, which involved a limited number of parties and usually specified whether reservations were possible and in what circumstances they could be accepted or objections could be made to them.

28. It should be noted that the vast majority of treaties to which one or more international organizations were parties were of a bilateral nature. By making allowance, in draft article 9,<sup>17</sup> for the possibility of multilateral treaties open to international organizations, the Commission had taken a very bold step. It would be difficult at the present time to give relevant examples of treaties of that kind, and it was unlikely that many multilateral treaties were open to international organizations unless all kinds of precautions were taken. The draft articles relating to reservations were thus of some practical value, but rather less than might be believed. The fact remained that they had given rise to strenuous objections, both in the Commission and in the Sixth Committee, and Governments seemed to be making the question a matter of principle.

29. The difficulties regarding the regime for reservations related primarily to formulation. Did international organizations that were parties to a treaty have the same rights as States in respect of the

<sup>16</sup> See *Yearbook . . . 1977*, vol. II (Part Two), pp. 109–110 and 113, footnotes 464 and 478.

<sup>17</sup> See 1646th meeting, para. 61.

formulation of reservations? It would be noted that he had considered it advisable to include an article on objection to reservations (art. 19 *ter*), which had no counterpart in the Vienna Convention, where that question was handled together with acceptance of reservations. He now experienced some doubts about the value of the proposed article 19 *ter*.

30. The question of acceptance of reservations had been the subject of a very important comment that went beyond the framework of reservations. The draft had been criticized for extending to international organizations the right to tacit acceptance by generally applying the rule that, after a period of twelve months, silence on the part of a contracting party signified tacit acceptance. Some people took the view that it was very dangerous and indeed unacceptable that, in respect of treaties, international obligations might arise for organizations otherwise than through a formal act. In that connection, the principle enunciated in the draft would, as it was now formulated, have effects that went beyond the framework of reservations and would influence provisions such as articles 45 and 65.<sup>18</sup> The problems should therefore be taken one by one.

31. With regard to the formulation of reservations, the Commission had found it possible to adopt a compromise solution that did not, generally speaking, subject organizations to the same rules as States. It gave them the same rights as States only in respect of treaties between international organizations. In the case of treaties between States and international organizations, it also gave them the same rights, except in the very frequent case in which the participation of the organization was essential to the object and purpose of the treaty. It often happened that an international organization was a party to a treaty without having the same status as the States that were parties to it, for example, when it was entrusted with supervision of the fulfilment of the obligations of those States. Its rights and obligations were then different. At the United Nations Conference on the Law of Treaties, the delegation of the United States of America had in fact been so insistent on taking account of treaties to which an international organization was a party because it had envisaged the possibility of a "trilateral" nuclear treaty. What it had had in mind was that supervision of the implementation of the rules laid down in a bilateral treaty should not be assigned to an organization such as the IAEA through treaties concluded between the two States concerned and that organization. In short, the Commission's compromise was to grant an international organization the same rights as a State when it had the same status as a State in a treaty. However, when it performed a supervisory function and the States parties to the treaty had committed themselves on the basis of such supervision, the organization knew what its supervisory functions were, and it was not desirable for it to be in a position later to formulate a reservation on what had

been agreed by the contracting States. In a case of that kind, the participation of the organization was considered essential to the object and purpose of the treaty.

32. If some members of the Commission and some Governments were so cautious about the freedom international organizations might have, it was mainly because the constituent instruments of organizations were generally silent on the question of the treaties they concluded and, in particular, on reservations. For example, the Charter of the United Nations said practically nothing about United Nations treaties. In such circumstances, practices became established, and some States were of the opinion that they did not sufficiently respect the rights of intergovernmental bodies. In his view, that problem could not be solved in the draft under consideration. It came within the constitutional law of each organization, and the Commission would be devoting itself to a study of comparative law, not international law, if it tried to draft provisions in a text that applied to the treaties, and not to the status, of international organizations. In that connection, he referred to footnote 79 of his report (A/CN.4/341 and Add.1) and pointed out that the provisions relating to the implementation of article 41 of the Agreement establishing the Common Fund for Commodities, which gave the Common Fund "full juridical personality", were not at all detailed.

33. Mention should also be made of the particular case of the European Communities, which participated in many treaties at the same time as their member States. The result was participation which, because it was similar to the participation of an international organization, might set a precedent for international organizations, and was therefore a further cause of concern for some members of the Commission and to Governments. What would the respective obligations of such an organization and its member States be if the organization and its member States formulated different reservations? If the view was taken that organizations could be parties to treaties to which their member States were also parties, it would be in keeping with the object and purpose of such treaties for their reservations to be symmetrical, so that third States could be fully aware of the obligations that had been assumed. In such a case, a prohibition on the formulation of reservations that were incompatible with the object and purpose of the treaty should be enough to allay any misgivings.

34. Although he did not intend to deal with drafting questions, he did wish to point out that the wording of article 19 *bis* might be simplified if the Commission remained faithful to its compromise solution.

35. Mr. USHAKOV said that he had three general comments to make. First, he wondered what meaning was to be attached to equality between States and international organizations. The problem was not one of placing international organizations on a fully equal footing with States in the draft. At most, the

<sup>18</sup> See 1647th meeting, footnote 1.

Commission could enunciate a rule of treaty law that applied equally to international organizations and to States. In the case of treaties concluded between international organizations, the question of equality with States obviously did not arise: the rules of treaty law applied uniformly to all organizations. The rule might be that reservations were authorized or, conversely, prohibited, and it was the same rule for all international organizations. However, nothing prevented the parties to a particular treaty from derogating from that rule and granting an organization that was a party a right by derogation from the rule. In the case of treaties between States and international organizations, there was complete equality between States and international organizations if the same rule of treaty law applied to all of them. In general, however, it was not possible, in the draft, to place States and international organizations on a footing of complete equality. Only in the matter of reservations was it possible, in some cases, to place international organizations on the same level as States. Yet, in articles 6 and 7,<sup>19</sup> for example, it had proved necessary to make a distinction between States and international organizations, in the first case because the capacity of international organizations to conclude treaties derived not from international law but from their relevant rules, and in the second case because international organizations did not have an official who was the counterpart of a Head of State, for example.

36. As to reservations, the Commission had proposed, for the text that was later to become the Vienna Convention, a set of articles under the heading "Reservations to multilateral treaties".<sup>20</sup> The Conference on the Law of Treaties, however, had removed that restriction, and the provisions of the Convention relating to reservations applied both to bilateral and to multilateral treaties. Thus, tacit acceptance of reservations after the 12-month period following the date on which the notification was given applied to all types of treaties.

37. In the draft under consideration, the Commission was dealing only with multilateral treaties, as was apparent from the wording of articles 19 and 19 *bis*. He nevertheless took it that the Special Rapporteur intended, starting with draft article 19, to cover all treaties, both bilateral and multilateral, and he doubted whether it was wise to include bilateral treaties in the provisions relating to reservations.

38. In connection with reservations, he would also like a distinction to be drawn between treaties concluded between one or more States and one or more international organizations and treaties concluded between international organizations and one or

more States. In that respect, he pointed out that some treaties were concluded chiefly between States, with the participation of one or more international organizations, and that others were concluded chiefly between international organizations, with the participation of one or more States, and therefore contained provisions that applied either to States or to international organizations and provisions that applied to all of them. In the case of the IAEA, for example, the treaties to which that organization was a party were usually treaties between States, with participation by the Agency, which performed supervisory functions. Some provisions concerned the contracting States and others concerned IAEA. That situation was obviously quite different from the one covered by the Vienna Convention, which applied only to States. Consequently, if the contracting international organizations were authorized to formulate reservations and were, for that purpose, placed on the same footing as States, it should be specified whether such organizations could formulate reservations only to provisions relating to international organizations or to all of the provisions of the treaty, including those which related to States.

39. Under the principle of equality, the same rules ought to apply to all States and to all international organizations, but it would still be necessary to determine the instances in which it was essential to provide for equality between the States parties and the international organizations parties to a treaty.

40. In his view, if the participation of the international organization was essential to the object and purpose of the treaty, the contracting international organization could be placed on an equal footing with the contracting States. Conversely, if the participation of a State in a treaty concluded between international organizations and one or more States was essential to the object and purpose of the treaty, the contracting State could be placed on an equal footing with the international organizations. He pointed out that the proposals he had made on that point in 1977 in document A/CN.4/L.253<sup>21</sup> had been based on that approach to the situation.

41. The view that it was not possible to authorize international organizations or States to formulate reservations to provisions that did not concern them had been the basis of a proposal for a wording to the effect that organizations and States were authorized to formulate reservations to certain provisions provided for by the treaty. Such a formulation might be used as a guiding principle to ensure complete equality between the contracting parties, whether States or international organizations.

42. Mr. CALLE Y CALLE said that section 2 of part II of the draft dealt with a difficult and controversial matter. The theories that had been developed on the subject of reservations had started

<sup>19</sup> See 1646th meeting, paras. 36 and 47.

<sup>20</sup> See *Yearbook . . . 1966*, vol. II, pp. 202–209, document A/6309/Rev.1, part II, chap. II, draft articles on the law of treaties with commentaries, part II, sect. 2.

<sup>21</sup> See *Yearbook . . . 1977*, vol. II (Part Two), pp. 109 *et seq.*, footnotes 464, 478, 480, 482 and 485.

with the well-known advisory opinion delivered by the International Court of Justice in 1951<sup>22</sup> when the concept of compatibility with the object and purpose of the treaty had been introduced, and the Vienna Convention had done much to further the same approach.

43. The right of States to formulate reservations was regarded as inherent in their sovereignty and in their capacity to conclude treaties. Draft article 6 recognized that international organizations also had capacity to conclude treaties: it could be said that they had acquired the right by derivation, inasmuch as States, which had created international organizations to serve the needs of the international community, had conferred such a right upon them.

44. In effect, reservations were no more than a restriction on the scope of the treaty, a view borne out by draft article 17,<sup>23</sup> which recognized that international organizations could consent to be bound by only part of a treaty. They could thus opt in favour of some reservations as opposed to others. Basically, therefore, a reservation could mean either consent to being a party to a treaty or opting in favour of one situation rather than another. Hence, the question at issue was not one of securing the ontological equality of the contracting parties, but of their assimilation. There might be a difference between contracting parties as subjects of law, but that difference could not affect the legal balance of the provisions.

45. The clause whereby an international organization could not formulate reservations if its participation in the treaty was essential to the object and purpose of the treaty was an important new element. In other cases, however, organizations should have almost as wide a capacity to formulate reservations as States, even though there might well be differences in the mode of formulating reservations or in the way of expressing objections to them. For those reasons, the capacity of international organizations should not be unduly restricted.

46. Sir Francis VALLAT said that it was very difficult in practice to persuade international conferences to make express provisions on reservations, which was why residuary articles on the subject were of particular importance. He therefore considered that the Commission should devote a little more time to those articles than it had to the preceding articles.

47. One of the basic questions concerned equality, which in his view was not quite so pertinent to the topic as the Commission had been led to believe. It was, of course, perfectly true that international organizations

and States were not equal, inasmuch as they had different status and different capacity. However, what was relevant to the topic was not the abstract idea of equality or inequality, but the fact that international organizations, by their very nature, had not only limited capacity but also their own procedures, as reflected, for example, in the rules of the organization concerned. If those two characteristics were taken into account and adequately provided for in the draft, the question of equality would be dealt with automatically. He therefore agreed with Mr. Ushakov that the whole matter turned on draft article 6 (which in a sense was the most important article in the draft), and under that article the capacity of an international organization to enter into a particular treaty was governed by the relevant rules of that organization: if it became a party to the treaty, the rules of treaty law applied as between the international organization and any other party, naturally and on a basis of equality. It was not possible to distinguish between different kinds of bodies according to whether they were organizations or States. If they were parties to the treaties, they had basically the same rights and obligations, irrespective of whether they were organizations or States. To raise a general question regarding the equality of their status therefore seemed to be largely irrelevant.

48. A difficulty arose in the case of reservations because at that point the international organization had not yet become a party to the treaty and was still in the process—on the threshold as it were—of becoming a party. Two questions must then be posed in any given case: was it within the capacity of the international organization to formulate the reservation? and was the international organization acting in accordance with its relevant rules? If it was contemplated that the international organization might become a party to the treaty, the content of the obligation in question must, by hypothesis, be within the legal capacity of that international organization and it followed that, if the international organization had the capacity to enter into the obligation, it must by implication have the legal capacity to limit that obligation by formulating a reservation.

49. That was the first basic point of principle from which he would approach the matter. Going a step further, he considered that, from the point of view of treaty law, the division of treaties into three classes, though it had arisen for sound, practical reasons, was largely artificial. However, assuming that there was such a distinction, he thought it was agreed that, so far as treaties between international organizations were concerned, there was no particular difficulty in the formulation of reservations by international organizations but that, in the case of treaties concluded between one international organization and several States, it was necessary to curb in some way the ability of organizations to formulate reservations. He wondered whether that opinion was not based on a slightly

<sup>22</sup> Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion: *I.C.J. Reports 1951*, p. 15.

<sup>23</sup> See 1647th meeting, para. 1.

distorted view of the significance of reservations. It was quite clear that a State could not alter by a formal reservation the legal position under the treaty as between two other States.

50. In that connection, he would point out that, from the definition of “reservation” contained in article 2, subparagraph 1 (d),<sup>24</sup> a reservation by an international organization would not affect the legal effect of the provisions of the treaty in their application as between States parties to the treaty, but only in their application to that international organization. If his understanding of the definition was correct, the idea that a reservation by an international organization altered the rights and obligations of the States as between themselves simply did not arise, because of the nature of the reservation. If an international organization wished to alter the rights and obligations under a treaty as between itself and other parties, whether States or international organizations, and if it was contemplated that that international organization would become a party to the treaty, then in principle it should be at liberty to formulate a reservation. It was important to start out from that basic principle and, if there were to be exceptions to it, to consider the exceptions.

51. Mr. REUTER (Special Rapporteur) said he was pleased to note that the statement by Mr. Calle y Calle was based on the same approach as the one he himself had adopted, for in his view too, it was not a matter of conferring equality on entities as such but of giving equal rights to the contracting parties to a treaty.

52. He also shared Sir Francis Vallat’s view, which was, moreover, an illustration of the saying that “he who can do more can do less”, since the mechanism of reservations made it possible only to limit commitments that had been undertaken. Sir Francis had been perfectly justified in saying that if the organization had the capacity to become a party to a treaty it could, by that very fact, and in the light of its nature and its own rules, also limit its commitments.

53. He fully grasped the meaning of the statement by Mr. Ushakov, who regretted that the suggestions he had made concerning reservations had been left out of the second version of the draft articles. It would be remembered that the question of the impossibility of entering reservations in the case of bilateral treaties had been considered at the United Nations Conference on the Law of Treaties, which had led to the Vienna Convention, but no decision had been taken on that question.

54. In proposing that a distinction should be made between treaties according to their nature, Mr. Ushakov had seemed to base his reasoning on the saying that “the accessory follows the principal”, the idea being that entities which were parties to a treaty in an “accessory” manner were ranked with the “prin-

cipal” parties. For his own part, he seriously doubted whether a distinction could, in practice, be made between treaties. He thought it necessary to propose straightforward solutions to the General Assembly, which might be averse to a text that was too subtle. One of the results of the Vienna Convention concluded in 1969 was that objections to reservations and acceptance of reservations had in the final analysis the same effect, although he was not entirely sure that that had been the original objective of the participants.

55. In the circumstances, he thought it would be preferable to say that international organizations were prohibited from formulating reservations in all cases. Indeed, Mr. Ushakov had nearly convinced him by stating that the international organization must be able to enter reservations when its participation was essential to the existence of the treaty. Nevertheless, in the text submitted to the Commission on first reading, he had, for the purposes of making a concession to that point of view, adopted an approach that was quite the reverse. Consequently, he was even more mistrustful about making the text inordinately complex.

*The meeting rose at 6 p.m.*

## 1649th MEETING

*Tuesday, 12 May 1981, at 10.05 a.m.*

*Chairman: Mr. Doudou THIAM*

*Present: Mr. Barboza, Mr. Calle y Calle, Mr. Díaz González, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, 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.4/339 and Add.1–5, A/CN.4/341 and Add.1)**

[Item 3 of the agenda]

#### **DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (continued)**

**ARTICLE 19 (Formulation of reservations in the case of treaties between several international organizations) and**

**ARTICLE 19 bis (Formulation of reservations by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States)<sup>1</sup> (continued)**

<sup>24</sup> *Ibid.*

<sup>1</sup> For texts, see 1648th meeting, para. 24.

1. Mr. BARBOZA said that many attempts had been made at codifying the subject of reservations, both regionally—for example, within the framework of the OAS, and internationally—as for example, in the Vienna Convention.<sup>2</sup> The fact that the latter, though up-to-date and complete, had not commanded unanimous support among writers was an indication of just how thorny the problem was. If that was the position in the case of treaties between such homogeneous entities as States, it was easy to appreciate how much more complicated was the case with which the Commission was now concerned, namely, treaties between such non-homogeneous entities as States and international organizations. It was therefore necessary to be extremely prudent when seeking to codify the subject, and to keep in mind the effect that a very general formulation could have on the practical life of organizations required to conclude an endless number of treaties.

2. He wished, in that connection, to remind the Commission of the advisory opinion of the International Court of Justice on *Reparation of injuries suffered in the service of the United Nations*,<sup>3</sup> which had developed case law on the question of the international personality of international organizations. Some aspects of that opinion were relevant to the topic before the Commission. The Court had, for example, underlined the need to vest with international personality the international organizations set up to perform certain functions which could not be carried out jointly by various Foreign Ministries. The most important feature of international personality was the capacity to conclude treaties. The Court, however, had held the capacity of international organizations differed from that of States and had laid down certain criteria for determining the nature of such capacity; it had, for instance, referred to the nature of the international organization, its internal rules, its objects, and the means afforded under its constituent instrument for the fulfilment of such objects.

3. It therefore seemed to him that, if the capacity to conclude treaties was such an important part of international personality, the faculty to formulate reservations must be part of that capacity. If the one was recognized, then the other must be recognized too, particularly since “reservation” was defined in the draft articles (art. 2, subpara. 1 (d))<sup>4</sup> as a statement which purported to exclude or to modify the legal effect of certain provisions of the treaty with respect to the part covered by the reservation. That quite clearly supplemented the capacity of the parties to the treaty, and particularly the capacity of international organizations. Were it otherwise, international organizations would feel bound, if certain provisions were unacceptable to them, to withdraw from a treaty, or not to

accede to it in the first place, something which would detract from the universality of treaties.

4. There were two main elements to the capacity to conclude treaties, the first being the element of liberty, which was fundamental to all treaties. The other element was equality. States and international organizations, of course, were not equal; the capacity of the latter was limited, a fact that was specifically reflected in draft article 6,<sup>5</sup> which quite properly referred to the limitations imposed by the rules of the organization. But once the organization had negotiated the particular hurdle of its own limitations, there must be equality, for equality of the parties was of the very essence of any contract.

5. He had already pointed out that rather than opt for a general position of abstract principle, the Commission should adopt a pragmatic approach and seek to achieve a compromise between the two widest-removed trends of opinion within the Commission and the Sixth Committee of the General Assembly. In his view, such a compromise was apparent in the draft articles, although there was one important exception, regarding the capacity of an international organization to enter reservations. He had in mind article 19 *bis*, paragraph 2, which placed international organizations and States on an unequal footing; conceivably, an international organization whose participation was essential to the object and purpose of the treaty might wish to enter a reservation which did not run counter to that object and purpose, but it could not do so unless it had been expressly authorized. On that point, therefore, the difference between the position of States and of international organizations was significant, and as the ILO had indicated in its comments (A/CN.4/339), it could give rise to harmful consequences. Hence it would be inadvisable to go beyond the terms of article 19 *bis*, paragraph 2, in restricting the capacity of organizations.

6. Mr. PINTO reminded the Commission that he had already stated his view (1645th meeting) that it would not be particularly helpful to consider the question of reservations from the standpoint of the equality or inequality of States and international organizations in the matter of treaty making. International organizations were fundamentally different and, as he had said, might be described as the “robots” of the international community in that they were programmed by member States to act in a certain way; to that extent, they appeared to be dependent on States in a way that States were not dependent on them. Again, international organizations could be described as composite international persons. An international organization had an international personality and was therefore more than the sum of its parts, but those parts—the member States—played a continuing role in steering the operations of the organization, something which likewise resulted in a situation of depen-

<sup>2</sup> See 1644th meeting, footnote 3.

<sup>3</sup> *I.C.J. Reports 1949*, p. 174.

<sup>4</sup> See 1674th meeting, footnote 1.

<sup>5</sup> For text, see 1646th meeting, para. 36.

dence for the international organization and a difference of quality, and hence an inequality, between States and international organizations. It would be better to adopt the kind of pragmatic approach already advocated by some members of the Commission to determine what was required in a particular case and how to provide for it.

7. In paragraph 56 of his tenth report (A/CN.4/341 and Add.1), the Special Rapporteur had drawn attention to the practice whereby an international organization was recognized as having the right to require that a reservation to a treaty that would result in unilateral modification of the organization's privileges and immunities should not be made effective unless and until the organization consented to it. He (Mr. Pinto) saw in that a basis for recognizing the right of an international organization to make its own reservations, as the obverse of its right to reject reservations made by others, including States. He agreed with that approach, and also with the Special Rapporteur's general conclusions in paragraph 65 of the report regarding the freedom of international organizations to formulate reservations and the need to formulate an exception, if any, in general terms.

8. However, without pursuing the debate on equality, all the Commission needed to do was to provide the international organization with such treaty-making capacity as was necessary for the performance of its functions. What type of capacity would it be fair to recognize in an international organization? And what type of capacity would it be unfair to withhold if the organization was to perform what it was programmed to perform? In his opinion, there were perhaps two points to be borne in mind: on the one hand, the essentially programmed operation of the international organization, and on the other, the steering capability retained by its member States. Any general limitation on the power to make reservations, or indeed on any other power, should be viewed on the basis of the limitations set forth in the rules of the organization. After all, it was the steering capability of member States that lay at the root of an organization's right to reject a reservation to which it felt unable to give its consent.

9. In the precedent regarding reservations to the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, cited by the Special Rapporteur in paragraphs 56 and 57 of his report, from where did the strength of the organization's refusal to accept a reservation derive? To his mind, it derived from the possibility of mobilizing opinion in the principal organ of the organization. There was what might be termed a current of conformity within that organ—an *opinio juris* within the constituent assembly, with the consequent threat of exposure of a particular Member to criticism. The report stated that the Secretary-General of the United Nations had urged that a reservation to the 1946 Convention on the Privileges and Immunities of the United Nations be withdrawn, and had stressed

that he would be obliged to bring the matter to the attention of the General Assembly if, despite his objection, it was maintained. Thus, it seemed that, the current of conformity was in favour of recognizing the power to reject the reservation. Similarly, it seemed that the current of conformity would recognize, when functionally necessary, the right to make reservations. For that reason, he favoured without too much hesitation the statement in paragraph 3 of article 19 *bis* on the general freedom of an organization to make reservations. He would have no objection to the particular case provided for in paragraph 2 of the same article if the Commission found it necessary, although he did not think it added much in the way of safeguards.

10. The particular case referred to in paragraph 66 of the Special Rapporteur's report might be important, but one could well ask whether there would ever be treaties in which States chose international organizations as their treaty partners and in which the international organizations or the functions entrusted to them would not arguably be essential to the object and purpose of the treaty. If they were not, what business would the international organization have in concluding a treaty with the States in the first place? If a group of States conferred certain supervisory functions on an international organization and the organization thus became an essential treaty partner, surely the way to ensure that it did not evade its obligations was to ensure correct decisions within its controlling organs and a proper orientation of the rules of the organization, rather than to draft some more or less obscure provision which restricted the power of the international organization to make reservations.

11. Lastly, he noted from footnote 79 of the report that the Special Rapporteur considered it would be beyond the scope of the report to examine, even superficially, certain types of treaties. He (Mr. Pinto) found that regrettable, particularly since the Special Rapporteur's views had started to have an influence on the negotiations at the United Nations Conference on the Law of the Sea and elsewhere.

12. Mr. SUCHARITKUL said that there were two conflicting tendencies: one to assimilate the situation of States to that of international organizations, and the other, to make a distinction between the respective situations of those entities. The controversy lay in the problem of the equality of States and international organizations.

13. Like Sir Francis Vallat (1648th meeting), he was of the opinion that, for the purposes of the application of the provisions of a treaty once it had been concluded and had entered into force, States and international organizations were equal. He also agreed with Mr. Ushakov (*ibid.*) that States and international organizations could be placed on an equal footing.

14. As had been pointed out, however, equality existed only from the standpoint of treaty law: the fact

of the matter was that not even international organizations themselves were equal, as could be seen from draft article 6, which provided that the capacity of an international organization to conclude treaties was governed by the relevant rules of that organization—and those rules varied greatly from one case to another. By contrast, article 6 of the Vienna Convention, which related exclusively to States, stated: “Every State possesses capacity to conclude treaties”, without any restriction. Hence, a State was necessarily different from an international organization.

15. It should none the less be noted that, in its draft articles and particularly in articles 27 and 46,<sup>6</sup> the Commission had endeavoured to maintain a constant parallel between the internal law of the State and the rules of the international organization. However, the internal laws of States differed, and their capacity to conclude treaties could be limited constitutionally. Earlier, the Special Rapporteur had cited the case of the French Fifth Republic, whose constitution was silent on the question of the capacity to formulate reservations. Moreover, the State itself changed and its capacity to conclude treaties was subject to changes by revisions of the constitution.

16. He therefore noted that the situation of States was not very different from that of international organizations in that regard. Yet no one could deny the obvious truth of the inequality of States and of international organizations in respect of their capacity to conclude treaties, as governed, in the case of States, by their basic law, and in that of international organizations, by their relevant rules.

17. He endorsed the Special Rapporteur’s view with regard to international legal personality and also considered that, in the field of treaty law, particular attention should be paid to the existence of capacity to conclude treaties, not to the possession of distinct international legal personality, or certain characteristics such as the existence of a permanent secretariat.

18. Similarly, he was generally in favour of the solution proposed by the Special Rapporteur in connection with practice, because the majority of treaties concluded between international organizations and States were headquarters agreements or agreements relating to the privileges and immunities of international organizations. Three major general multi-lateral treaties came to mind in that regard, namely, the 1946 Convention on the Privileges and Immunities of the United Nations,<sup>7</sup> the 1947 Convention on the Privileges and Immunities of the Specialized Agencies<sup>8</sup> and the 1975 Vienna Convention.<sup>9</sup> In practice, those instruments had been the subject of many reservations, particularly with regard to the privileges and

immunities of the nationals of the host country of an organization. The Commission should examine such practice in a more detailed manner before it formulated a final opinion on the matter.

19. He nevertheless considered that, since the capacity to conclude treaties was limited, the capacity to formulate reservations should likewise be limited. The possibility of formulating reservations should be governed by prior conditions, in particular the requirement that the treaty made provision for reservations or that reservations should meet certain conditions laid down in the treaty. The limitations on the capacity to conclude treaties should be the same as those on the capacity to formulate reservations.

20. Mr. ŠAHOVIĆ said that, at the 1648th meeting, the Special Rapporteur had described a number of ways of solving problems still outstanding. His own view was that on second reading the Commission should confine itself to improving the texts already adopted on first reading and to settling questions that had hitherto gone unanswered. He did not think it was necessary to resume a discussion that had already taken place, or that the wording of the draft should be radically altered. Sir Francis Vallat had already demonstrated how the right of international organizations to formulate reservations derived from draft article 6, and it should be noted that draft article 9, paragraph 2,<sup>10</sup> was similar in that it recognized that the “participants” in the drawing-up of a treaty had the right to state that they could not agree to the text of a treaty at the time of its adoption—a right which necessarily encompassed the right to formulate reservations.

21. With regard to the second major question, namely, that of equality between States and international organizations, the Special Rapporteur had been very precise when he had referred to the principles of the treaty regime, which was based on the freedom and equality of the parties. He personally had never had the slightest doubt: any discrimination as between States and international organizations that might slip into the draft would, in fact, signify an omission in the text prepared by the Commission. Admittedly, the various conflicting views had to be taken into account, but the Commission must none the less endeavour to promote the principle of equality between the parties to a treaty and deliberately avoid the use of a double standard, precisely for the purpose of promoting the progressive development of international law. He considered that, from the standpoint of progressive development, the Commission could freely propose a number of articles to States so that they could settle the issue later.

22. Lastly, he hoped that the Commission would move on to consider the actual text of the articles and seek to give definite shape to ideas already expressed during the first reading.

<sup>6</sup> See 1647th meeting, footnote 1.

<sup>7</sup> United Nations, *Treaty Series*, vol. 1, p. 15.

<sup>8</sup> *Ibid.*, vol. 33, p. 261.

<sup>9</sup> See 1644th meeting, footnote 7.

<sup>10</sup> For text, see 1646th meeting, para. 61.

23. Mr. VEROSTA said he shared Mr. Pinto's view that it might be necessary to give further consideration to State practice.

24. He noted that the legal opinion of the Secretary-General of the United Nations referred to by the Special Rapporteur in paragraph 56 of his report concerned a particular case that had been the result of the desire of the Member States of the Organization and the States parties to the Convention on the Privileges and Immunities of the Organization to ensure that it could adequately perform its functions.

25. He would also like the texts prepared by the United Nations Conference on the Law of the Sea mentioned earlier by Mr. Pinto to be submitted to the Commission before the end of the current discussion.

26. Lastly, he would like to know whether the practice of States and international organizations afforded other examples that might be helpful to the Commission, and, in particular, whether reservations had been made to the many treaties concluded by such a regional organization as the EEC, to which States had delegated many powers. If examples were lacking, he thought that the Commission could simply prepare a broadly worded text and leave the choice of the appropriate solution in each particular case to the member States which controlled the operations of organizations.

27. Mr. RIPHAGEN said that from the discussion it sometimes seemed as though treaties appeared out of the blue, whereas they were in fact the product of negotiations and the outcome, if not of unanimity among the negotiators, then of a majority decision reached at an international conference. In either case, there could be a lapse of time during which that product might be subject to a change of opinion. The institution of reservations, therefore, was often very necessary to save a treaty and to ensure that it was ratified by all participants. It was important to bear that in mind, particularly in the case of international organizations, which were less monolithic than States and were governed by their own internal rules. Hence it might prove necessary, in order to save a treaty and to secure the participation of the organization, to permit the organization to enter a reservation so that it could meet its obligations under its internal rules.

28. Reservations were, in a sense, a re-opening of negotiations; nobody was obliged to accept them, and they afforded an opportunity for everybody to explain his position. From the practical point of view, the Commission should be wary of any *a priori* limitation on the possibility of formulating reservations and, for that reason, he had some doubts about article 19 *bis*, paragraph 2.

29. Mr. REUTER (Special Rapporteur), referring to practice, said that in his report he had provided all the information he had been able to find on situations in which the problem of reservations had arisen. He had nothing to add on that point, particularly since in the

Commission itself reservations had been expressed about the status of the EEC as an international organization. Moreover, he was of the opinion that the special rapporteur on a particular topic must, above all, endeavour at all times to guide and simplify the discussion of his draft articles. He did not, however, have any objection to a report being submitted to the Commission on the recent work of the Conference on the Law of the Sea. He also understood that some members would like to revert to the proposals made by Mr. Ushakov in 1977.<sup>11</sup>

30. In accordance with the comments made by Mr. Šahović, he said that he would pinpoint the major areas of agreement that had emerged from the discussions. First, the Commission seemed to recognize the equality of States and international organizations in matters relating to treaties. It also recognized that a basic limitation resulted from draft article 6, which strictly limited the capacity of international organizations to formulate reservations. In his opinion, it was the task of the Drafting Committee to decide whether reference should be made in every article to the limitations placed on reservations by article 6. In addition, the Commission agreed that a general limitation resulted, in the case of international organizations, from the definition of reservations itself, and that a third limitation lay in the provisions of the actual treaty, which could provide that certain reservations were precluded or that the right of an international organization to enter reservations was expressly limited.

31. Agreement on those points having been reached, difficulties then arose in trying to formulate the articles themselves. Most of the members of the Commission seemed to be in favour of the text prepared on first reading, which, in principle, offered the possibility of formulating reservations with certain minimum and additional limitations, while the draft submitted on second reading embodied only a single and relatively specific limitation. The real problem was one of deciding how to express limitations other than those on which the members were in agreement. Some members had been of the opinion that article 19 (c) of the Vienna Convention set a general limitation, namely, that of compatibility with the object and purpose of the treaty. He noted that draft article 19 *bis*, paragraph 2, did not use any other criterion.

32. He nevertheless wondered whether the criterion of the object and purpose of the treaty did not involve special limitations for international organizations and whether it would not be preferable to try, without using wording that was too strict, to state that the object and purpose of the treaty comprised, in the case of the participation of international organizations, limitations that should be enunciated in a single sentence, which might read: "Reservations by an international organization which . . . may be contrary to the object

<sup>11</sup> See 1648th meeting, footnote 21.

and purpose of the treaty". The sentence would cite a number of cases as examples, including that of a contradiction between a reservation by an international organization and a reservation by a State. He was grateful to Mr. Ushakov for seeking to draw a general distinction between various categories of treaties, some of which were concluded chiefly between organizations and others chiefly between States. He did not, however, think it was possible to establish categories that the authors of the Vienna Convention themselves had abandoned the idea of establishing in the field of treaties between States. Admittedly, the object and the purpose of the treaty were vague criteria, but it should be possible to cite as examples certain cases that were characteristic of the particular situation of international organizations.

33. Mr. USHAKOV said he wished again to emphasize the fact that, although the provisions of the Vienna Convention relating to reservations applied to both multilateral and bilateral treaties, the draft articles relating to reservations must apply only to multilateral treaties. The United Nations Conference on the Law of Treaties had had good reasons for deciding to depart from the draft articles prepared by the Commission and not to confine itself to multilateral treaties alone. The deletion by the Special Rapporteur of the terms "treaty between one or more international organizations", "treaty between States and one or more international organizations" and "treaty between international organizations and one or more States" did not signify that the draft could be said to cover bilateral treaties between two organizations or between a State and an organization. In the case of treaties between States, it might, for political reasons, be useful for States to be able to formulate reservations not only to multilateral treaties but also to bilateral treaties. If the Parliament of one of the two States parties to a bilateral treaty ratified the treaty without any reservations and the other State party entered a reservation, all that was required was twelve months of silence for the reservation of the second State to be accepted, without the Government of the first State having to bring the matter before Parliament again. There did not, however, seem to be any reason for a similar rule in the case of bilateral treaties between two international organizations or between an organization and a State.

34. It should also be noted that the capacity to formulate reservations was in no way related to the capacity to conclude treaties. As indicated by article 6 of the Vienna Convention, there was no limit on the capacity of States to conclude treaties. Any State could conclude any treaty but, as was apparent from article 19 of the Vienna Convention, it could not formulate any reservation it pleased. The same was true of international organizations. The fact that an international organization possessed the capacity to conclude treaties did not mean that it could also formulate any reservation it pleased.

35. Again, in the matter of reservations there were at present no rules of customary international law that applied to the treaties to which international organizations were parties, and in particular to treaties concluded exclusively between international organizations. By proposing rules on the matter, the Commission was engaging not in the codification but in the progressive development of international law. However, the rules relating to reservations to treaties concluded between States had been codified in the Vienna Convention on the basis of established practice and international legal decisions.

36. Turning to the draft article 19 (Formulation of reservations) which he had proposed,<sup>12</sup> he said that he attached more importance to clear legal situations than to simple wording.

37. Paragraph 1 of his proposal enunciated the rule that an international organization which was a party to a treaty between several organizations could formulate a reservation if such a reservation was expressly authorized by the treaty or if it was otherwise agreed that the reservation was authorized. That was a straightforward legal situation: when a reservation was authorized, there could be no possibility either of an objection to that reservation or of separate relations between the party which formulated the reservation and those which either accepted it or did not. It was clear that, for the time being, only limited multilateral treaties concluded between organizations could be covered. Multilateral treaties open to participation by all international organizations were inconceivable. Therefore, why not enunciate the rule that a reservation must be authorized, either in the treaty itself or after the conclusion of the treaty? It would complicate the situation to adopt the same solution for treaties between international organizations as for treaties between States. It should nevertheless be made clear that the treaties between organizations covered by the draft were exclusively limited treaties.

38. Paragraph 2 of the text he had proposed applied to treaties between States and one or more international organizations. Since such treaties chiefly governed relations between States, with the participation of one or more international organizations, the rule proposed was similar to that contained in article 19 of the Vienna Convention. Every State could, in principle, formulate reservations concerning its relations with the other States parties.

39. Paragraph 3 provided that in the case of such a treaty an international organization could formulate a reservation if the reservation was expressly authorized by the treaty or if it was otherwise agreed that the reservation was authorized. An international organization could not be authorized to formulate any reservation it pleased when the treaty essentially

<sup>12</sup> *Yearbook ... 1977*, vol. II (Part II), pp. 109–110, footnote 464.

involved the relations between the States that were parties to it. As in the case covered by paragraph 1, no problem of acceptance of the reservation or objection to the reservation would arise, because the reservation was authorized.

40. Paragraph 4 applied to those treaties between States and one or more international organizations in which the participation of the organization was essential to the object and purpose of the treaty. The situation of the States parties was then assimilated to that of the organization: they could formulate a reservation if the reservation was expressly authorized by the treaty or if it was otherwise agreed that the reservation was authorized. The rules whose implementation the organization was responsible for supervising did not directly concern the organization but were none the less of great importance to it, because reservations formulated by States could, by amending those rules, affect the organization's supervisory functions. Yet, when it concluded the treaty, the international organization undertook to carry out a particular type of supervision.

41. In paragraph 5, relating to treaties concluded by international organizations with the participation of one or more States, the situation of the State was assimilated to that of the organization. That solution also settled the problem of objections.

42. The first alternative for draft article 19 proposed by the Special Rapporteur (A/CN.4/341 and Add.1, para. 69) called for one final comment of a drafting nature. Paragraph 2 of that draft article, which concerned the capacity of an international organization to formulate reservations, used the words "a treaty" and stated that the organization could not formulate reservations to the treaty "with regard to the application of the latter by States". However, the term "a treaty" could apply to both multilateral and bilateral treaties. Obviously, a bilateral treaty between a State and an organization could be applied only by one State and not by States. Again, a treaty concluded between international organizations and a State could not be applied by States, in the plural, nor could a bilateral treaty between two organizations. Hence, it was not possible to refer to "a treaty" in that provision.

43. Mr. QUENTIN-BAXTER said he subscribed to the view of Sir Francis Vallat (1648th meeting) and other speakers that it would not be expedient to attempt to limit the power to enter reservations to treaties. He was, therefore, wholly sympathetic to the aim of achieving general equality between the parties to such instruments.

44. On the other hand, he also tended to share the doubts expressed by, for example, Mr. Riphagen, concerning the advisability of maintaining the substance of article 19 *bis*, paragraph 2, either as it had been adopted on first reading or as it was now proposed by the Special Rapporteur in paragraphs 69 and 70 of his report.

45. A provision of that kind did have some value, inasmuch as it sought to focus attention on the particular situation in which the participation of an international organization was essential to a treaty; but, as Canada had pointed out in its comments (A/CN.4/339), it was difficult to relate the phrase "essential to the object and purpose of a treaty" to the phrase "incompatible with the object and purpose of the treaty", which appeared in the present version of article 19 *bis*, subpara. 3 (c). The difficulty arose less from the exacting requirement of defining the "object and purpose" (or in other words, the "essence") of a treaty than from a confusion of thought, an attempt to align in the article two different prohibitions, namely, a ban on reservations by a party whose participation in a treaty was essential and a ban on reservations that touched the essentials of a treaty.

46. Still greater difficulty would be caused by replacing the text of article 19 *bis*, paragraph 2 and subparagraph 3 (c), by the version proposed by the Special Rapporteur in paragraph 70 of his report. In that respect, he very much agreed with the views of the ILO—which was to be commended for having responded, and responded to such constructive effect, to the Commission's appeal for comments—as recorded in paragraphs 12 to 14 of its comments (A/CN.4/339). If a treaty was built around the functions of a particular international organization, reservations by the organization that related to those functions would automatically be precluded as being incompatible with the object and purpose of the instrument. There did not, however, seem to be any real reason for precluding reservations by the organization that were incidental to the object and purpose of the treaty and that had no connection with the organization's special role.

47. The Special Rapporteur's proposal to delete article 19 *ter* (A/CN.4/341 and Add.1, para. 74) was all the more welcome because the difficulties to which he himself had alluded would be compounded if that provision was maintained in anything like its present form.

*The meeting rose at 1 p.m.*

## 1650th MEETING

*Wednesday, 13 May 1981, at 11.05 a.m.*

*Chairman: Mr. Doudou THIAM*

*Present: Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Diaz González, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, 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.4/339 and Add.1-5, A/CN.4/341 and Add.1)

[Item 3 of the agenda]

**DRAFT ARTICLES ADOPTED BY THE COMMISSION:  
SECOND READING (continued)**

**ARTICLE 19** (Formulation of reservations in the case of treaties between several international organizations) and

**ARTICLE 19 bis** (Formulation of reservations by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States)<sup>1</sup> (concluded)

1. Mr. FRANCIS, referring to the ILO's comments on reservations (A/CN.4/339), said the ILO appeared to believe that, under the terms of article 19 bis, express authorization was required for the formulation by an international organization of reservations to non-essential elements of a treaty in which that organization's participation was itself essential. In his own view that was a fallacy, for paragraph 2 of the article permitted reservations both by express authorization and by agreement in some other form; he was sure that, in practice, it would readily be "otherwise agreed", both by States and by international organizations, that an organization in such a situation might enter reservations to the elements of a treaty that were not essential to its object and purpose.

2. Again, the Commission should always take care, on its second reading of draft articles, to preserve the compromises it had reached on first reading. Originally he had thought that international organizations should be granted the same rights as States in all aspects of treaty-making, but now believed that, in the case in point, the kind of compromise mentioned by the Special Rapporteur in paragraph 54 of his tenth report (A/CN.4/341 and Add.1) was necessary. He was encouraged in that belief by the comment from the Government of Canada (A/CN.4/339) that:

The Commission appears to be on the right track in proposing a rather more restrictive rule for reservations and objections by international organizations in these cases. It is to be hoped, however, that the Commission will be able to formulate some alternative wording to express this approach, in order to avoid possible controversy where the participation of an international organization is not essential to the object and purpose of the treaty.

3. Sir Francis VALLAT said that the discussion had brought him to a different conclusion from that reached by Mr. Francis on the subject of reservations by international organizations. The Commission must, as a general rule, be very careful about incorporating compromise formulas in its proposals. Its task was one

of codification, and it must be guided less by a concern to resolve passing political problems, to which a compromise might be the best solution, than by the objective of drafting rules of lasting value.

4. More specifically, since article 19 bis, paragraph 2, envisaged a situation in which it was necessary for a particular international organization to be a party to a treaty, the principal objective of that paragraph must surely be to create conditions in which such participation was possible. In practice, it was not States but, by reason of their relevant rules or their purposes or constitutions, international organizations that were the most likely to experience difficulties with the provisions of a draft treaty. The easiest way of overcoming such difficulties, and thus promoting participation by organizations in treaties, was to authorize reservations—provided, of course, that no reservation went to the root of the functions which a treaty conferred upon the reserving organization. As currently drafted, article 19 bis, paragraph 2, had, so to speak, got the wrong end of the stick and had no place in a work of codification.

5. He had given further careful study to article 19 as proposed by Mr. Ushakov at the Commission's twenty-ninth session,<sup>2</sup> and, by comparison with the corresponding provisions of the Commission's draft, found it unduly restrictive. The article, although simply worded, would in fact complicate the situation, since it would entail the elaboration of express provisions concerning reservations and, as the members of the Commission knew from experience, it was always very difficult to secure the adoption of such provisions at an international conference. He therefore urged that the Commission should base its further work in the field of reservations on the articles 19 and 19 bis that it had adopted on first reading.

6. Mr. REUTER (Special Rapporteur), said that, before summing up the discussion, he would like to reply to two comments made by Mr. Ushakov.

7. At the previous meeting, Mr. Ushakov had pointed out that the words "by the treaty with regard to the application of the latter by States" contained in paragraph 2 of the first alternative text of article 19 proposed by the Special Rapporteur (A/CN.4/341 and Add.1, para. 69) were not satisfactory because that paragraph spoke of "a treaty", something which implied that it could also be applied by international organizations. Mr. Ushakov had been altogether correct in making that comment, which also applied to the alternative proposed in paragraph 70 of the report. The Commission could solve that drafting problem either by reverting to the original detailed wording or deleting the words "by States", and in that way refrain from specifying the entity by which the treaty was being applied.

8. Mr. Ushakov had also pointed out at the 1649th meeting that, in the form adopted on first reading,

<sup>1</sup> For the texts, see I648th meeting, para. 24.

<sup>2</sup> See I649th meeting, footnote 12.

articles 19 and 19 *bis* conveyed a shade of meaning that was missing from the two variants for the new article 19 which he (the Special Rapporteur) had proposed. In their detailed versions, those two articles related exclusively to multilateral treaties. It was quite true that that shade of meaning had been lost: over-simplification of the wording necessarily led to simplification of the substance. During the first reading, the Commission had adopted wording clearly indicating that the articles on reservations applied to multilateral treaties alone, and had done so precisely on Mr. Ushakov's initiative. He was sorry that none of the members of the Commission had expressed views on the second comment by Mr. Ushakov. If the Commission wanted to introduce the clarification sought by Mr. Ushakov, it would have to revert to the wording adopted on first reading, a course that would prevent it from simplifying the wording of articles 19 and 19 *bis*.

9. When he had proposed merging the two articles into a single provision, he had been fully aware that the shade of meaning pointed out by Mr. Ushakov would be lost. He had opted for such a solution because he was not sure that the Commission was convinced of the need for the draft articles on reservations to apply exclusively to multilateral treaties; the fact that it had not followed up Mr. Ushakov's suggestions regarding substance might explain why it had not had anything to say about such a change in form. In any case, it would be useful for the Drafting Committee to know exactly what the Commission's view was on that point. To argue on the basis of article 20 of the Vienna Convention,<sup>3</sup> as Mr. Ushakov had done in support of his position, was not persuasive. The use of the words "the other contracting States" in article 20, paragraph 1, of the Vienna Convention did not make it possible to say with any certainty that the articles of that instrument on reservations applied only to treaties concluded by not less than three States.

10. In that connection, he would like to offer an example suggested to him by the last comment made by Sir Francis Vallat. If a bilateral treaty was concluded between a State and an international organization, one of the organization's intergovernmental organs might find that, in terms of the organization's constitutional procedure, the text adopted was not acceptable for constitutional reasons. The easiest way out for the organization would be to approve that text and formulate a reservation. Usually, international organizations could formulate reservations only to multilateral treaties, but if, in the case in question, the organization formulated a reservation and the State concerned accepted it, a delicate problem of law would arise. Again, a State party to a multilateral treaty might formulate a reservation which was not authorized and another State party might accept it. The agreement concluded was, in the final

analysis, a partial agreement to which special provisions applied. All in all, bilateral agreements were the ones which seemed to give rise to the fewest difficulties in cases of that kind. The Commission could either reopen the discussion of the question raised by Mr. Ushakov or leave it to be settled by the Drafting Committee.

11. The text of article 19 proposed by Mr. Ushakov did not call for any further comments. It reflected a very straightforward position that could be described in the following way: international organizations could only formulate reservations that were expressly authorized, either by the treaty or otherwise. Nevertheless, it had to be emphasized that, if the Commission or any future international conference was one day inclined to adopt such a solution, it would probably be extremely difficult to explain the concept of a treaty that was concluded chiefly between States but in which an international organization was allowed to participate, and the concept of a treaty that was concluded chiefly between international organizations but in which a State participated in an accessory manner. Those concepts were ingenious, but difficult to apply. Admittedly, a trilateral treaty for the supply by one State to another State of fissionable material, with the participation of an international organization that was entrusted with the task of ensuring that the beneficiary State respected certain conditions, was an example of a treaty concluded between States with the participation of an international organization; but not all treaties concluded between States and an international organization necessarily came within that category. Similarly, treaties concluded between international organizations and a State were not always treaties concluded chiefly between international organizations with the participation of a State. In the important field of international assistance, several international organizations might, for example, conclude a treaty with a State for the execution of a large drainage project. He would be reluctant to say that such a treaty was a treaty concluded mainly between international organizations. Hence, the two concepts proposed by Mr. Ushakov did not seem easy to use, but the same criticism could also obviously be made of the alternatives under consideration.

12. No matter how the exceptions were worded, in the final analysis it would be difficult not to generalize, and that might give rise to problems of application. In the absence of very straightforward provisions indicating what was authorized and what was prohibited, some flexibility in the application of treaties was to be expected—but that was not necessarily a bad thing.

13. The views expressed by the members of the Commission on the articles under consideration could be divided into three categories. Mr. Ushakov (1648th and 1649th meetings) had stated that he was opposed to a liberal solution, other members had stated that they were in favour of such a solution, and others, such as Mr. Pinto (1649th meeting) and Mr. Verosta (*ibid.*),

<sup>3</sup> See 1644th meeting, footnote 3.

had said that they were not in a position to make a final judgement. Those in favour of a liberal solution had expressed divergent views on article 19 *bis*, paragraph 2. Mr. Barboza (*ibid.*), Mr. Šahović (*ibid.*) and Mr. Francis were clearly in favour of retaining the restriction contained in that provision but considered that the wording was not satisfactory and, quite possibly, the idea expressed therein should not even be adopted in the end. Mr. Quentin-Baxter (*ibid.*), Mr. Riphagen (*ibid.*) and Sir Francis Vallat were opposed to that paragraph; in their view, the wording was unsatisfactory and other wording ought to be found. Mr. Sucharitkul (*ibid.*) seemed to be in favour of retaining the restriction enunciated in article 19 *bis*, paragraph 2, but in a different form. Mr. Calle y Calle (1648th meeting) had stated that he was in favour of a liberal solution.

14. If the articles under consideration were referred to the Drafting Committee, it would have to consider not only matters of a purely drafting nature but also the problem of article 19 *bis*, paragraph 2, on the understanding that it accepted the guidelines contained in articles 19 and 19 *bis*. There could be no question of carrying on the same substantive discussion indefinitely in the Drafting Committee.

15. Sir Francis VALLAT said, with reference to the Special Rapporteur's comments on the possibility of reservations to bilateral treaties, that his own instinctive belief had always been that such reservations were a nonsense and were impossible. However, in recent years he had had experience of two cases in which the possibility of such reservations had been admitted: in the first case, the party concerned had ultimately decided against formulating a reservation, but in the second case, a reservation had been made at the time of deposit of an instrument of ratification. The reason why the possibility of such reservations might be admitted was, in the final analysis, relatively simple: bilateral treaties were often negotiated in such a climate of political strain and public interest in the countries concerned that, once agreement had been reached on a text, practical considerations made it impossible to reopen the negotiations. In such circumstances, a party having second thoughts about any provisions of the text had little opportunity to make its opinions known other than at the time of ratification. It was simpler to view such notifications not as invitations to renegotiate the treaty but as reservations within the meaning of the Vienna Convention, with all that that entailed in the way of objections and so on.

16. In view of his slight, and hence inconclusive, practical experience of such situations, he did not wish to suggest that the Commission's draft should deal with bilateral treaties. The best solution would seem to be to adopt a text which, like that approved on first reading, implied that it concerned only multilateral treaties, and to leave the question of reservations to bilateral instruments open until some future date.

17. Mr. USHAKOV, referring to a comment by the Special Rapporteur, said he was not sure it had been on his initiative that the Commission had decided to deal exclusively with multilateral treaties in the articles on reservations. However, he was certain that the Commission had been unanimous in recognizing the need to confine itself to treaties of that kind.

18. Mr. ŠAHOVIĆ said that he shared the views expressed by Sir Francis Vallat on the problem of reservations to bilateral and multilateral treaties. Indeed, he seemed to recall that, when the Commission had elaborated its draft articles on the law of treaties, it had not clearly indicated in the commentary what course should be followed. Perhaps it would be wiser not to take a final decision at the present time either. On the one hand, practice should not be prevented from developing, and on the other, the Commission did not seem to be entirely clear whether States should be able to formulate reservations to bilateral treaties.

19. With regard to article 19 *bis*, paragraph 2, his position had been based on the fact that the situation governed by that provision could have adverse effects on the freedom of international organizations to formulate reservations. The Commission might well be attaching too much importance to that situation if it referred to it expressly. The Drafting Committee should examine the matter in the light of the over-all solution to the problem of reservations. If the Drafting Committee considered that article 19 *bis*, paragraph 2, was necessary, arguments should be put forward in support of it.

20. Mr. RIPHAGEN said that, to his mind, there could not, *a priori* be any limit on reservations to bilateral treaties. After all, the principal objective in undertaking the negotiation of a treaty was to bring the instrument into force. In the case of a bilateral treaty, that objective would automatically be frustrated if reservations were not permitted. A party which decided that the text required amendment and was deprived, by reason of a prohibition on reservations, of the possibility of reopening the negotiations would have no choice but to withdraw from the treaty altogether. The Treaty concerning the Permanent Neutrality and Operation of the Panama Canal (1977) was an example of a bilateral instrument which it had been possible to conclude by reopening the negotiations.

21. Reservations created a problem only with regard to multilateral treaties, upon which, as the Special Rapporteur had remarked, they had the effect of splitting into a series of "partial agreements". The United Nations Conference on the Law of Treaties had endorsed the current system of reservations despite that defect, because of the obvious difficulty of reconvening a conference each time any of the provisions of a treaty was called into question. The system remained the best solution available.

22. Mr. CALLE Y CALLE said he did not think that the possibility of formulating reservations to bilateral treaties should completely be ruled out, nor did he consider that there should be any *a priori* prohibition on such a possibility. It seemed to him that there had been a tendency at the United Nations Conference on the Law of Treaties not to consider that possibility, since the expression “the other contracting States”, in the plural, appeared in article 20, paragraph 1 of the Vienna Convention, and the expression “the other parties”, also in the plural, was contained in article 21 of that convention.

23. The whole of article 21, which dealt with the legal effects of reservations, was based on the idea that a plurality of legal regimes, deriving from the effect of the reservations, should co-exist within the framework of the treaty. In the case of a bilateral treaty, if one of the parties wished to reduce the extent of its obligations, it could make a proposal to that effect at the time of the negotiations; if it wished to do so after signature, it would have to make a fresh proposal, something which would be tantamount to reopening the negotiations. The parties might well decide to refer to the temporary or permanent suspension of a particular clause as a “reservation”, but so far as he was concerned, it signified further agreement to suspend or reduce the obligation.

24. In that connection, he noted that article 20, paragraph 3, of the Convention provided that, when a treaty was a constituent instrument of an international organization, a reservation had to be accepted by the organization through its competent organ. Hence there was added reason to admit the possibility of reservations when organizations were parties to the treaty itself, for they would then have a greater right to accept and object to reservations.

25. Lastly, with reference to Mr. Ushakov's 1977 proposal, he was grateful for the effort made to find some clearer wording for article 19. He considered, however, that paragraphs 3 and 5 of the proposal did not bring out the subtle distinction between treaties concluded chiefly between organizations but involving the participation of one or more States and treaties concluded chiefly between States but involving the participation of one or more organizations.

26. Mr. TABIBI said that he endorsed the compromise solution discussed by the Special Rapporteur in paragraph 54 of his report (A/CN.4/341 and Add.1).

27. With regard to reservations to bilateral treaties, he did not think the Commission should take a position on the question of a complete prohibition on reservations, since much could happen between the time a treaty was negotiated and the time it was signed and ratified. There might well be good reasons to reopen the negotiations and, in the event of any new developments, both States and international organizations should have the opportunity to make known their wishes.

28. Lastly, he agreed that the matter should be left open to allow Member States and organizations more time to reflect and to submit their views.

29. Mr. NJENGA said that reservations to bilateral treaties were normally made in the course of the negotiations when one party had not managed to provide for certain of its interests. If the matter was not resolved at the time, there was no treaty: it was as simple as that. And if one of the parties, after signing the treaty, subsequently sought to introduce a reservation, the other side would be entitled to regard such conduct as an act of bad faith. That was not the way things were done in bilateral treaties, at least not in his experience. The proper course to follow, if a new situation arose, was for the party seeking an amendment to request a revision of the agreed terms. If the other side accepted that request, there was no problem; otherwise, the negotiations were reopened.

30. In the light of those considerations, he thought it better for the Commission to confine itself to the question of multilateral treaties, for it would merely create innumerable problems if it entered into the matter of bilateral treaties.

31. With regard to draft article 19, he agreed in general with the compromise formulation but experienced the same difficulties as Sir Francis Vallat. Specifically, article 19 *bis*, paragraph 2, dealt with a situation in which an international organization was required, because of the functions entrusted to it, to be a party to a treaty. To prevent an organization from making reservations to the treaty would simply mean placing obstacles in its way to becoming a party to the treaty, and he failed to see what was to be gained by a restrictive regime in that instance. After all, a reservation by the international organization might be entirely unconnected with the functions entrusted to it; it could, for instance, be connected with its own internal rules.

32. In the circumstances, he considered that, when the Drafting Committee came to consider article 19 *bis*, it should not rule out the possibility of omitting paragraph 2.

33. Mr. USHAKOV said that a decision at the present time was obviously out of the question. He nevertheless noted that the wording already adopted, which provided for the possibility of reservations to a treaty between States and one or more organizations, left the question of reservations to bilateral treaties open. However, if the Commission altered the wording of the provision and used the formula “treaty between international organizations”, it would then be referring both to multilateral treaties and to bilateral treaties concluded between two international organizations. Such a course would mean not a change in the text, but a change in the meaning of the draft articles, so as to allow for the possibility of formulating reservations to multilateral treaties.

34. In his opinion, the Commission was confronted not with a theoretical problem, but simply with the adoption of a specific decision on the wording of the article under consideration.

35. Mr. REUTER (Special Rapporteur) said that the situation was quite simple: first, the Commission wished to retain the wording of the text on reservations adopted on first reading; and second, it should explain in the commentary that the wording was being retained because the subsequent articles related to multilateral treaties, and the question of bilateral treaties remained open.

36. He thought that the Commission could refer articles 19 and 19 *bis* to the Drafting Committee.

37. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer articles 19 and 19 *bis* to the Drafting Committee.

*It was so decided.*<sup>4</sup>

#### Organization of work (continued)\*

38. The CHAIRMAN informed the Commission of the conclusions adopted by the Enlarged Bureau at the meeting it had held on 13 May 1981.

39. With regard to the organization of the work of the thirty-third session, the Enlarged Bureau had tentatively adopted the following programme:

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| 1. Jurisdictional immunities of States and their property (item 7) . . . . .   | 18-22 May      |
| 2. Succession of States in respect of matters other than treaties (item 2) . . . . .   | 25 May-12 June |
| 3. Question of treaties concluded between States and international organizations or between two or more international organizations (item 3) . . . . . | 15-19 June     |
| 4. State responsibility (item 4) . . . . .   | 22 June-3 July |
| 5. International liability for injurious consequences arising out of acts not prohibited by international law (item 5) . . . . .                       | 6-10 July      |
| 6. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (item 8) . . . . .                                    | 13-17 July     |
| 7. Adoption of the Commission's report . . .   | 20-24 July     |

That programme was open to changes.

40. The Enlarged Bureau had also decided to establish a Planning Group composed of the following members: Mr. Quentin-Baxter (Chairman), Mr. Barboza, Mr. Bedjaoui, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Riphagen, Mr. Šahović, Mr. Tabibi, Mr. Ushakov and Sir Francis Vallat.

41. In addition, he (the Chairman) had considered the matter referred to him by the Secretariat con-

cerning the request for information made by the secretariat of UNCITRAL and had decided to refer it to the Planning Group and authorize the Secretariat to send a tentative reply indicating that the matter was under consideration.

42. Lastly, the Enlarged Bureau had proposed that the Commission should meet on Ascension Day, Thursday, 28 May, but no meeting should be held on Whit Monday.

43. If there were no objections, he would take it that the Commission adopted the proposals by the Enlarged Bureau.

*It was so decided.*

*The meeting rose at 12.30 p.m.*

### 1651st MEETING

*Thursday, 14 May 1981, at 10.10 a.m.*

*Chairman:* Mr. Doudou THIAM

*Present:* Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Diaz González, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

#### Statement by the Chairman

1. The CHAIRMAN expressed his horror at the acts perpetrated against His Holiness Pope John Paul II, to whom he extended his own and the Commission's best wishes for a quick recovery.

#### Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/339 and Add.1-5, A/CN.4/341 and Add.1)

[Item 3 of the agenda]

#### DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (continued)

ARTICLE 19 *ter* (Objection to reservations)

2. The CHAIRMAN invited the Special Rapporteur to present draft article 19 *ter*, which read:

#### *Article 19 ter. Objection to reservations*

1. In the case of a treaty between several international organizations, an international organization may object to a reservation.

<sup>4</sup> For consideration of the texts proposed by the Drafting Committee, see 1692nd meeting, paras. 19-24.

\* Resumed from the 1643rd meeting.

2. A State may object to a reservation envisaged in article 19 *bis*, paragraphs 1 and 3.

3. In the case of a treaty between States and one or more international organizations or between international organizations and one or more States, an international organization may object to a reservation formulated by a State or by another organization if:

(a) the possibility of objecting is expressly granted to it by the treaty or is a necessary consequence of the tasks assigned to the international organization by the treaty; or

(b) its participation in the treaty is not essential to the object and purpose of the treaty.

3. Mr. REUTER (Special Rapporteur) reminded the Commission that, on the question of the right to submit objections to reservations, it had adopted on first reading an article 19 *ter* parallel to the provisions on reservations but enlarging the right of international organizations, which it authorized to submit objections in cases where they were not entitled to enter reservations. The Commission had, however, intimated that it was not entirely satisfied with that solution.

4. He noted that the Vienna Convention,<sup>1</sup> which applied only to States, contained no separate article on objections, which it dealt with incidentally in the articles on the acceptance of reservations, the effects of reservations, and the withdrawal of reservations and objections to reservations. Moreover, that instrument did not even define objections.

5. It was also quite clear that objections were less closely linked with the right to submit reservations than with the capacity of a State to become a contracting party or signatory to a treaty; for if a treaty prohibited reservations, States might nevertheless accompany their signatures or expressions of consent to be bound by the instrument with texts which they would call, for example, interpretative declarations. In such cases, States could not be prevented from objecting to what were, in fact, reservations.

6. It was essential to determine whether an objection to a reservation could only be based on a legal argument (the fact that no possibility of making reservations was provided for in the treaty, for example) or whether a legitimate objection could be based on grounds of interest alone. The Expert Consultant for the United Nations Conference on the Law of Treaties, to whom that question had been referred, had considered that a State could legitimately formulate an objection to a reservation on grounds of interest. In practice, however, States would advance a legal argument in support of their objection.

7. It should be noted that, under the regime of objections established by the Vienna Convention, the effect of a simple objection to a reservation was no different from that of acceptance of the reservation. Consequently, he very seriously doubted whether any useful purpose would be served by including an article on objections to reservations in the Commission's

draft. He emphasized that, by deciding to go further than the Vienna Convention and attempting to clarify the question of objections, the Commission might raise difficulties which could affect that convention.

8. The faculty of making objections to reservations was linked with the status of contracting party, and the Commission certainly need not examine that problem. If it decided that international organizations never had the right to make objections to reservations, it would make them greatly diminished entities which would not even have any means of protecting their rights. It might therefore be wiser not to include a provision such as article 19 *ter*.

9. Mr. USHAKOV said he thought there was certainly some justification for article 19 *ter*. A treaty between States and one or more international organizations could create relations between States proper, as was shown by article 3 of the Vienna Convention. The Commission must therefore decide whether international organizations which were parties to such instruments could formulate reservations to provisions relating to States. Sir Francis Vallat (1648th meeting) had demonstrated that, by its very wording, draft article 2,<sup>2</sup> subparagraph 1 (*d*), precluded that possibility.

10. However, the situation seemed different where objections to reservations were concerned; for if the draft contained no definition of an objection, no limitation would be imposed by the text of the future instrument—which was not the case in regard to reservations. But although it was logical to think that an organization could not object to reservations formulated by States concerning their relations *inter se*, it must nevertheless be able to object to reservations by States if they changed relations between States created by the treaty and those relations were part of the very reason for which the organization intended to become a contracting party. Similarly, a State could obviously not object to reservations which concerned relations between international organizations *inter se*, but it must be able to make an objection if such reservations changed the conditions of its participation in the treaty.

11. He did not think the deletion of article 19 *ter* would, of itself, remove all the difficulties that article attempted to resolve. The wording he himself had proposed in 1977,<sup>3</sup> on the other hand, left no room for such problems, since it provided that international organizations could formulate reservations only if they were expressly authorized to do so by the treaty or if it was otherwise agreed that the reservation was authorized. Consequently, in the case of a treaty between States and one or more international organ-

<sup>1</sup> See 1644th meeting, footnote 3.

<sup>2</sup> See 1647th meeting, footnote 1.

<sup>3</sup> See 1649th meeting, footnote 12.

izations where the participation of one or more international organizations was essential to the object and purpose of a treaty, States were placed in the same position as international organizations and the question of objections no longer arose, since reservations must be agreed to, tacitly or expressly.

12. He urged the Commission to give further consideration to that question before deciding to delete article 19 *ter* from the draft.

13. Lastly, he stressed that it was necessary to adopt, in general, a vocabulary sufficiently precise to obviate, as far as possible, the need for interpretation, or at least strictly to limit the interpretations possible.

14. Mr. REUTER (Special Rapporteur) said he would like to know whether, according to the draft proposed by Mr. Ushakov, an international organization could make objections even when it was not entitled to formulate reservations—for example, if it considered that a reservation made by a State party was not one authorized for the States.

15. Mr. USHAKOV said that his proposal authorized international organizations to make reservations only if the parties had so agreed. Its purpose was to place States and international organizations which were parties to a treaty on an equal footing and to preclude reservations which might destroy the essence of the treaty. Hence the question of possible objections to reservations could not arise, and disputes could only relate to interpretation of the provisions of the treaty, in other words, to what reservations were permitted or prohibited. Conversely, since reservations had to be authorized by the treaty itself, or by some other form of agreement, a reservation could not, *ex hypothesi*, give rise to an objection. Any treaty provision was certainly open to different interpretations by the parties, but the problem which might arise on that account was not related to the definition of the faculty of making reservations or objections.

16. Mr. CALLE Y CALLE, noting that the draft articles dealt first with objections to reservations and then with acceptance of reservations, said it would have been more logical if those two points had been dealt with in the reverse order.

17. While draft article 19 *ter* could perhaps be deleted, provided that objections to reservations were properly dealt with in later articles, he thought it might be useful to retain it as drafted, since it provided for the possibility of making objections on the basis of the tasks assigned to the international organization by the treaty. That special circumstance was covered in both subparagraphs (a) and (b) of paragraph 3. Thus it would not be possible for either a State or an international organization to enter a reservation to a provision of a treaty if that provision defined the functions of the international organization. He considered, however, that paragraph 2 should refer not only to paragraphs 1 and 3 of article 19 *bis*, but also to paragraph 2 of that article.

18. The concepts of objection and acceptance were not defined either in the Vienna Convention or in the draft articles. Acceptance was of particular importance, since it was one way of entering into a commitment, of expressing consent. It was true, however, that the Vienna Convention only defined (in art. 2 (b)) “ratification”, “acceptance”, “approval” and “accession” as means of expressing consent—but not the most common way of giving consent, namely, signature.

19. Lastly, it had been said that some reservations were not really reservations: when reservations were prohibited they were called declarations. It had also been said that an objection had the same effect as acceptance. That was true, except when the objection was to the entry into force of the treaty.

20. Mr. RIPHAGEN said that there was a tendency to think of treaties, particularly multilateral treaties, as instruments which laid down the law, rather than as the result of negotiated interests. The whole idea of reservations had first been expounded in the well-known advisory opinion of the International Court of Justice<sup>4</sup> when it had dealt with a very special humanitarian convention in which the interests involved had been those of people, not States, and it was that idea which had subsequently been embodied in the Vienna Convention. There were many treaties whose provisions maintained a certain balance of interests, and that balance had great significance in the final elaboration of a treaty. A reservation could disturb the balance, and the fact that it automatically had reciprocal effect did not restore it. In some treaties, the balance was between interests that were not legally correlated at all. For those reasons, he inclined to the view that it would be neither right nor possible to place any limitation on objections to reservations, and he therefore agreed that draft article 19 *ter* should be deleted.

21. Mr. ŠAHOVIĆ said he was afraid the Commission might be attaching too much importance to objections to reservations, which were simply the consequence of the right to enter reservations. It might even be said that they were corollary to the right to enter reservations. The Commission should concentrate on the question whether article 19 *ter* was necessary to the draft. In particular, he wondered for what reasons Mr. Calle y Calle considered that paragraph 2 of article 19 *ter* should refer not only to paragraphs 1 and 3 of article 19 *bis*, but also to paragraph 2 of that article.

22. He himself was not convinced of the usefulness of articles 19 *bis* and 19 *ter*, the justification for which would vanish entirely if the Drafting Committee decided to deal with the question of the participation of

<sup>4</sup> Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. Advisory Opinion: *I.C.J. Reports 1951*, p. 15.

international organizations in a provision of general scope.

23. There was no reason to attach so much importance to objections as a separate concept, and he thought the Commission could confine itself to dealing with the question in draft article 20,<sup>5</sup> on acceptance of reservations.

24. Mr. USHAKOV said the idea that because the treaty established a balance between the interests of the parties each of them should be able to make objections to any reservation, was acceptable only in the abstract and was contradicted by practice.

25. He pointed out that a treaty could contain provisions which, for example, concerned only States and their relations *inter se*, and that a contracting international organization could not be authorized to make reservations to provisions of that kind. On the other hand, if a reservation made the participation of the international organization useless, the organization could decide that the treaty would not enter into force between itself and the reserving State. Thus the problem was a complex one, and it could not be generally affirmed that any party could enter a reservation to any provision.

26. Sir Francis VALLAT said it had become increasingly clear to him that article 19 *ter* had no proper place in the draft. It was unnecessary, complicated, confusing and wrong in principle. It should not be there, just as it had no counterpart in the Vienna Convention.

27. It was wrong in principle because once the terms of a treaty had been drafted no party or potential party to that treaty should have the right unilaterally to alter the rights or obligations of another party without its consent. The system of reservations was the exception to that general principle, but the general principle remained. What paragraph 3 of article 19 *ter* sought to do was to divest international organizations in certain, not very clear, circumstances of the right even to object—which was perhaps one of mankind's most inherent rights and certainly a right that must attach to any party to a treaty. To his mind, the case was one in which the parties, whether international organizations or States, should be equal before the law, particularly in the context of the rather exceptional legal provisions relating to treaties. In his view, no convincing argument had been put forward in favour of the limitation imposed by paragraph 3 of article 19 *ter*, which was the only paragraph in the article with any real bite. He would be grateful, however, if somebody could explain to him how subparagraphs (a) and (b) of that paragraph would operate. They seemed to introduce a confusing element which it would be very difficult to interpret and which could only make life more difficult for international organizations, without any justification for doing so.

28. Mr. RIPHAGEN, referring to Mr. Ushakov's remarks, said that the possible effect of a reservation to a multilateral treaty would be to split up the treaty into bilateral provisions. An objection to a reservation did not in any way affect the relationship between the State making the reservation and the State accepting it; it was relevant only to the relationship between the State which made the reservation and the entity which objected to it. So there was no problem on that score, and, in his view, Mr. Ushakov's point served to strengthen his own (Mr. Riphagen's) argument.

29. In any event, he agreed with Sir Francis Vallat that article 19 *ter* had no place in the draft.

30. Mr. NJENGA said that an article on the lines of draft article 19 *ter* had wisely been omitted from the Vienna Convention. The right to object to a reservation was a corollary of the right to make a reservation, and that right was so basic that it could not be denied to the parties to a treaty, whether they were States or international organizations. Moreover, draft article 19 *ter* was worded in such a way that it could only cause international organizations unnecessary difficulties. As had already been pointed out, paragraphs 1 and 2 stated the obvious. Only paragraph 3 had any substance, and it was difficult to see how it would operate.

31. In the circumstances, he favoured the deletion of draft article 19 *ter* in its entirety.

32. Mr. CALLE Y CALLE, replying to Mr. Šahović, who had asked the reason for his suggestion that article 19 *ter*, paragraph 2, should include a reference to the corresponding paragraph of article 19 *bis*, said he believed that the right of a State to object to a reservation stood, even if the reservation was expressly authorized. Indeed, he thought that the right of objection remained unlimited, whatever the conditions to which the making of reservations was subject; the right of objection was, as Mr. Njenga had said, the corollary of the right of reservation.

33. Mr. USHAKOV stressed the fact that, according to the definition of the term "reservation" given in draft article 2, subpara. 1 (d), a State or an international organization could not make any reservations they pleased to a treaty. The only possible reservations were those relating to provisions of the treaty which were specifically applicable to the State or to the organization concerned. Thus, in the case of a treaty concluded between States with the participation of an organization, the organization could not make reservations to the provisions concerning the relations of those States *inter se*. It followed that, if article 19 *ter* was deleted, it would be possible to object to any reservation, whereas the possibility of formulating reservations was limited. In the case of a treaty between States in which an international organization was allowed to participate, the organization would thus be able to object to reservations relating to the relations between those States.

<sup>5</sup> See para. 47 below.

34. Mr. REUTER (Special Rapporteur) said that before summing up the discussion on article 19 *ter* he would reply to the questions put to him.

35. He had been asked whether he could explain and provide a clear justification for subparagraphs (a) and (b) of paragraph 3: the answer was that he could not. When he had drafted his tenth report (A/CN.4/341 and Add.1), he had found those provisions confusing. They did contain the shadow of an idea, but it was not possible to explain it or justify it clearly.

36. The question put by Mr. Calle y Calle, who had asked whether paragraph 2 of article 19 *bis* should not be mentioned as well as paragraphs 1 and 3 in article 19 *ter*, paragraph 2, prompted him to make a quite general comment. It was clear from the discussions at the United Nations Conference on the Law of Treaties that a number of States had assumed that objections to reservations must be based on a legal argument. That was, indeed, the position that the Commission had adopted in elaborating its draft articles on the law of treaties. But the Conference had not followed the Commission on that point. According to the Conference, when reservations were authorized, the machinery of reservations and objections enabled a State to choose, within the general framework of a treaty, according to its own interests alone and without any justification by a legal argument, which commitments it accepted and which it rejected. Mr. Ushakov had a definite opinion on that point: the regime of objections did not relate to the case in which the reason for the objection was a legal one. An objection was merely part of a mechanism that made it possible to determine the nature of the particular commitments undertaken within the general framework of a treaty. It could nevertheless be asked whether, in view of the wording of the Vienna Convention, the Commission was entitled to define the concept of an objection precisely. It could, of course, take the view that, according to that instrument, objections could be based solely on an assessment of interests. But did it necessarily follow that the mechanism of objections did not apply when the justification given for an objection was a legal reason? That seemed to be Mr. Ushakov's view; he considered that such cases were disputes which had nothing to do with the problem of objections. Personally, he (the Special Rapporteur) did not think it was possible to define an objection on the assumption that it could be based only on an assessment of interests. If it was based on a legal reason, it could give rise to a legal dispute, which would then be settled by the means available to the States concerned.

37. Reverting to the example of a treaty concluded between two States with the participation of the IAEA with a view to the transfer of fissionable material, he said that supposing one of the States parties formulated a reservation, the answer to the question whether the Agency could object to that reservation for a legal reason would depend on the treaty. If the reservation was prohibited by the treaty, the only effect of the

Agency's objection would be to make its opposition known. The reserving State could then review its position. If it did not yield, the IAEA could and should go further: it would state that the objection was serious and that it did not regard that State as a party to the treaty. Since the treaty was a trilateral one, it could not then be concluded. It was essential for an organization placed in such a position to act in that way, since its honour was at stake. In the case in point, the Agency would not be able to guarantee operations which it did not consider legally justified. It was possible to go even further: one of the two States might enter a reservation which was authorized by the treaty and which the other State accepted, and the Agency might then find that the application of the treaty could give rise to liberties that would preclude any guarantee of the peaceful use of the fissionable materials. In view of its general policy, the Agency could not answer for such a risk. It would be quite normal for it to make an objection, even in the absence of a legal reason, and to renounce the conclusion of the treaty.

38. It could be retorted that an organization was not entitled to object to a reservation concerning the relations of States *inter se*; but it was extremely difficult, even in a trilateral treaty, to draw a line between what was the exclusive concern of the States and what the exclusive concern of the organization. In that respect, article 3 of the Vienna Convention was not sufficiently detailed: relations between States could, of course, be divided into categories, but only within certain limits. An international organization would, in fact, never raise objections on matters which did not concern it in any way; but it was obviously for the organization itself to decide in each case whether it was concerned or not.

39. If the International Sea-Bed Authority possessed capacity to conclude treaties, it might conclude a treaty with two or three States on matters relating to protection of the environment. The Authority would guarantee the treaty, which would be an open treaty making no provision for reservations. One State might subsequently make a reservation, which was accepted by another State. The Authority might then consider that some of the treaty commitments had been modified and had become contrary to its general policy of environmental protection. It would be quite normal for the Authority to be able to object to that reservation and, if the State concerned did not accept its objection, to be able to refrain from concluding the treaty, at least in its relations with the States concerned.

40. Consequently, if the Commission was moving towards a definition of an objection, it would have to take a decision; but it would not be able to affirm that the mechanism of objections did not apply to declarations containing criticism based on legal reasons. It was bound to follow the same line as the Conference on the Law of Treaties, whatever surprises that might bring. Hence, if the Commission could not define the

concept of an objection, it would be extremely difficult for it to discuss the effect of an article on objections.

41. Thus, Mr. Calle y Calle's suggestion that article 19 *bis*, paragraph 2, should be mentioned in article 19 *ter*, paragraph 2, could be justified only if it was accepted that an objection could be based on legal grounds; otherwise, the wording of article 19 *ter*, paragraph 2, was satisfactory.

42. In those circumstances, as the members of the Commission had expressed different views on the nature of objections, he was reluctant to retain article 19 *ter*. It would probably not be advisable for the Commission to adopt a position which would be more restrictive than that of the Conference on the Law of Treaties and might have indirect effects on the Vienna Convention. In any event, the members of the Commission seemed to agree that an objection had a broader effect than a reservation. An objection was a means of defending a basic right of an entity which was to become a party to a treaty.

43. Summing up the views expressed in the Commission on article 19 *ter*, he said that Mr. Ushakov had a personal opinion, based on the actual concept of an objection and on the idea that an international organization must never be put in the position of having to raise an objection. Mr. Ushakov also feared that, from the Commission's point of view, an organization was entitled to object to points involving relations between States. In that connection, he (the Special Rapporteur) stressed that it would be very difficult in practice to distinguish the relations of States *inter se* from the relations between States and international organizations, and that an international organization was never inclined to object to matters which did not concern it. States must either trust the judgement of the organization or not conclude a treaty with it.

44. Mr. Riphagen, Sir Francis Vallat and Mr. Njenga had all suggested that article 19 *ter* might not be necessary. Mr. Calle y Calle and Mr. Šahović had expressed similar views, but had thought that the article could be retained if it was possible to prove that paragraph 3 was useful and not contrary to other provisions.

45. It might be advisable to refer article 19 *ter* to the Drafting Committee to see whether a justification could be found for it.

46. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article 19 *ter* to the Drafting Committee.

*It was so decided.*<sup>6</sup>

<sup>6</sup> For consideration of the text proposed by the Drafting Committee, see 1692nd meeting, paras. 19–24.

ARTICLE 20 (Acceptance of reservations in the case of treaties between several international organizations) *and*

ARTICLE 20 *bis* (Acceptance of reservations in the case of treaties between States and one or more international organizations or between international organizations and one or more States)

47. The CHAIRMAN invited the Special Rapporteur to present articles 20 and 20 *bis*, which read:

*Article 20. Acceptance of reservations in the case of treaties between several international organizations*

1. A reservation expressly authorized by a treaty between several international organizations does not require any subsequent acceptance by the other contracting organizations unless the treaty so provides.

2. When it appears from the object and purpose of a treaty between several international organizations that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. In cases not falling under the preceding paragraphs and unless the treaty between several international organizations otherwise provides:

(a) acceptance by another contracting organization of a reservation constitutes the reserving organization a party to the treaty in relation to that other organization if or when the treaty is in force for those organizations:

(b) an objection by another contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving organizations unless a contrary intention is definitely expressed by the objecting organization;

(c) an act expressing the consent of an international organization to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting organization has accepted the reservation.

4. For the purposes of paragraphs 2 and 3 and unless the treaty between several international organizations otherwise provides, a reservation is considered to have been accepted by an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

*Article 20 bis. Acceptance of reservations in the case of treaties between States and one or more international organizations or between international organizations and one or more States*

1. A reservation expressly authorized by a treaty between States and one or more international organizations or between international organizations and one or more States, or otherwise authorized, does not, unless the treaty so provides, require subsequent acceptance by the contracting State or States or the contracting organization or organizations.

2. When it appears from the object and purpose of a treaty between States and one or more international organizations or between international organizations and one or more States that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation formulated by a State or by an international organization requires acceptance by all the parties.

3. In cases not falling under the preceding paragraphs and unless the treaty between States and one or more international

organizations or between international organizations and one or more States otherwise provides:

(a) acceptance of a reservation by a contracting State or a contracting organization constitutes the reserving State or organization a party to the treaty in relation to the accepting State or organization if or when the treaty is in force between the State and the organization or between the two States or between the two organizations;

(b) an objection to a reservation by a contracting State or a contracting organization does not prevent the treaty from entering into force

between the objecting State and the reserving State,  
between the objecting State and the reserving organization,  
between the objecting organization and the reserving State, or  
between the objecting organization and the reserving organization

unless a contrary intention is definitely expressed by the objecting State or organization;

(c) an act expressing the consent of a State or an international organization to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State or organization has accepted the reservation.

4. For the purposes of paragraphs 2 and 3 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a contracting State or organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

48. Mr. REUTER (Special Rapporteur) said he would leave aside the drafting problems raised by articles 20 and 20 *bis* and would deal only with a problem of substance.

49. That problem arose in connection with article 20 *bis*, but he would discuss it only in relation to article 20, paragraph 4. In its written comments (A/CN.4/339), the Soviet Union had stated the question of principle raised by article 20 in the following terms: "It would seem that any actions by an international organization relating to a treaty to which it is a party must be clearly and unequivocally reflected in the actions of its competent body". Article 20, paragraph 4, set a time-limit of twelve months for the acceptance of reservations. If no objection to a reservation was made within that time and there was no special act of acceptance, the reservation was considered to have been accepted. The difficulties to which that rule gave rise were probably due to the fact that, at the United Nations Conference on the Law of Treaties, reference had been made to tacit acceptance. The Conference could have stated a rule to the effect that the right to make an objection was extinguished after a period of twelve months. The criticism made of the rule in paragraph 4 was that it implied a kind of acquiescence, which had been allowed for States, but which could not be allowed for international organizations, since such tacit acquiescence did not adequately protect the member States of an organization. In that connection, he pointed out that, if the rule had been reversed—an international organization's silence amounting to an objection after twelve months—the same criticism could have been made of it. That rule

would, however, have had other consequences, because an objection could be withdrawn, whereas an acceptance could not. Hence reversing the rule would not suffice to resolve the question of principle. Besides, other articles of the draft provided for the mechanism of tacit acceptance, in particular articles 45 and 65.<sup>7</sup> Mr. Ushakov had found the time limit set in article 65 rather short for international organizations.<sup>8</sup> If the Commission now took a position on the question of principle similar to that of the Soviet Union, it would come up against further problems when considering those other articles.

50. It should also be noted that the notion of tacit acceptance was not entirely satisfactory. Two cases must be distinguished: the State which expressed its consent to be bound by the treaty might already have been informed of the reservation or it might not. In the first case, it was not so much tacit acceptance as implicit acceptance by a formal act. The State accepted, but it knew that a reservation had been entered and did not take the opportunity of making an objection. An act thus followed the reservation. In the second case, the silence really did amount to tacit acceptance, without any subsequent formal act. Perhaps that distinction did not make any difference, but it was necessary to draw attention to it. The Commission would probably not wish to take a position on the point independently of the question of principle.

51. In that connection, it was important to mention the problem of the guarantees to be given to the member States of an international organization. The member States must, of course, be protected, but so must other States. If the rule that silence amounted to tacit acceptance after twelve months applied to States acting on their own, States acting collectively through an international organization would be favoured by being given an indefinite time in which to make their positions known. In practice, however, and particularly in the case of a restricted treaty, things necessarily became clear after a certain time, for it was essential to know how the treaty was going to be applied. Difficulties only arose when there was a large number of States parties to a treaty. He therefore believed that, from the practical point of view, the criticism that had been made could be ignored.

52. If the Commission did not agree with him, it could either make a distinction between the two cases to which he had drawn attention, or fully accept the criticism of article 19 *ter* and apply its implications not only to that article but also to article 45, and even article 65, in which it would certainly not suffice to extend the time-limit set.

*The meeting rose at 12.55 p.m.*

<sup>7</sup> See 1647th meeting, footnote 1.

<sup>8</sup> See *Yearbook* ... 1980, vol. I, p. 21, 1588th meeting, para. 34.

## 1652nd MEETING

Friday, 15 May 1981, at 10.05 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Aldrich, Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitul, Mr. Tabibi, 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.4/339 and Add.1–5, A/CN.4/341 and Add.1)

[Item 3 of the agenda]

#### DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

ARTICLE 20 (Acceptance of reservations in the case of treaties between several international organizations) *and*

ARTICLE 20 *bis* (Acceptance of reservations in the case of treaties between States and one or more international organizations or between international organizations and one or more States)<sup>1</sup> (*concluded*)

1. Mr. USHAKOV said that it was essential to determine whether an international organization could tacitly accept a reservation, in the same way as a State. In principle, States and international organizations were free to adopt any position on any political or legal question with which they were confronted at the international level, by means of a decision by a competent organ. Under the Vienna Convention,<sup>2</sup> the competent organ of a State must take a position when faced with a reservation; it could either accept it or reject it. As a former member of the Commission, the late Gilberto Amado, used to say, States were not children and they could not be presumed to have forgotten to take a decision on a reservation when they were aware of its existence. The Vienna Convention provided States with two possibilities: they could accept reservations either by a formal act or by remaining silent for twelve months. In either case, they took a decision. In the former case, their decision was published, whereas in the latter, the organ which had taken the decision in accordance with the constitutional procedure did not publish it.

2. The situation of international organizations was the same. When faced with a reservation, they must take a position by a decision of the competent organ.

<sup>1</sup> For texts, see 1651st meeting, para. 47.

<sup>2</sup> See 1644th meeting, footnote 3.

However, the organs of international organizations generally held public meetings, and their decisions were, in principle, published. Consequently, a decision on a reservation could be communicated expressly to the other contracting parties.

3. It was pertinent to consider the scope of the acts of ratification and accession provided for in the Vienna Convention. Clearly, a State which ratified or acceded to a treaty and was aware of the existence of a reservation but did not refer to it in its act of ratification or accession could not be considered as having accepted the reservation. The ratification or accession could, for example, take place one month after the date on which the State had received notification of the reservation, so that it still had eleven months to take a decision on it. The fact that a State expressed its consent to be bound by a treaty before or after it became aware of a reservation was not crucial.

4. In his view, the rule concerning tacit acceptance, as stated in the articles under consideration, could not be applied to objections, since the consequences of acceptance and of objection were different. Acceptance had specific legal consequences, whereas objection could have two kinds of effects. The treaty in question could enter into force between the reserving State and the State objecting to the reservation, except for the provision or provisions to which the reservation related. Alternatively, the State objecting to a reservation might, by so doing, intend to reject the treaty as a whole. Moreover, regardless of the way in which the rule was stated, in either case a decision by a competent organ of the organization or State concerned was necessary.

5. There were important reasons—more of a political than of a legal nature—why the Vienna Convention afforded States a choice between express or tacit acceptance of reservations. In some cases, it was politically preferable for a State not to publish its decision to accept a reservation, for express acceptance might well prove embarrassing, whereas tacit acceptance passed unnoticed. In other cases, constitutional considerations were the determining factors; tacit acceptance meant that a Government could refrain from referring the matter once again to Parliament when the latter had endorsed the ratification of a treaty before any reservation had been formulated. In the case of international organizations, there were, generally speaking, no such political reasons, since the deliberations of their organs were, in principle, public. Consequently, an international organization could not tacitly adopt a position on a reservation. How could an organ like the United Nations General Assembly or Security Council take a tacit decision on a reservation, without deliberating and voting on the matter?

6. Tacit acceptance of a reservation, whether by a State or an international organization, called for a time-limit. Without a time-limit, the concept of tacit acceptance would be meaningless, since the situation

of uncertainty could continue indefinitely. A time-limit must also be set if international organizations were to be required to accept or reject reservations expressly. Perhaps the time-limit of twelve months would not be sufficient because, in some international organizations, the competent organs held only two sessions each year. Account should be taken of any comments that international organizations might still make in that regard.

7. In his opinion, if an international organization failed to take a decision on a reservation within the given time-limit, the reservation could not be considered as either accepted or rejected. If the treaty had already been formally approved by the organization at the time the reservation was formulated, but the organization subsequently took no decision on the reservation, the treaty must be considered as suspended as far as relations between the organization and the reserving party were concerned. Such a situation was abnormal but it could arise, as could the abnormal situation covered by article 18 of the Vienna Convention, a situation in which a treaty was signed but not ratified.

8. Lastly, he continued to hold the view that it was impossible to formulate a rule whereby silence on the part of an international organization would be tantamount to acceptance of a reservation. He stressed that the article which he had proposed<sup>3</sup> did not give rise to the same difficulties as the articles under consideration, since it ruled out any problem of objection to reservations.

9. Mr. RIPHAGEN, referring to the question of tacit acceptance of reservations, said that he doubted whether there was much difference between a modern State and an international organization with respect to awareness of the existence of a reservation. For example, in the case of treaties of which the Secretary-General of the United Nations was the depositary, reservations were first communicated to him and then transmitted by him to the States parties to the instruments concerned; whether knowledge of such a reservation reached all the competent authorities of a particular State—and it did not always do so—depended, as in the case of an international organization, on the efficiency of its bureaucracy.

10. More important, the construction of tacit or implied acceptance and that of objections which were not real objections (in the sense that they did not prevent the entry into force of a treaty between a reserving State and a State opposing the reservation) had, he believed, been devised in order to maintain the integrity of multilateral treaties to the greatest possible extent, to avoid splitting them into a series of bilateral agreements. In his view, the reasons which had led the United Nations Conference on the Law of Treaties to adopt the present system with respect to States were

also valid with respect to international organizations, and the system should, therefore, be extended to them too.

11. Mr. CALLE Y CALLE said that it was fair to apply not only to States but also to international organizations the principles mentioned by the Special Rapporteur in his report (A/CN.4/341 and Add.1, para. 81), namely, the principles that a legal entity was responsible for its conduct and that it must define its juridical positions within a reasonable time. Furthermore, international organizations were now familiar, through practical experience, with what participation in a treaty entailed and with the possibility of requesting the inclusion in an instrument, should they feel it necessary, of a longer time-limit for expressing their reactions to reservations than the usual and reasonable period of twelve months.

12. For that reason, and also because the rules involved were simply residual rules that catered for situations not expressly covered by a treaty, he believed that article 20, paragraph 4, and article 20 *bis*, paragraph 4, should be maintained in their present form.

13. Mr. TSURUOKA said that he agreed with the comments by Mr. Riphagen and Mr. Calle y Calle. The solution proposed in connection with implicit acceptance was the outcome of a logical interpretation. However, the stipulated twelve-month time-limit for tacit acceptance might lead to some misgivings because of the differences between States and international organizations. He welcomed the fact that the draft adopted on first reading took ample account of the current practice and of foreseeable developments in the fairly near future. In his opinion, the Commission should concentrate on creating international instruments that were easy to apply.

14. He also endorsed Mr. Njenga's comment (1651st meeting) that the capacity to accept reservations was the corollary of the recognized capacity of international organizations to conclude treaties and formulate reservations. Recognition of the capacity of international organizations to formulate reservations signified recognition of the fact that the organization had sufficiently effective machinery to be able to participate in the conclusion of treaties, to formulate reservations and likewise to handle any normal procedure in the life of a treaty.

15. He expressed the hope, therefore, that the Commission would indicate, if not in the actual text of the draft, then at least in the commentary, that the articles related only to international organizations which had the capacity to exercise rights and assume obligations under international law and were thus able to become parties to treaties, in keeping with the opinion expressed by the Canadian Government in its observations (A/CN.4/339).

16. Mr. REUTER (Special Rapporteur) said that the two articles under consideration raised three different problems.

<sup>3</sup> See *Yearbook* . . . 1977, vol. II (Part Two), p. 113, footnote 478.

17. To begin with, the Commission must determine whether the twelve-month time limit stipulated in articles 20 and 20 *bis* was long enough in the case of international organizations. Mr. Ushakov had not given any final answer on that point and Mr. Calle y Calle seemed to favour a twelve-month time-limit, provided the commentary made it clear that the rule was a residual one and that an organization permitted to take part in negotiations could argue that such a time-limit was insufficient. The members of the Drafting Committee should reflect on that problem—although it was not, in his view, fundamental—in order to arrive at the most equitable solution.

18. Again, members were generally agreed on the need to set a time-limit, even though the consequences of the expiry of the time-limit still had to be determined later.

19. The third question was the most complex, since it was one of deciding whether an organization's conduct could be invoked against the organization, even in matters of treaties. He emphasized that some standards were undoubtedly necessary in that regard, and perhaps even more so for international organizations than for States. However, he would prefer to postpone consideration of that question, which emerges again in connection with other articles. In considering Mr. Ushakov's proposal at the present stage, the Commission should not adopt a general position that would apply to the draft as a whole.

20. He did not consider it possible to establish a privileged status for international organizations that would be justified by their organic weakness. If the security necessary for legal relations was not to be destroyed, the principle must be that whoever participated in such relations was bound by his conduct. Mr. Ushakov's proposal in that regard was an interesting one, since its effect would be to suspend, on expiry of the twelve-month time-limit, the effects of the treaty in relations between the international organization and the reserving State. Obviously, the effects of the treaty would not be suspended in respect of the other parties. However, in such a case, the international organization's position as a result of its silence would in fact be the same as if the organization had formulated an objection declaring that the effect of the objection, in its relations with the reserving State, was that it would not consider the reserving State as a party to the treaty vis-à-vis the organization itself. Such a position would not be treated as an objection, but it would nevertheless have the effects of an objection. In that connection, Mr. Ushakov seemed to be concerned more with a matter of principle than with a specific problem, since the result was the same as if one decided that the presumption established for States was reversed in the case of organizations.

21. Speaking as a member of the Commission, he pointed out that Mr. Ushakov had stated that, in most cases, the deliberations of the competent organs of international organizations were public. While that was

true in the case of the General Assembly or the Security Council, it was nevertheless for the United Nations to determine whether, for example, the Secretary-General was himself competent to make an objection to a reservation. Admittedly, practice afforded examples of circumstances in which the Secretary-General had taken the initiative of making statements which he had qualified as objections—even when they did not constitute objections within the meaning of the Vienna Convention, but rather “legal criticisms”. Nevertheless, the problem remained of determining what constituted an objection, for the Vienna Convention was silent on the matter. Moreover, not all the governing bodies of organizations necessarily deliberated in public.

22. To sum up, all members who had spoken had favoured a possible relaxation of the time-limit for international organizations, but wished to retain paragraph 4 of the provisions under consideration.

23. He thought that articles 20 and 20 *bis* could be referred to the Drafting Committee.

24. Mr. USHAKOV said that he had drawn a distinction between two categories of reservations—those which were expressly authorized by the treaty and those which were authorized in some other manner. Reservations in the first category did not in principle call for acceptance, except where the treaty provided otherwise. Reservations in the second category were also authorized, even if not expressly.

25. A legal criticism was made when a State declared that the reservation of another State was contrary to the object and purpose of the treaty. He did not see such a declaration as an “objection”, for the fact that a contracting party formulated an unauthorized “reservation” gave rise to a dispute regarding the interpretation of the provisions of the treaty and it had to be resolved by all the parties or by recourse to expressly established procedures for the settlement of disputes.

26. The CHAIRMAN suggested that the Commission should refer articles 20 and 20 *bis* to the Drafting Committee.

*It was so decided.*<sup>4</sup>

ARTICLE 21 (Legal effects of reservations and of objections to reservations),

ARTICLE 22 (Withdrawal of reservations and of objections to reservations),

ARTICLE 23 (Procedure regarding reservations in treaties between several international organizations), *and*

ARTICLE 23 *bis* (Procedure regarding reservations in treaties between States and one or more international organizations or between international organizations and one or more States)

<sup>4</sup> For consideration of the texts proposed by the Drafting Committee, see 1692nd meeting, paras. 25–35.

27. The CHAIRMAN invited the Special Rapporteur to present articles 21, 22, 23 and 23 *bis*, which read:

*Article 21. Legal effects of reservations and of objections to reservations*

1. A reservation established with regard to another party in accordance with articles 19, 19 *ter*, 20 and 23 in the case of treaties between several international organizations, or in accordance with articles 19 *bis*, 19 *ter*, 20 *bis* and 23 *bis* in the case of treaties between States and one or more international organizations or between international organizations and one or more States:

(a) modifies for the reserving party in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving party.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a party objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving party, the provisions to which the reservation relates do not apply as between the two parties to the extent of the reservation.

*Article 22. Withdrawal of reservations and of objections to reservations*

1. Unless a treaty between several international organizations, between States and one or more international organizations or between international organizations and one or more States otherwise provides, a reservation may be withdrawn at any time and the consent of the State or international organization which has accepted the reservation is not required for its withdrawal.

2. Unless a treaty mentioned in paragraph 1 otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless a treaty between several international organizations otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting organization only when notice of it has been received by that organization;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the international organization which formulated the reservation.

4. Unless a treaty between States and one or more international organizations or between international organizations and one or more States otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to a contracting State or organization only when notice of it has been received by that State or organization;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

*Article 23. Procedure regarding reservations in treaties between several international organizations*

1. In the case of a treaty between several international organizations, a reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting organizations and other international organizations entitled to become parties to the treaty.

2. If formulated when signing, subject to formal confirmation, acceptance or approval, a treaty between several international organizations, a reservation must be formally confirmed by the reserving organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

*Article 23 bis. Procedure regarding reservations in treaties between States and one or more international organizations or between international organizations and one or more States*

1. In the case of a treaty between States and one or more international organizations or between international organizations and one or more States, a reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and organizations and other States and international organizations entitled to become parties to the treaty.

2. If formulated by a State when signing, subject to ratification, acceptance or approval, a treaty mentioned in paragraph 1 or if formulated by an international organization when signing, subject to formal confirmation, acceptance or approval, a treaty mentioned in paragraph 1, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to a confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

28. Mr. REUTER (Special Rapporteur), supported by Mr. ŠAHOVIĆ and Mr. USHAKOV, suggested that, since the articles in question had not given rise to substantive comments, it would be preferable for the Commission to refer them to the Drafting Committee, but reserve the right to revert to a number of important points later on, after the Committee's deliberations.

29. The CHAIRMAN suggested that the Commission refer articles 21, 22, 23 and 23 *bis* to the Drafting Committee, under the conditions suggested by Mr. Reuter.

*It was so decided.*<sup>5</sup>

ARTICLE 24 (Entry into force of treaties between international organizations),

ARTICLE 24 *bis* (Entry into force of treaties between one or more States and one or more international organizations),

ARTICLE 25 (Provisional application of treaties between international organizations), and

<sup>5</sup> *Idem*, paras. 36–37, 38–39 and 40–41.

ARTICLE 25 *bis* (Provisional application of treaties between one or more States and one or more international organizations)

30. The CHAIRMAN invited the Commission to consider articles 24, 24 *bis*, 25 and 25 *bis*, which read:

*Article 24. Entry into force of treaties between international organizations*

1. A treaty between international organizations enters into force in such manner and upon such date as it may provide or as the negotiating organizations may agree.

2. Failing any such provision or agreement, a treaty between international organizations enters into force as soon as consent to be bound by the treaty has been established for all the negotiating organizations.

3. When the consent of an international organization to be bound by a treaty between international organizations is established on a date after the treaty has come into force, the treaty enters into force for that organization on that date, unless the treaty otherwise provides.

4. The provisions of a treaty between international organizations regulating the authentication of its text, the establishment of the consent of international organizations to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

*Article 24 bis. Entry into force of treaties between one or more States and one or more international organizations*

1. A treaty between one or more States and one or more international organizations enters into force in such manner and upon such date as it may provide or as the negotiating State or States and organization or organizations may agree.

2. Failing any such provision or agreement, a treaty between one or more States and one or more international organizations enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States and organizations.

3. When the consent of a State or an international organization to be bound by a treaty between one or more States and one or more international organizations is established on a date after the treaty has come into force, the treaty enters into force for that State or organization on that date, unless the treaty otherwise provides.

4. The provisions of a treaty between one or more States and one or more international organizations regulating the authentication of its text, the establishment of the consent of the State or States and the international organization or organizations to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

*Article 25. Provisional application of treaties between international organizations*

1. A treaty between international organizations or a part of such a treaty is applied provisionally pending its entry into force if:

(a) the treaty itself so provides; or

(b) the negotiating organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating organizations have otherwise agreed, the provisional application of a treaty between international organizations or a part of such a

treaty with respect to an international organization shall be terminated if that organization notifies the other international organizations between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

*Article 25 bis. Provisional application of treaties between one or more States and one or more international organizations*

1. A treaty between one or more States and one or more international organizations or a part of such a treaty is applied provisionally pending its entry into force if:

(a) the treaty itself so provides; or

(b) the negotiating State or States and organization or organizations have in some other manner so agreed.

2. Unless a treaty between one or more States and one or more international organizations otherwise provides or the negotiating State or States and organization or organizations have otherwise agreed:

(a) the provisional application of the treaty or a part of the treaty with respect to a State shall be terminated if that State notifies the other States, the international organization or organizations between which the treaty is being applied provisionally, of its intention not to become a party to the treaty;

(b) the provisional application of the treaty or a part of the treaty with respect to an international organization shall be terminated if that organization notifies the other international organizations, the State or States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

31. The CHAIRMAN suggested that articles, 24, 24 *bis*, 25 and 25 *bis* should be referred to the Drafting Committee.

*It was so decided.*<sup>6</sup>

*The meeting rose at 11.30 a.m.*

<sup>6</sup> *Idem*, paras. 43–44.

## 1653rd MEETING

*Monday, 18 May 1981, at 3.10 p.m.*

*Chairman:* Mr. Doudou THIAM

*Present:* Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

**Jurisdictional immunities of States and their property**  
(A/CN.4/331 and Add.1,<sup>1</sup> A/CN.4/340 and Add.1,  
A/CN.4/343 and Add.1–4)

[Item 7 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL  
RAPPORTEUR

<sup>1</sup> *Yearbook . . . 1980*, vol. II (Part One).

1. The CHAIRMAN invited the Special Rapporteur to introduce his third report on the jurisdictional immunities of States and their property (A/CN.4/340 and Add. 1).

2. Mr. SUCHARITKUL (Special Rapporteur) reminded the Commission that a study group had been set up in 1978 to prepare an exploratory report on the jurisdictional immunities of States and their property,<sup>2</sup> and that he had presented a preliminary report in 1979.<sup>3</sup> Those two reports had identified the subject-matter and relevant source materials and had examined general aspects of jurisdictional immunities as well as certain problems of general understanding and definition. Subsequently, pursuant to the instructions of the Sixth Committee of the General Assembly, the Special Rapporteur had prepared six draft articles, which had been submitted in 1980 in his second report (A/CN.4/331 and Add.1). The first five articles formed the introduction to the draft, while the sixth laid down the first general principle, that of State immunity. Draft articles 1 and 6 had been provisionally adopted,<sup>4</sup> on the understanding that the Commission could revert to them later.

3. He was most grateful to all members of the Commission for the help and advice he had received in connection with the preparation of his third report. Mr. Pinto, as Chairman of the Commission's thirty-second session, had explained to the Sixth Committee of the General Assembly the delicate nature of the Commission's task in its search for an acceptable compromise. Mr. Reuter had pointed out to him the infinite complexities inherent in the very nature of the subject-matter. Mr. Ushakov had made a number of positive suggestions, in which connection members would recall that, although a definition of State property had been adopted, it had become clear that the matter would require further consideration. The definition of State property in the context of succession of States was not quite the same as in the context of the immunities of States and their property. Possibly the criterion to be adopted in determining whether, in a given case, immunity from jurisdiction or, as the case might be, from attachment or execution, should be granted was whether the property in question was in the possession and control of the State. Both the Commission and the General Assembly had, however, indicated that the question of property and immunity from execution could be dealt with at a later stage.

4. He owed a special debt of gratitude to Sir Francis Vallat, who had provided valuable guidance on draft articles 1 and 6. The Commission might at a later stage wish to omit the words "questions relating to" in draft

article 1, as being redundant, but he considered that it would be advisable to retain them so long as the scope of the subject of State immunities had not been determined. In draft article 6,<sup>5</sup> for want of a better term, he had used the terms "territorial State" and "foreign State", but it might be preferable to say simply "a State" and "another State". The term "territorial State" could be misleading, since the draft articles were concerned with the State of the forum and not necessarily with the territorial State as such, and if the term "territorial State" was not used, there would be no need to have "foreign State" as its counterpart.

5. The Chairman had raised a very important question, which had also been discussed in the Sixth Committee of the General Assembly, namely, whether the subject of the jurisdictional immunities of States should be treated as a general principle of international law or as an exception to the more fundamental principle of territorial sovereignty. He trusted that the Commission would pronounce on that question and that the commentary on the report would adequately reflect its discussions.

6. With regard to the point made by Mr. Tsuruoka at the Commission's previous session, that paragraph 2 of draft article 6 was perhaps unnecessary, he believed that it would serve as a link with draft article 7 and that, in a way, it represented a compromise between divergent views. In that connection, the United Kingdom representative in the Sixth Committee had said that if State immunity had still to be established as a principle of international law, it would be particularly difficult to prove an exception to it.<sup>6</sup> Thus, it was a matter of the burden of proof, which could be shifted depending on whether or not State immunity was regarded as an established principle.

7. In his second report, he had cited State practice, which seemed to provide overwhelming support for the existence of a general rule or principle of State immunity. There were, however, some differences of opinion on the formulation of that principle in draft article 6. The majority view in the Commission had been that a State was immune from the jurisdiction of another State, but that principle had been criticized by some as not being sufficiently normative. It had therefore been made subject to a qualifying phrase: "in accordance with the provisions of the present articles". As yet, however, the content of those articles was unknown.

8. His third report (A/CN.4/340 and Add.1) contained five further draft articles, which dealt with the general principles of State immunity following from the proposition set out in draft article 6: article 7, entitled

<sup>2</sup> See *Yearbook ... 1978*, vol. II (Part Two), pp. 152 *et seq.* paras. 179 *et seq.*

<sup>3</sup> See *Yearbook ... 1979*, vol. II (Part One), p. 227, document A/CN.4/323.

<sup>4</sup> See *Yearbook ... 1980*, vol. II (Part Two), p. 138, para. 112. For the text of the two articles adopted by the Commission: *ibid.*, pp. 141 and 142.

<sup>5</sup> For the text of articles 1-6 submitted by the Special Rapporteur, see *Yearbook ... 1980*, vol. I, p. 195, 1622nd meeting, para. 4, and p. 199, 1623rd meeting, para. 2.

<sup>6</sup> See *Official Records of the General Assembly, Thirty-Fifth Session, Sixth Committee*, 51st meeting, para. 17; and *ibid.*, *Sessional fascicle*, corrigendum.

“Rules of competence and jurisdictional immunity” (*ibid.*, para. 44), and articles 8, 9, 10 and 11 (*ibid.*, paras. 58, 71, 81 and 92), which dealt, respectively, with consent of State, voluntary submission to the jurisdiction, counter-claims and waiver.

9. Draft article 7 was the corollary of the right to immunity laid down in draft article 6, in that it imposed a duty on the part of one State to refrain from exercising jurisdiction over or against another. Such a duty was recognized under the laws of many countries, though there were many nuances in its formulation. For instance, section 86 (1) of the Indian Code of Civil Procedure provided that no ruler of a foreign State could be sued in any court except with the consent of the central Government in writing.<sup>7</sup> Article 61, paragraph 1, of the law entitled “Fundamentals of civil procedure of the Soviet Union and the Union Republics, 1961” proscribed a similar duty in a slightly different manner, by providing that an action could be brought against a foreign State “only with the consent of the competent organs of the State concerned.”<sup>8</sup>

10. In that connection, the question of the competence of the court arose. If the court called upon to exercise jurisdiction was not competent—in other words, if the case did not fall within the jurisdiction of the court according to its own rules—then, in his submission, the question of immunity did not arise: there being no jurisdiction, there could be no immunity from jurisdiction. The two concepts—competence and immunity—were interrelated, inasmuch as the court might not proceed in a case, either because it had no competence or because the State was immune.

11. There were also a number of concepts that were closely interrelated under the internal law of different countries. For instance, it had recently been suggested that sovereign immunity was one aspect of the “act of State” doctrine—“act of State” being understood in the sense of a defence to an action in tort. There was a clear distinction to be drawn between jurisdictional immunity on the ground that the defendant was a sovereign State—though the court would otherwise have been competent—and other cases in which the court had no competence, either because the matter was outside its territorial jurisdiction or because the subject-matter had no connection whatsoever with the court or because, for some other reason, the subject-matter was not actionable before the court or was not justiciable before the judicial authority.

12. When the concept of jurisdictional immunity had originally been formulated in such classic cases as

*The Schooner “Exchange” v. McFaddon and others* (1812)<sup>9</sup> there had been a concurrence of two types of sovereignty—territorial sovereignty and national sovereignty. Thus, the presence of one State on the territory of another, in the form, say, of the presence of troops, of the sovereign in person, of ambassadors or of other representatives, had given rise to concurrent jurisdiction. One jurisdiction had then given way to the other, with the result that jurisdictional immunity had arisen. As State practice had developed, however, and as States had begun to prescribe the limits of the jurisdiction of their own courts, it seemed to have become generally accepted that the State could have jurisdiction even where no territory was involved. For instance, if there was an agreement to submit to the jurisdiction or an agreement on the choice of law, the law of certain States would permit them to exercise jurisdiction—which could perhaps be regarded as extraterritorial jurisdiction—in matters pertaining to nationality, to jurisdiction over aircraft and space craft, and to jurisdiction over areas falling outside the national sovereignty but within the national jurisdiction.

13. In most cases, it was possible to distinguish lack of competence on grounds other than jurisdictional immunity. There might, for instance, be some technical defect, such as lack of legal personality or of capacity to litigate. He had referred in his third report to a case that had come before the Supreme Court of Thailand, in which it had been held that the Government of Thailand lacked the capacity to be sued under Thai law because it did not have legal personality.<sup>10</sup> In certain jurisdictions, some aliens lacked the capacity to sue and be sued, and that was particularly true in time of war.

14. In regard to the “act of State” doctrine, it was important to distinguish between non-actionability of acts of a foreign Government and non-justiciability owing to lack of competence and jurisdictional immunity, for, if the court declined jurisdiction on the ground of jurisdictional immunity, the defect was curable either by the State giving its consent, or by conduct, or by waiver. But, if the court declined jurisdiction because it lacked competence, neither waiver nor consent could remedy the defect.

15. Another element in the general proposition that a State had a duty to refrain from exercising jurisdiction over another State was the absence of compulsory jurisdiction. Even in the case of the International Court of Justice, jurisdiction was not compulsory initially. Likewise, under internal law, a municipal court could not be expected to have compulsory jurisdiction over another State. That question was closely allied to the element of compulsion: where there was consent, there

<sup>7</sup> India, *The Code of Civil Procedure, 1908 (As modified up to the 1st May 1977)* Ministry of Law, Justice and Company Affairs, (n.d.) p. 32.

<sup>8</sup> USSR, *Sbornik zakonov SSR i ukazov Prezidiuma Verkhovnogo Soveta SSR 1938–1975* [Compendium of laws of the USSR and of decrees of the Presidium of the Supreme Soviet of the USSR, 1938–1975] (Moscow, *Izvestia Sovetov Deputatov Trudiashchikhsia SSR*, 1976), vol. 4, p. 53. [Translation by the Secretariat.]

<sup>9</sup> W. Cranch, *Reports of Cases argued and adjudged in the Supreme Court of the United States*, 3rd ed. (New York, Banks Law Publishing, 1911), vol. VII, p. 116.

<sup>10</sup> See A/CN.4/340 and Add.1, footnote relative to para. 20.

was no compulsion; where there was willingness, there was no subjection.

16. It has been said that there was no need to include any interpretative provisions to indicate what was meant by "State". If that view were accepted, some reference should perhaps be made to the circumstances in which a State was said to be "impleaded". He had therefore listed in his third report (A/CN.4/340 and Add.1, paras, 27 *et seq.*) certain action which might be regarded as impleading a foreign State: proceedings against a foreign State, proceedings against the central Government or head of a foreign State, proceedings against political subdivisions of a foreign State, and proceedings against organs, agencies or instrumentalities of a foreign State. He had also made a passing reference to State agents or representatives of foreign Governments, including sovereigns, ambassadors, diplomatic agents, consular agents and other types of representatives of foreign Governments attending meetings, whose status and immunities had to some extent been dealt with in other conventions. There were also proceedings affecting State property or property in the possession or control of a foreign State. State practice seemed to suggest that a State would be impleaded if a vessel in its possession or control was attached without due consideration being given to the kind of activity in which the vessel was engaged, with a view to determining the extent of its immunities and how amenable it was to the jurisdiction of the court.

17. Lastly, he pointed out that two alternative versions of paragraph 2 of draft article 7 had been submitted for the Commission's consideration. It should also be borne in mind that draft articles 8 to 11 were mainly of a procedural nature and subsidiary to the main rule laid down in draft article 6.

#### ARTICLE 7 (Rules of competence and jurisdictional immunity)

18. The CHAIRMAN invited the Commission to proceed to consideration of draft article 7 (A/CN.4/340 and Add.1, para. 44), the text of which read:

##### *Article 7. Rules of competence and jurisdictional immunity*

1. A State shall give effect to State immunity under article 6 by refraining from submitting another State to its jurisdiction, notwithstanding its authority under its rules of competence to conduct the proceedings in a given case.

##### ALTERNATIVE A

2. A legal proceeding is considered to be one against another State, whether or not named as a party, so long as the proceeding in fact impleads that other State.

##### ALTERNATIVE B

2. In particular, a State shall not allow a legal action to proceed against another State, or against any of its organs, agencies or instrumentalities acting as a sovereign authority, or against one of its representatives in respect of acts performed by them in their official functions, or permit a proceeding which seeks to deprive another State of its property or of the use of property in its possession or control.

19. Mr. RIPHAGEN said that, the Special Rapporteur's full and lucid report and introductory statement having provided much food for thought on a very intricate topic, he could do no more than express his immediate feelings.

20. In his view, one of the most remarkable features of the topic was the interaction between the three "levels" of inter-State relationships: the intergovernmental level, or that of relations between sovereigns; the level of relations between national legal systems or "jurisdictions"; and the level of international commerce, in the broad sense of the movement of goods and persons across national frontiers and of the interplay of the national and international regulations to which such use of foreign territory gave rise. The same interaction, albeit in the reverse sense, was apparent in the case of the rule prohibiting the use by one State of the territory of another for the performance of public acts. Both the principles embodied in that rule and in the concept of State immunity were based on the notion of the equality and separation of States, and in each case the application of the principle could be mitigated by consent.

21. In the case of State immunity, consent, like the interaction of inter-State relationships, could take three forms: the express consent of the receiving State to the establishment within its territory of diplomatic, consular or other missions of a foreign State; the consent of the "sending" State, through an explicit or implicit waiver of immunity, to the exercise of jurisdiction by the "receiving" State; and the consent implied by voluntary entry into a legal relationship under national law, and on an equal footing, with non-State entities. The latter form of consent could be manifested through entry into a contract, through conduct which was a tort against another party, or even through the acquisition of what was generally termed "status". All three levels of consent must be taken into account in considering the question of State immunity, and it was gratifying to see that the Special Rapporteur had already taken some steps in that direction.

22. Further elements to be taken into account were those of jurisdiction and the factual manifestations of a State. The various kinds of jurisdiction included: jurisdiction as expressed in the force of abstract rules; the authoritative determination in specific situations of concrete rights and obligations; and the exercise of factual power. The factual manifestations of the State included its representatives of "instrumentalities", its conduct, and those objects or goods of a State which might be present in the territory of another State.

23. He had been struck, in reading draft article 7, by the flexibility of the Special Rapporteur's approach. That flexibility was apparent in all three elements of the article, namely, the notion of action by a party against another State, the notion of impleading, and the notion of the "other State" itself. Naturally, those notions would need to be more clearly defined, but for the moment their vagueness should facilitate the further

study of the topic. It could be considered that the notion of legal proceedings already had a legal relationship, usually in the form of a request for remedy, as its basis. The notion of impleading was sufficiently flexible to take account of the various forms in which a foreign State might be involved in legal proceedings.

24. With regard to the further definition of that notion, the Special Rapporteur had already noted in his report that the question of the inadmissibility of proceedings against the political subdivisions and the other instrumentalities of States required clarification, and that, since State practice in the matter was far from uniform, the Commission would have to choose between a number of options. The Special Rapporteur had taken the stand, in alternative A for article 7, paragraph 2, that the impleading of another State was a matter of fact. There he was on the right track, but it would probably be necessary to have some legal qualification of the kind of situation in which another State was "in fact" impleaded. While the Special Rapporteur was right in saying that jurisprudence had often considered a State's possession or control of property, rather than its legal relationship to that property, to be the relevant point in that respect, he himself wondered whether the legal relationship was not also of some importance. In alternative B, the Special Rapporteur had taken account of the fact that another State, could not always be considered to act in the same capacity in relation to non-State entities; sometimes such entities were under its sovereignty, and sometimes they were not. In the latter case, the only possibility of establishing a legal relationship between the other State and the entity was to do so on a basis of equality—and that, of course, was also pertinent to the question of State immunity.

25. Mr. TABIBI commended the Special Rapporteur's work as a very valuable aid to the study of a complex topic in what could be considered to be a new field of international law. In examining the topic, care must be taken not to slip from the domain of public international law into that of private international law, and the highly sensitive issue of the sovereignty and sovereign equality of States must be borne constantly in mind.

26. An aspect of the topic that was of particular interest to him was the protection of the interests of States, especially small States. For example, while every State had the right to develop its own natural resources as it saw fit, small States were often unable to do so without the aid of larger nations. The draft articles must safeguard the interests of the territorial State, as well as of the foreign State, in such situations; their potentially conflicting interests required careful handling, but the Special Rapporteur had already demonstrated his awareness of that need, his skill in balancing the various elements involved, and his intention to draw both on State practice and on the decisions of national and international courts.

27. He (Mr. Tabibi) approached draft article 7 in the same spirit of caution and desire to avoid overlapping between public international law and private international law as that in which the Commission had taken up the question of the scope of the topic the previous year. In that light, he found that the article was flexible and followed naturally from draft article 6. He had, as yet, no final opinion concerning the alternative versions of paragraph 2 of article 7, though he found alternative A simpler and clearer.

28. Sir Francis VALLAT said that the topic before the Commission was one which required a great deal of thought—a requirement which the Special Rapporteur had clearly satisfied in his exemplary third report and oral presentation of draft article 7. The subject was, however, so complex that it would be impossible to comment fully on that article until the succeeding provisions were also available.

29. As he understood it, what lay at the heart of the Special Rapporteur's thinking with regard to draft article 7 was the distinction between competence and immunity. While he entirely agreed that the distinction existed, he was not sure that it was necessarily right to hold that competence must precede immunity. That was, admittedly, the case in the purely juridical sense, for, if there was no competence, the question of immunity could not arise, but he had serious doubts as to whether it was necessarily the case in the practical and procedural senses. That was not an abstract, but a very real problem: one of the first questions which would be asked of a lawyer representing a State that was the subject of proceedings in a foreign court would be whether the State, in the form of a representative of its Government, should enter an appearance in the proceedings. Answering that question would be extremely difficult if competence had to be disputed in the courts of the foreign State before the question of immunity arose. He believed, therefore, that the Commission should not regard the question of competence and immunity as a "prior question", in the sense in which the issue of jurisdiction might be so considered before, for example, the International Court of Justice.

30. There was a related procedural question which he also hoped the Special Rapporteur would investigate in due course, namely, the question whether a State claiming sovereign immunity ought or ought not to be required to participate in proceedings before the courts of another State. While it was often wisest for the State claiming immunity not to enter an appearance, that was not always the most helpful procedure. The draft articles might offer the Commission an opportunity to discuss and, perhaps, even to help to solve what was a very difficult problem.

31. A further procedural question was that of action by the executive of a State with respect to immunity. As members of the Commission were aware, in some States, immunity was not normally accorded without some form of action—such as, in the United Kingdom,

the delivery of a Foreign Office certificate—by the executive, or Government. The Commission should, therefore, consider the relevant function of the Government of a State in which proceedings of the kind in question were brought and its relationship to a claim of sovereign immunity.

32. Another, far more fundamental question (which he believed to be the underlying reason for the Commission's study of the topic) was that of the nature of the activities of a State claiming sovereign immunity and the conditions in which those activities were conducted. Should the same rule, or even the same principle, apply to activities carried on by a State through its organs, which fell, in one case, directly into the public sphere, and, in the other case, into the sphere of activities, such as commercial activities, normally conducted by private enterprises? He had in mind the case of *Mighell v. Sultan of Johore*,<sup>11</sup> which he saw as a cause for serious doubt whether, in all circumstances, even a head of a State could be identified with the immunity of the State itself. Was it reasonable that, in relation to a private activity, such as entry into a contract to marry, a sovereign should always be able to hide behind State immunity? To make such a claim seemed to him to be a terrible abuse of the concept of State immunity. The questions which State organs could be regarded as synonymous with their parent State for the purposes of immunity and in what circumstances they could be so regarded must be given thorough study, and the outcome of that study would influence the Commission's attitude to the principles embodied in draft article 7.

33. There remained the very delicate question of the meaning of the term "implead". He agreed in principle with the Special Rapporteur's use, in alternative version A of paragraph 2 of article 7, of the words "in fact impleads", inasmuch as it was not necessary for a State to be impleaded by name for it effectively to be involved in proceedings. However, bearing in mind recent proceedings before the International Court of Justice, he believed that the Commission must find more precise wording which would indicate that a legal proceeding would be considered as one "against another State" if that State's legal interests were involved to the extent that they would be legally affected by a judgement in the case.

**Question of treaties concluded between States and international organizations or between two or more international organizations (continued)**  
(A/CN.4/339 and Add.1-5, A/CN.4/341 and Add.1)

[Item 3 of the agenda]

<sup>11</sup> United Kingdom, *The Law Reports of the Incorporated Council of Law Reporting, Queen's Bench Division, 1894* (London), vol. I, p. 149.

**DRAFT ARTICLES ADOPTED BY THE COMMISSION:  
SECOND READING (continued)**

34. Mr. PINTO drew attention to document ILC (XXXIII)/Conf. Room Doc. 5, in which he had listed the provisions of the Draft Convention on the Law of the Sea<sup>12</sup> and the Agreement Establishing the Common Fund for Commodities<sup>13</sup> that were relevant to the question of treaties concluded between States and international organizations or between two or more international organizations.

35. He hoped that that document would assist the members of the Commission in referring to the two voluminous and important documents in question.

*The meeting rose at 5.40 p.m.*

<sup>12</sup> "Draft convention on the law of the sea (Informal text)" (A/CONF. 62/WP.10/Rev. 3 and Corr.1 and 3).

<sup>13</sup> *Agreement Establishing the Common Fund for Commodities* (United Nations publication, Sales No. E.81.II.D.8), p. 1.

## 1654th MEETING

*Tuesday, 19 May 1981, at 10.05 a.m.*

*Chairman:* Mr. Doudou THIAM

*Present:* Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

**Jurisdictional immunities of States and their property (continued)** (A/CN.4/331 and Add.1,<sup>1</sup> A/CN.4/340 and Add.1, A/CN.4/343 and Add.1-4)

[Item 7 of the agenda]

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

**ARTICLE 7 (Rules of competence and jurisdictional immunity)<sup>2</sup> (continued)**

1. Mr. CALLE Y CALLE said that, while the question under consideration was in some respects a difficult one, it was nevertheless of an extremely urgent nature. The concept of immunity as a consequence of sovereignty was an old concept, which was recognized and applied by States, but which was becoming increasingly difficult to apply in the modern world. A

<sup>1</sup> *Yearbook . . . 1980*, vol. II (Part One).

<sup>2</sup> For text, see 1653rd meeting, para. 18.

trend was currently emerging in favour of the powers of the territorial State, which had hitherto been very respectful of the sovereignty of other States in matters of immunity, whether it was a question of foreign heads of State, for example, or of the property of foreign States. The current trend was for States to subject to their jurisdiction not other States as such, but situations in which other States were directly or indirectly involved.

2. In his third report (A/CN.4/340 and Add.1), the Special Rapporteur had attempted to state the rule of immunity, taking as a basis another general, more fundamental rule—that of competence, or territorial sovereignty. It was debatable whether one general rule could really be more fundamental than another; perhaps it would be preferable to consider one rule as preceding the other. Obviously, territorial sovereignty logically preceded immunity, since there could be no immunity without sovereignty or prior territorial competence. Sovereignty and competence constituted, as it were, the starting point, the normal situation, whereas immunity was the exception. Within States, no question of immunity arose. For a question of immunity to arise, one State must be involved in the area of jurisdiction of another State as a result of the presence of its sovereign, head of State, diplomatic agents or property. There might or might not then be assimilation to the situation of the subjects of the State in which the persons or property in question were situated. Obviously, the presence of one State in the area of jurisdiction of another State presupposed respect for the laws of the latter State, at least up to a point.

3. In comparing the concepts of competence and immunity, the Special Rapporteur had referred to the existence of a general rule of competence. The notion of competence was thus taken in its broadest sense, including not only the jurisdictional power of courts, but also the power of the State to act in a certain way and its obligation to refrain from exercising its competence. It was there that the essence of immunity lay. In that connection, he noted that articles in preparation were concerned with the idea of judicial competence; they related to jurisdictional immunity, from the point of view of the courts of justice, to the exclusion of everything concerning direct or objective immunity. A State that refrained from entering a foreign Embassy was respecting an objective immunity, which did not need to be established before the courts. On the other hand, an immunity invoked by a State before a court must be considered and ruled on by that court. In that connection, he pointed out that the mere fact that one State notified another State of judicial proceedings instituted in the former State in itself meant that the former State was subjecting the latter State to its jurisdiction.

4. The report before the Commission contained a very well-ordered presentation, the various elements of which were articulated so as to lead up, step by step, to

the text of draft article 7. That provision relied on the territorial competence of States to enunciate the rule that such competence could not be exercised in certain circumstances. The Special Rapporteur stated that it was not necessary to name the State against which legal proceedings were being taken when such proceedings were against persons, entities or property connected with that State. Recently, claims for compensation for a death resulting from the conduct of police officers of a foreign State had been brought before the courts of the United States of America, and the action had been not only against the perpetrators of the act, but also against the State of which they were nationals.

5. The principle stated in article 7, paragraph 1, was quite acceptable as to its substance. As to drafting, it would be preferable for the last phrase in the Spanish version to read: “*aunque con arreglo a sus reglas de competencia esté en general facultado para iniciar un procedimiento jurisdiccional en una materia determinada*”. As far as the alternative versions of paragraph 2 were concerned, alternative B was preferable because it was more explicit and contained all the relevant elements. In the Spanish version of those two alternatives the word “*acción*” was qualified by “*judicial*”, whereas it should be qualified by “*jurisdiccional*”.

6. Mr. USHAKOV said that the Commission had just begun its work on the jurisdictional immunities of States and their property and was in a position of some uncertainty, particularly because of the two articles that had been adopted the previous year.<sup>3</sup>

7. Article 6 was, in fact, only a restatement of article 1, and neither one of them stated substantive rules. According to article 1, the draft articles related to the immunity of States and their property from the jurisdiction of other States. Article 6, paragraph 1, provided that:

A State is immune from the jurisdiction of another State in accordance with the provisions of the present articles.

That meant that the draft articles were going to define the content of jurisdictional immunities. Since article 6 provided that States were immune from the jurisdiction of other States in accordance with the draft articles, and article 1 stated only that the articles applied to questions relating to the jurisdictional immunities of States and their property, it would be necessary to draft articles indicating what the immunities in question were and in what cases they must be granted. The Commission would then have to formulate provisions similar to those of the 1961 Vienna Convention on Diplomatic Relations.<sup>4</sup>

8. That task was possible, in principle, but it would be necessary to consider every conceivable situation

<sup>3</sup> See 1653rd meeting, footnote 4.

<sup>4</sup> For the text of the Convention (hereinafter called “1961 Vienna Convention”) see United Nations, *Treaty Series*, vol. 500, p. 95.

separately, specify which State organs could act within the jurisdiction of another State and, in each case, indicate what immunities the receiving State must grant. In practice, however, such a task did not seem possible. It would first be necessary to define the cases in which a State was represented in one way or another within the jurisdiction of another State, such representation differing in more than one respect from representation by a diplomatic mission, and, in each case, to determine the immunities to be granted. The 1961 Vienna Convention contained no general rule on the enjoyment of privileges and immunities; it specified what those privileges and immunities were. In his opinion, it was probably not possible to enumerate the jurisdictional immunities of States and their property in the same way. Yet it appeared from article 1 and article 6 that those immunities would subsequently be enumerated. Article 7, which provided that the territorial State must refrain from exercising its jurisdiction in certain cases, added nothing to articles 1 and 6, since those cases had not been specified.

9. It was for those reasons that he had not been in favour of articles 1 and 6 the previous year. The situation had become all the clearer now that the Special Rapporteur had made article 7 derive from article 6, basing himself on article 6 as though it stated a rule. For the Special Rapporteur, providing in article 6 that a State was "immune from the jurisdiction of another State" amounted to restating jurisdictional immunity as a general rule or general principle (A/CN.4/340 and Add.1, para. 7). But article 6 did not state a general rule; it merely specified that a State was immune from the jurisdiction of another State "in accordance with the provisions of the present articles", which did not mean that it had general immunity from the jurisdiction of another State. The Special Rapporteur was thus proceeding from a general rule which did not exist, to announce, in article 7, the rule that the receiving State must refrain from exercising its jurisdiction when there were jurisdictional immunities, whereas article 6 did not indicate when such immunities existed.

10. Since the Commission had only just begun its work and it followed from the two articles provisionally adopted at the previous session that the content of jurisdictional immunities and the cases in which they must apply would be specified in other articles, it was important to clarify some basic concepts.

11. The Commission must, for example, define the meaning of the term "jurisdiction of the State". Did it mean the power of the State, the authority of the State and the sovereignty of the State, taken as a whole, or only judicial jurisdiction? When it was said that a territory was under the jurisdiction of a State, that meant that it was under the power, authority or sovereignty of that State. It was precisely in that sense that the concept of jurisdiction should be understood for the purposes of the draft articles. If only courts and

tribunals were involved, a distinction must obviously be made, on the one hand between civil and criminal cases and on the other, between the administrative tribunals and constitutional courts that might exist in some States. The topic under consideration, however, could only involve civil cases, for it was quite clear that a State could not be subject to criminal jurisdiction or, for that matter, to the jurisdiction of an administrative tribunal or a constitutional court. Yet that point did not seem to have been made clear by the Special Rapporteur when referring to courts.

12. The use of the term "competence" instead of the term "jurisdiction" should be avoided. Those terms might sometimes have the same meaning, but in the present case it would be very dangerous to use them synonymously. According to the theory of competence developed by the normativists, in particular by Kelsen, the competence of States existed only insofar as it was granted to them by international law. Consequently, the use of the term "competence" in the draft was bound to raise the question of who granted such competence. It was thus clear that the Commission should not take the term "jurisdiction" in the restrictive sense of "judicial jurisdiction", which was necessarily limited to civil procedure and would exclude certain measures of coercion. In that connection, he pointed out that the 1961 Vienna Convention did not apply only to judicial immunities, as shown by article 22 on the inviolability of the premises of the diplomatic mission and article 24 on the inviolability of the archives and documents of the mission.

13. That situation could have been reflected in article 1 if it had been stated that the draft articles applied to the immunities of a State from the jurisdiction of another State or other States. A distinction should be drawn between the concept of jurisdiction in the strict sense and in the broad sense. In the strict sense, the term applied only to immunities from the jurisdiction of a State. In the broad sense, it also applied to immunities from the administration or control of a State, according to whether reference was being made to a dependent territory administered by a State or to a temporarily occupied territory under the control of a State. It was therefore important for the Commission to agree on the exact meaning to be ascribed to the term "jurisdiction".

14. There seemed to be no doubt about the existence of a principle of international law according to which a State was immune from the jurisdiction of another State. The Commission could not confine itself to indicating the cases in which a State did not enjoy that immunity. It could not draft provisions on the exceptions without first having stated the principle. At present, however, it was stated in article 6 that a State was immune from the jurisdiction of another State "in accordance with the provisions of the present articles", which meant that there was no general principle, but that the Commission was going to indicate when jurisdictional immunities existed and how they applied.

15. The expression “absolute sovereignty”, which the Special Rapporteur had used in explaining the justification for the jurisdictional immunities of States (A/CN.4/340 and Add.1, para. 7), was not satisfactory. Such immunities did, of course, result from the sovereignty of States, just as all international law was based on the concept of sovereignty. It could be held that jurisdictional immunities placed limitations on State sovereignty, but then it was international law as a whole that imposed the limitations. Since there was no State in the world that enjoyed absolute sovereignty, international law could be regarded as limiting the absolute sovereignty of all States. Moreover, the same applied to internal law: restrictions on the freedom of the individual implied restrictions on the freedom of other people. It was thus always in regard to all persons or all States that limits were placed on freedom or on sovereignty. The State that granted jurisdictional immunities no doubt agreed to a limitation of its sovereignty, but from that point of view, international law as a whole would have the effect of limiting its sovereignty. In fact, the immunities granted by a State safeguarded the sovereignty of all other States and its own sovereignty as well, since by virtue of the principle of reciprocity, it granted such immunities only because other States must grant them to it. In the absence of such a rule of reciprocity imposed by international law, the sovereign equality of States would no longer exist. The rule of the granting of jurisdictional immunities was, in fact, the corollary of the basic rule of the sovereign equality of States.

16. States granted jurisdictional immunities to other States of their own free will. True, international law required them to grant such immunities in some situations, but those situations only arose if the receiving State was willing. The presence of a State within the area of jurisdiction of another State was always fully agreed to by the latter, as Mr. Riphagen had pointed out at the previous meeting. The same applied to State property: there was nothing to prevent a State from refusing to have the property of another State within its area of jurisdiction. There was thus no limitation of any kind, but rather consent, generally given on the basis of reciprocity. A State which allowed the presence of another State or property of another State within its area of jurisdiction accepted the consequences in regard to immunities.

17. The internal law of the receiving State must obviously be respected by States enjoying jurisdictional immunities, and it might perhaps be advisable to introduce into the draft articles a provision corresponding to article 41 of the 1961 Vienna Convention.

18. Mr. TSURUOKA said that the Commission’s work on the question of jurisdictional immunities was still at a preliminary stage. He had already had an

opportunity of expressing his views on the subject, in particular with regard to the method to be followed.<sup>5</sup>

19. He noted that the principles of the jurisdictional immunity of States were evolving considerably, moving away from the so-called “doctrine of absolute immunity” and closer to the theory of restrictive or limited immunity. Although that phenomenon was widespread, there were nevertheless, in many respects, profound divergencies between States—and even undeniable incoherences within some States.

20. Moreover, it was generally recognized that jurisdictional immunity was linked with the question of State sovereignty, and thus with a fundamental aspect of international legal relations. The Commission should therefore exercise the utmost caution.

21. The discussions at the current session showed the doctrinal differences and the variety of practices in different States and under different legal systems. Consequently, if it was to achieve any useful result in the area under study, the Commission must adopt a realistic approach and avoid departing too far from practice, in order to ensure the greatest possible number of ratifications of any future draft convention. The inductive method must be used. The Commission should apply itself to ascertaining precisely what current State practice was in regard to jurisdictional immunities all over the world. Nevertheless, the need for a compromise between the different positions would call for some degree of progressive development of law. The contradiction between those two affirmations was only apparent, since it would be advisable to remain as close as possible to current practice, but show a spirit of compromise in order to reconcile divergent positions.

22. He then referred to the position of Japan, which he had already had occasion to explain earlier. In 1928, the Supreme Court had pronounced firmly in favour of the doctrine of absolute immunity. That position had remained the basis for subsequent judicial decisions, although they had shown a trend in favour of restriction, mainly during the post-war years. In his view, it would not be correct to say that contemporary Japanese judicial practice still favoured absolute immunity.

23. By contrast, Government practice had firmly adopted the doctrine of relative immunity, as evidenced by the trade treaties concluded with the USSR in 1957 and with the United States of America in 1953. Japanese practice thus appeared to be gradually moving away from the strictly conservative school and adopting a more restrictive attitude. The same trend could be observed in many other countries, and might even be described as general.

<sup>5</sup> See *Yearbook . . . 1980*, vol. I, p. 204, 1624th meeting, paras. 19 *et seq.*

24. In his opinion, draft article 7, as proposed by the Special Rapporteur, was a preliminary provision which had the great merit of being sufficiently flexible, and the unquestionable ambiguity of which was quite deliberate. The article represented a door through which everyone could pass and which should enable the Commission to move beyond the preliminary stage of its work. He recommended that everyone should cross that threshold without fear.

25. Mr. PINTO said he believed the message to be derived from Mr. Tsuruoka's wise comments was that the Commission needed not so much to state a doctrine as to reflect current practice, including the evolution of practice regarding State immunity. The matter should be approached in a practical way, with a view to stating what the legal position was and, if necessary, what it ought to be.

26. In considering the Special Rapporteur's reports, he had endeavoured to determine why there was a need for the rule known as State immunity. It seemed to him that some kind of balance had to be established between the various interests involved. They included, for instance, the interests of private individuals engaged in commercial transactions with a foreign State; the interests of a Government in promoting such transactions and in building up the confidence on which they must be based; the interests of the territorial State in maintaining its own jurisdiction throughout its territory and in such areas as it deemed it necessary to do so for the protection of its wider interests; and lastly, the interests of the foreign State in not permitting its own interests to be made subject to the decisions of foreign courts, since that could reduce the efficiency of its actions and even subvert the implementation of its policies. In balancing those interests, certain rules had to be laid down and, as Mr. Tsuruoka had pointed out, a practical rather than a doctrinaire approach was required. The Commission should review the situation and endeavour to reflect in practical terms what it considered the rules were and what they should be.

27. In preparing his reports and draft articles 1, 6 and 7, the Special Rapporteur had done precisely that. He had invited the Commission to consider the relationship between competence and immunity, competence being understood in the sense of the competence of a judicial or administrative jurisdiction, since the other meanings of that term were apparently not included. He had stated that where there was no competence the Commission did not have to consider immunity from jurisdiction, and, in paragraph 2 of draft article 6, he had provided the Commission with a further elaboration of the kind of immunity he had in mind. Although it was arguable that neither draft

article 1 nor draft article 6 stated a principle, his own (Mr. Pinto's) view was that the Special Rapporteur had indeed stated a principle; the fact that it was a refinement of a qualified doctrine made it no less a principle. The fact that the Special Rapporteur had not yet expounded all his ideas regarding such qualification would not prevent the Commission from proceeding with its examination in the manner indicated by the Special Rapporteur, although it should reserve the right to review the question as a whole on completion of the draft and to decide whether or not practice had been properly reflected.

28. The Special Rapporteur had then proceeded to distinguish cases which related not to the concept of immunity as such, but to lack of jurisdiction for reasons other than immunity. He had formulated the proposition that a State should not exercise compulsory jurisdiction over a foreign State—in other words, that it must not implead a foreign State. The word “implead”, as he (Mr. Pinto) understood it, implied prosecution and, used in that sense, meant that the territorial State must not compulsorily subject a foreign State to its jurisdiction. The Special Rapporteur had described what constituted a foreign State and the various subdivisions of the State; he had also described what constituted State property for the purposes of his exposition, and had pointed out that it should not be limited to claims of title or ownership by the foreign Government, but should extend to property in its possession or control.

29. Draft article 7 constituted a logical progression from draft article 6. The word “submitting”, in article 7, paragraph 1 was, however, somewhat concise; possibly what was meant was “subjecting” or “permitting the subjection of”. Under alternative A of paragraph 2, as was clear from the use of the word “impleads”, proceedings could be contemplated, but must not involve compulsory jurisdiction over the foreign State. Alternative B dealt with the circumstances in which jurisdiction over a foreign State would arise, and referred to the kind of agencies and property that would attract immunity. His own view was that alternative B was a necessary extension of, as opposed to an alternative to, alternative A.

30. While he was prepared to agree to the referral of draft article 7 to the Drafting Committee, he considered that certain points required further examination. In particular, the phrase “so long as the proceeding in fact impleads that other State”, in alternative A, was perhaps not full enough. It was necessary to introduce the idea of a legal relationship involving the interests of the foreign State which needed to be protected by immunity.

*The meeting rose at 12.35 p.m.*

## 1655th MEETING

Wednesday, 20 May 1981, at 10.10 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Aldrich, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

### Jurisdictional immunities of States and their property (continued) (A/CN.4/331 and Add.1,<sup>1</sup> A/CN.4/340 and Add.1, A/CN.4/343 and Add.1-4)

[Item 7 of the agenda]

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

##### ARTICLE 7 (Rules of competence and jurisdictional immunity)<sup>2</sup> (continued)

1. Mr. FRANCIS said it had been observed by Mr. Tabibi at the 1653rd meeting that the Special Rapporteur was concerned with the development of a new branch of international law. That was perfectly true, for while the 1961 Vienna Convention<sup>3</sup> and the 1963 Vienna Convention on Consular Relations<sup>4</sup> were confined to the representational aspects of inter-State relations, the work in which the Commission was engaged was far broader in scope, extending to all aspects of those relations in so far as they were affected by State immunity.

2. Mr. Tabibi had also said that one of the benefits of the Commission's work was that it would help to protect the permanent sovereignty of the countries of the Third World over their natural resources, which would in turn encourage protection of foreign investment within the wider context of international trade. There was, however, another dimension to that work, for it would also help to promote friendly relations and co-operation between States and to avoid disputes and dissension. That was important in view of Mr. Tsuruoka's statement (1654th meeting) that the doctrine of absolute State immunity was no longer accepted jurisprudence in Japan—and as could be seen from State practice, the same applied to other countries. Consequently, since the number of States tending to adopt a more restrictive approach to State immunity was increasing, it was only right and proper for the Commission to try to codify the law accordingly. He was sure it would be equal to the task.

<sup>1</sup> *Yearbook* . . . 1980, vol. II (Part One).

<sup>2</sup> For the text, see 1653rd meeting, para. 18.

<sup>3</sup> See 1654th meeting, footnote 4.

<sup>4</sup> For text, see United Nations, *Treaty Series*, vol. 596, p. 261. The Convention is hereinafter called "1963 Vienna Convention".

3. As to the Commission's method of work, Mr. Tsuruoka had stressed the importance of an inductive approach, of a realistic understanding of the contemporary world and progressive developments, and of a readiness to compromise. Those were essential ingredients for the successful outcome of the Commission's work. In that connection, due account should be taken of article 47, subparagraph 2 (b) of the 1961 Vienna Convention, according to which States could "extend to each other more favourable treatment than is required" under that convention. That provision could be useful to the Commission in dealing with the question of compromise.

4. His comments on draft article 7 would necessarily be limited because, as Sir Francis Vallat had pointed out (1653rd meeting), it was not possible to take a position on that article without first examining draft articles 8 to 11. Draft article 7 was of course, the logical consequence of draft article 6. In that connection, Mr. Ushakov, speaking of the previous meeting on the general question of the relative force of immunity and territorial sovereignty, had said that there was no absolute sovereignty and that immunity, rather than being a limitation of sovereignty in the absolute sense, was based on the general mutual consent of States. By the same token, there was nothing absolute about lack of jurisdiction within the context of the application of State immunity. If lack of jurisdiction were absolute, then, if consent was given or waiver effected, the territorial State could not exercise jurisdiction.

5. The Special Rapporteur, speaking of Indian law, had referred to the application of the principle of immunity even where, under normal circumstances, the State would have had jurisdiction. The position as he (Mr. Francis) saw it was that when immunity started to operate, jurisdiction was suspended by virtue of the general mutual consent of States. That meant that, in specific cases and on a reciprocal basis, immunity could be waived and the State concerned would have jurisdiction. To that extent, there was a strong permissive element in immunity from the standpoint both of the State claiming it and of the State granting it, which enabled jurisdiction to be exercised in the event of waiver or consent by the State affected.

6. No comment on draft article 7 would be valid if account were not taken of the definitions laid down in article 2, subparagraph 1 (b) (A/CN.4/331 and Add.1, para. 33) and in article 3, subparagraph 1 (b) (iv) (*ibid.*, para. 48),<sup>5</sup> which referred respectively to "administrative authorities" and "administrative . . . powers". Clearly, therefore, the exercise of administrative authority had to be contemplated otherwise than in a judicial context. Indeed, in paragraph 13 of his report (A/CN.4/340 and Add.1), the Special Rapporteur acknowledged that the jurisdiction of a State might not be exclusively territorial.

<sup>5</sup> See also 1653rd meeting, footnote 5.

Subject to the content of draft articles 8 to 11, it seemed to him (Mr. Francis) that article 7 had been drafted in an exclusively territorial context, with emphasis on legal proceedings and adjudication. Possibly, however, the Special Rapporteur intended to deal with the point raised in paragraph 13 of his report in another context.

7. Lastly, expressing his preference for alternative A of article 7, paragraph 2, he recommended that the draft article be referred to the Drafting Committee.

8. Mr. ŠAHOVIĆ said he agreed with Sir Francis Vallat that it would be useful to have a clearer idea of the Special Rapporteur's intentions regarding the articles that would follow draft article 7. It might have been advisable for him to submit to the Commission a general outline of the whole draft, for the third report was not confined to expounding general principles, but also raised certain questions that could only be settled after a precise analysis of practice and the various sources on which the Commission's work should be based.

9. As shown by the information submitted by Governments (A/CN.4/343 and Add.1-4), the Commission must take account of the growing diversity of legal systems. It was undoubtedly from the contemporary practice and legislation of States, much more than from doctrine, that it must derive new rules, though it should not neglect the older rules that should be adapted to the current situation.

10. In his report, the Special Rapporteur still paid great attention to the general foundations and the nature of the jurisdictional immunities of States, although that aspect was no longer fundamental at the stage reached in the Commission's work, which should henceforth be firmly concentrated on practice. However interesting they might be, theoretical questions gave rise to views that were bound to differ, as was shown by the Commission's discussions, whereas the task on hand was to prepare a draft aimed primarily at the solution of specific problems. It would therefore be advisable for the Special Rapporteur to concentrate his analysis on State practice and to propose to the Commission draft articles that would carry its work beyond the preliminary stage.

11. The text of the report contained the expressions "more fundamental . . . concept of sovereignty" and "more basic principle of sovereignty" (A/CN.4/340 and Add.1, paras. 7 and 8), which the Special Rapporteur had used to refer to the theory of absolute sovereignty. He (Mr. Šahović) pointed out that the Commission had already found that that theory was undoubtedly losing support, and noted that there could never be degrees of sovereignty. It existed as a fact and as an attribute of every State engaged in international legal intercourse. In his view, it would be difficult for an analysis based on such an approach to lead to the formulation of practical provisions for inclusion in draft articles.

12. As to the "new point of departure" mentioned in paragraph 9 of the report, he thought the general basis of the draft should rather be the principle of co-operation between States, which should make it possible to settle the practical question of jurisdictional immunity, taking the mutual interests of the States concerned into account. Any other solution would inevitably lead to a deadlock through the opposition of two rival sovereignties of equal strength. The draft articles must indeed settle a series of problems relating to the rights and obligations of the two parties and to the concrete circumstances of the jurisdictional immunity of States. Unless it deliberately pursued that aim, the Commission might confine itself to preparing a draft of ten articles or so, in which it would attempt to solve, by the traditional method, the problem of jurisdictional immunity, which usually took up only two or three pages in works on international law. The most important aspect of the Commission's work lay in the conclusions to be drawn from the notion of the consent of States, with a view to solving the problem of reciprocity on the basis of a study of practice.

13. With regard to draft article 7, he referred to the reservations he had expressed at the previous session when draft article 6 had been adopted on first reading,<sup>6</sup> and suggested that it might be advisable to redraft article 6 in the light of the wording proposed for draft article 7, paragraph 1. That would make it possible to clarify the scope of the concept of jurisdictional immunity. The purpose of draft article 7, paragraph 1, was not entirely clear, however, particularly because of the wording of the second part of the sentence, starting with the word "notwithstanding". The rule was stated negatively, and perhaps placed too much emphasis on the concept of competence.

14. With regard to alternatives A and B of paragraph 2, he would prefer a general, but clear formulation. He noted that alternative B expressed two ideas in one and the same provision; he would prefer alternative A. Like other members of the Commission, however, he considered that the concept of "impleading" was not sufficiently clear and should be further clarified.

15. Mr. DÍAZ GONZÁLEZ said that the discussions at the previous session had already shown the extent of the difficulties raised by the question of the jurisdictional immunities of States. There were two possibilities: to make a thorough study of the general principles that applied, and thus prolong the preliminary phase of the work; or to begin to prepare a draft of articles at once, so as to avoid loss of time.

16. The topic of the jurisdictional immunities of States was quite suitable for progressive development, and called for the elaboration of new law. He agreed with Mr. Šahović that a prolonged study of doctrine

<sup>6</sup> See *Yearbook . . . 1980*, vol. I, p. 205, 1624th meeting, para. 26; and pp. 265-266, 1634th meeting, paras. 54-56.

could not produce a satisfactory result; for the views of States and the practices they followed had always differed widely in regard to jurisdictional immunities, which were a privilege whose extent was determined by the State that accorded it.

17. Sovereignty could not be qualified; it was the very foundation of the legal equality of States. He noted that Mr. Ushakov had said that a State which accorded a privilege did so in anticipation of what it might receive in return, and thus did so with a view to safeguarding its own interests.

18. He agreed with Sir Francis Vallat (1653rd meeting) that it would be difficult to take any valid decision on the draft articles adopted at the previous session, or on draft article 7, without knowing what provisions were to follow. Moreover, the Special Rapporteur had taken care to submit a draft article 7 that was worded flexibly enough to dispel any possible hesitation and to allow the Commission to go forward in its work without waiting till all the preliminary difficulties had been overcome.

19. The principle of sovereignty was universally recognized as a source of the jurisdictional power of States, and the draft articles were intended to regulate the exceptions to that principle. The basis of the draft could not, however, be a doctrine or a basic definition of international law; it must lie in State practice, whose common denominator must be ascertained and reflected in a set of provisions.

20. He could accept draft article 7 as submitted by the Special Rapporteur, provided that the texts of that article and of articles 1 and 6 were regarded as guidelines liable to be revised. He also endorsed the drafting amendments proposed by Mr. Calle y Calle at the previous meeting.

21. As to alternatives A and B for paragraph 2, he was in favour of the former, which was the most general and the most likely to further the Commission's work.

22. Lastly, he agreed with Mr. Tsuruoka (1654th meeting) that further progress should be made on the basis of practice, and shared Sir Francis Vallat's view that the Commission could not take any final decisions until it had made a more thorough study of available source materials.

23. Mr. QUENTIN-BAXTER said he could quite understand why Mr. Ushakov felt that the articles adopted the previous year provided no firm foundation on which to proceed. However, the absence in the initial stages of a solid basis for future work was by no means peculiar to the present topic; there were often real difficulties in establishing such a basis until there had been a thorough exchange of views. Hence, he could see no immediate prospect of returning to the subject-matter of draft articles 1 and 6 and believed that the Commission should, as the Special Rapporteur had suggested, continue its efforts in the light of those provisions.

24. Other speakers had rightly said that there were excellent reasons why the Commission should be experiencing difficulty in finding the core of the topic before it. When the Commission had discussed the question of diplomatic intercourse and immunities, it had been able to start from a universally accepted proposition: the institution of diplomacy was held to be inseparable from the immunities that made possible the performance of its functions. When it came to sovereign immunity, or the jurisdictional immunities of sovereign States and their agencies, the Commission had a vast range of incidents to consider, from those affecting a travelling head of State to those affecting property that might or might not be closely connected with the sovereign activities of a State. To pick out from that background the factors that might lead from the outset to the drafting of disciplined articles was extremely difficult.

25. Like a number of other speakers he could, however, see a beginning of differentiation with respect to the concept of consent. Irrespective of whether immunity preceded consent or vice versa, the question of immunity only arose when a State admitted to its territory emanations of a foreign sovereignty. Such exchange of immunity by consent was so much a part of certain aspects of international life that immunity itself might be considered the basic rule; but in spheres outside that uncontroversial core, the question must be asked to what States had consented in their mutual relations. It was clear from judicial judgments and the literature that a distinction had been made from the earliest times between express and implied consent, between the kinds of activity—such as the peacetime movement of one State's naval vessels through the territorial waters of another State—that could be taken as receiving implied consent to their performance and attracting the immunity that went with such consent, and the kinds of activity with respect to which consent must be express for immunity to exist at all.

26. That led to the question of knowledge. In the complex modern world, it was a normal occurrence for emanations of a foreign sovereignty to be present in the territory of a State without the authorities of that State having any particular knowledge of that presence. From the legal point of view, such situations immediately raised the question what the territorial States concerned had consented to: could they, for example, be said to have agreed to the pursuit, within their own territories, of any dealings that were properly subject to their own authorities and would attract immunity if it emerged that they were sufficiently associated with another sovereign State? In his view, neither practice nor reason warranted the making of such a sweeping assumption.

27. None the less, there was, with regard to the granting of immunity for commercial activity, a discernible trend towards the application, not of a complex and subtle distinction between acts of sovereignty and other acts, but of the simple, practical test of asking whether the activity related merely to

trade and whether the sovereign whose interests were involved had entered the marketplace of his own volition. Most important precedents in that sphere were to be found in the Convention on the Territorial Sea and the Contiguous Zone<sup>7</sup> and the Convention on the High Seas,<sup>8</sup> adopted at Geneva in 1958, and it would seem that the criteria in question were increasingly applied in international commerce. Criteria of that sort were, he believed, more fundamental than the criterion of competence, to which the Special Rapporteur had paid particular attention in his third report (A/CN.4/340 and Add.1).

28. He fully appreciated that there was a very subtle relationship between the competence of a State and the granting of immunities, and that there might, for example, be cases in which it would be necessary to determine whether an organ was declining to act for reasons of immunity or because of its own lack of competence. However, the general approach in matters of international law was not to look into the internal arrangements of States or to accept them as a justification for the waiving of international rules. Furthermore, he wondered whether concern with the problem of competence was really necessary in the case of the draft articles. If State organs did not have the requisite competence they would presumably not act, and the need to plead immunity would not arise; if, on the other hand, that need did arise, the question whether a particular organ had a particular competence would not be a factor in the problem. As the Special Rapporteur had indicated, competence was of the essence in the rule that no State should attempt so to extend its own jurisdiction as to interfere with the activities of other sovereign States within their own borders; but so far as he himself could determine, that kind of question did not arise directly in the draft articles.

29. He believed that in draft article 7 the Special Rapporteur had presented the Commission with two articles, for the community of interest between paragraph 1 and either version of paragraph 2 was not such that they ought ultimately to be included in a single provision. Paragraph 1 dealt, in the broadest possible terms, with the subjection of one State to the jurisdiction of another. It served to remind the reader of the basic proposition that States acted through all branches of their Government and of their obligation to observe, in the circumstances with which the draft articles as a whole were concerned, the requirements, whatever they might be, of the law of sovereign immunities. Both versions of paragraph 2 focused on the judicial branch of Government, thereby fulfilling a requirement that must indeed, be met early in the draft articles.

30. With regard to alternative A, he had some doubt about the meaning to be given to the word "impleads".

In paragraph 28 of his report, the Special Rapporteur suggested that the word itself implied a compulsion, the doing of something against someone's will. It was certainly a very common concept in the English law of sovereign immunity that a sovereign State might not be "impleaded" against its will, but in that context the word was used neutrally. He would, therefore, welcome clarification of the sense in which the word was employed in the draft articles: did it mean simply that the State concerned was to be considered party to a proceeding, or did it mean more, in the sense that the party's legal interests were involved?

31. In paragraph 29, the Special Rapporteur took up the question of the extent of the notion of a "State". In that respect, he had employed in alternative B of article 7, paragraph 2, language very close to that used by Lord Atkin when, in the case *The "Cristina"* (1938),<sup>9</sup> he had laid down, in perhaps the widest terms ever used in an English court, the proposition that immunity applied not only when a State became a party to proceedings, but also when those proceedings affected in any way the destination or use of property within its ownership, possession or control. That dictum had heavily influenced judgements on questions of immunity in United Kingdom courts and other British jurisdictions, leading to an increasingly absolute application of the rules of immunity. On the other hand, the courts themselves had voiced doubts about that practice, and the other great common law system, that of the United States of America, had broken away from it at an early date. Indeed, a Justice of the United States Supreme Court had gone out of his way to say that the test of ownership, possession and control was impossible to apply consistently and had such ramifications that it could not become the basis for an adequate legal distinction. That view had, indeed, been borne out by events, for the common law system itself had rejected the distinction by legislative intervention. It was, in fact, one of the Special Rapporteur's greatest difficulties in considering policy with respect to sovereign immunity, that he was required to do so at the very time when States themselves were reviewing such questions and when they were, in some instances, abrogating the effects of very long lines of precedent.

32. With those considerations in mind, he thought that both the proposed versions of paragraph 2 of article 7, especially alternative B, went too far. He believed that the Commission would at least begin to see what should be the core of the draft articles if it followed the natural process of differentiation through consent, knowledge and the application of the criterion of commercial or non-commercial activity, but that if it gave too much weight to tests such as that of ownership, possession and control, it would find itself confronted with the same difficulties as has been encountered by the judicial systems that had developed them.

<sup>7</sup> United Nations, *Treaty Series*, vol. 516, p. 205.

<sup>8</sup> *Ibid.*, vol. 450, p. 11.

<sup>9</sup> *Annual Digest and Reports of Public International Law Cases, 1938-1940* (London), case No. 86, p. 250.

33. Sir Francis VALLAT said that, while he very much agreed with Mr. Quentin-Baxter that the resolution of the issue of consent was close to the centre of the topic, he thought that a still more fundamental requirement was the need to achieve a proper balance between the sovereignty of each of the two States that might be parties to a particular case. Care must be taken not to favour the interests of the territorial State at the expense of those of the “sending” State, and vice versa. Furthermore, that balance must be sought in the context of the needs of the late twentieth century, and not of the very different circumstances that had obtained in the eighteenth and nineteenth centuries.

34. Linked to that idea of balancing the interests of sovereign States was a point that had been brought out very clearly by Mr. Ushakov (1654th meeting), namely, that sovereignty was not an absolute concept. As Lord McNair had said, one of the attributes of sovereignty was to be able to accept limitations on its exercise; equally, it was one of the attributes of a sovereign State to be capable of living in the context of public international law, which necessarily implied limits on the exercise of sovereignty. Consequently, the question whether one State must submit to the jurisdiction of another or whether the second State must grant the first immunity was essentially a practical problem associated with the nature of sovereignty. That was the basic position from which he himself approached the draft articles.

35. That being so, he viewed many of the precedents in the form of judgements of national courts with some reserve. The Special Rapporteur had rightly perceived in the decisions of United Kingdom, and particularly English, courts a steady trend towards the granting of immunity to foreign sovereigns. It was, however, important to bear in mind in that respect that the trend had originated in the United Kingdom’s imperial era. Account must also be taken of the extent to which English law courts had historically regarded themselves as bound by the judgements of their predecessors. It was only within the last decade or so that the United Kingdom’s supreme court of appeal, the House of Lords, had been freed from the strict application of the doctrine of *stare decisis*. While it was true, then, that United Kingdom courts had developed and applied the practice of the granting of absolute sovereign immunity, covering both States and their property, he hoped that the Commission would be guided, not by that example, but by present-day United Kingdom legislation, particularly by the *State Immunity Act 1978*,<sup>10</sup> which clearly showed the abandonment of the previous policy. As to that policy, it might be noted that there was a remarkable lack of international

judicial precedents laying down anything like a principle of absolute immunity for foreign States and their property.

36. With regard to draft article 7, he agreed in particular with the comments of Mr. Tsuruoka and Mr. Pinto (1654th meeting). He still believed that it would be necessary to see the subsequent articles before taking a final decision on the wording of article 7, but after the discussion in the Commission, he would have no objection to referral of the article, as it appeared in paragraph 44 of the Special Rapporteur’s third report, to the Drafting Committee. The only comment he wished to make was that he found alternative B far too detailed and thus very much out of keeping with the gradual approach so wisely adopted by the Special Rapporteur.

*The meeting rose at 12.40 p.m.*

## 1656th MEETING

*Thursday, 21 May 1981, at 10 a.m.*

*Chairman: Mr. Doudou THIAM*

*Present: Mr. Aldrich, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.*

### **Jurisdictional immunities of States and their property** (*continued*) (A/CN.4/331 and Add.1,<sup>1</sup> A/CN.4/340 and Add.1, A/CN.4/343 and Add.1–4)

[Item 7 of the agenda]

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

#### ARTICLE 7 (Rules of competence and jurisdictional immunity)<sup>2</sup> (*concluded*)

1. Mr. JAGOTA, referring to the draft articles provisionally adopted by the Commission at the previous session,<sup>3</sup> said that his only reservation concerning article 1 related to its use of the words “questions relating to” the immunity of a State, inasmuch as it remained to be seen from the later draft articles what those questions were. Similarly, in both paragraphs of article 6, the rules stated were qualified by the phrase “in accordance with the provisions of the present articles”, and most of those articles still remained to be discussed and defined.

<sup>10</sup> United Kingdom, *The Public General Acts, 1978* (London, H.M. Stationery Office), part I, chap. 33, p. 715; text reproduced in: American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. XVII, No. 5 (September 1978), p. 1123.

<sup>1</sup> *Yearbook . . . 1980*, vol. II (Part One).

<sup>2</sup> For text, see 1653rd meeting, para. 18.

<sup>3</sup> See 1653rd meeting, footnote 4.

2. In article 7, paragraph 1, the Special Rapporteur took the rule enunciated in article 6 and specified how it was to be given effect. Alternatives A and B of paragraph 2 provided, respectively, an explanation of the scope of the term “legal proceeding” and an elaboration of the definition of the term “another State”.

3. Paragraphs 7 to 23 of the Special Rapporteur’s third report (A/CN.4/340 and Add.1) contained an elaboration of the concept of jurisdiction, which the Special Rapporteur had thought it expedient to distinguish from the concept of the competence of the forum. He had concluded that competence was a matter of internal law and that the question of immunity arose only if the forum was competent. That conclusion was correct, and, as the Special Rapporteur himself seemed to have recognized in the fifth sentence of paragraph 19 of his report, the issue of competence was consequently irrelevant to the topic of State immunity and need not be further considered.

4. Of the matters discussed in paragraphs 20 to 24 of the report, the only one relevant to the present topic was the “act of State” doctrine. The Special Rapporteur distinguished between the relative nature of State immunity, which he held to be relative in the sense that a State might not claim the immunity to which it was entitled, and the absolute nature of the “act of State” doctrine as applied by the United States of America, according to which an act, once established as a sovereign act of a foreign State, attracted immunity and could not be the subject of proceedings. In his own view, that distinction was false; even in cases of sovereign immunity, the Commission must look to State practice, which, as it was now emerging, was to divide State acts into sovereign acts and non-sovereign, or commercial, acts.

5. The Special Rapporteur intended to deal, in draft article 8 (A/CN.4/340 and Add.1 para. 58)<sup>4</sup> with the question of the need or otherwise for consent to the exercise of jurisdiction. If consent was necessary in relation to sovereign acts, it must surely also be necessary in relation to “acts of State” as defined by the United States doctrine. Moreover, with the promulgation of the *Foreign Sovereign Immunities Act of 1976*,<sup>5</sup> that doctrine was destined soon to disappear, even in the United States. In short, the Commission should leave aside the study of paragraphs 7 to 24 of the report and make a detailed examination of the contents of paragraphs 27 to 42, which set out the background to what he believed should be a separate article, namely, the present alternative B for article 7, paragraph 2.

<sup>4</sup> Text reproduced in 1657th meeting, para. 1.

<sup>5</sup> United States of America, *United States Code, 1976 Edition*, vol. 8 (Washington, D.C., U.S. Government Printing Office, 1977), title 28, art. 1330. Text of the Act reproduced in: American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. XV, No. 6 (November 1976), p. 1388.

6. In his view, the essence of article 7 was to be found in paragraphs 25 to 26 of the report, in particular in the passage reading:

As “a State is immune from the jurisdiction of another State”, it follows that no State has the power to make another State submit to its jurisdiction. This absence of power could also be expressed in terms of an obligation on the part of a State not to exercise sovereign authority or a duty to suspend its jurisdiction over another State against its will.

In other words, before one State could be brought before the courts of another, it must consent thereto in one of the ways to be described in articles 8 to 11.

7. He believed that article 7 was a correct statement of the law as it had existed prior to 1970. For the period 1970–1980 it was partly correct, because the world had then been divided, roughly speaking, into two parts, consisting, on the one hand, of the United States of America, the United Kingdom and much of Europe and, on the other hand, of the socialist States and the developing countries. The States comprising the first group had viewed the question of State immunity from a substantive viewpoint, distinguishing between sovereign acts and non-sovereign acts, or acts that were solely of a commercial nature, and towards the end of the 1970s, they had decided to claim jurisdiction unless the State involved had been able to prove that the act in question had been of a sovereign nature. Concrete examples of the application of that policy had included the seizure of military property owned by a State, but at the time in the hands of a private individual who had subcontracted for its repair; the application of the law of the host State to the employees—especially local employees—of foreign missions and to diplomatic premises and vehicles; and the removal of immunity from State trading agencies and the like by the provisions of the United States 1976 *Foreign Sovereign Immunities Act* which he had already mentioned and the United Kingdom *State Immunity Act 1978*.<sup>6</sup> Prior to 1970, the distinction between sovereign and non-sovereign acts had been made, in States of the first group, by the Ministry of Foreign Affairs or its equivalent. Now, however, foreign States were required to appear before the courts and to plead immunity, and it was the courts that determined in which category an act should be placed.

8. Owing to those two changes—the introduction of a distinction in substantive law between sovereign and non-sovereign acts and the amendment of the procedure for claiming immunity—the performance of the same act could entail the appearance of a State before the local courts in one part of the world but not in another. In India, for example, no foreign State could be brought to court without the consent of the Central Government, and no such consent had been given until

<sup>6</sup> See 1655th meeting, footnote 10.

1981. The reasons which led the Indian Government to change its practice had been the parallel existence of the two systems to which he had alluded and a desire to avoid abuses of immunity. A similar attitude had now been adopted by the socialist States, which applied the distinction between sovereign and non-sovereign acts only to the acts of a foreign State which classified their own activities in the same way.

9. The question remained as to what regime States would apply in the 1980s. In his view, the decade would be one of turmoil, as more and more States reacted to the stimulus which, he believed, had led the United States and the United Kingdom to change their laws—namely, the increase in the number of States and the consequent increase in the abuse of privileges—and as the intellectual change which had led to the elimination from internal law of the rule that the sovereign was above the law took effect in international relations. There would ultimately be a change of custom, borne of a desire to achieve reciprocity of treatment, and an intellectual change based on the belief that there should be a rule of international law applicable to all. As he saw it, exceptions from that rule would be permitted only on the basis of specific agreements providing that certain acts of certain property would be exempt from jurisdiction.

10. He believed that article 7 should serve as a model for those agreements, but that it was at present drafted in too absolute and unqualified a fashion for that to be possible. That, however, was only a tentative assessment, which he would review in the light of the subsequent discussion and further draft articles.

11. Mr. ALDRICH said he wished to take the opportunity of his first statement before the Commission to thank all its members for having elected him. He considered it a signal honour to have been chosen to fill a post previously occupied by Mr. Schwebel and Mr. Kearney, and would do his utmost to justify that choice.

12. Turning to the topic under discussion, he said that he had no difficulty in accepting draft articles 1 and 6. That he had no difficulty with article 6 was due to the inclusion in it of the phrase “in accordance with the provisions of the present articles”; the concern he felt about article 7 was perhaps due in large part to the absence of any expression of that kind.

13. He agreed with the Special Rapporteur that there was a difference between competence and immunity but that the order in which they were discussed was of no importance, as other speakers had also maintained. What was important was to avoid being drawn into detailed consideration of questions of competence, since it would be most inappropriate and risky to try to regulate such matters by international agreement. The task was one he would not wish to undertake with regard, for example, to the “act of States” doctrine which, in the context of United States of America law, had undergone continual change. Despite the mag-

nitude of that change in the last decade, he was not sure he could agree with Mr. Jagota that the United States would abandon the doctrine altogether.

14. In a sense, paragraph 1 of article 7 did avoid going into questions of competence, but that left him wondering whether it served any purpose at all. He interpreted the phrase “shall give effect to State immunity under article 6” not as a statement of absolute immunity, the recognition of which was only one aspect of contemporary practice, but, because of the reference back to article 6, as a reference to whatever immunity the draft articles ultimately established. To make the declaration contained in article 7, paragraph 1, that no State might derogate through its own rules of competence from the basic rule set out in article 6, seemed to be stating the obvious and might therefore be considered unnecessary. If such a declaration was considered useful, however, it might be best not to limit the prohibition to the use of rules of competence, but to say that there could be no derogation by means of rules of competence or otherwise.

15. He agreed with Mr. Quentin-Baxter (1655th meeting) that both versions of paragraph 2 of article 7 dealt with different subject-matter from paragraph 1 and that, if either of them was retained, it should probably constitute a separate article. He assumed that both the phrases “legal proceeding” (alternative A) and “legal action” (alternative B) meant “judicial action”. It was principally the fact that they dealt with judicial action that differentiated those provisions from paragraph 1, which, like article 6, concerned the broader question of State action. Furthermore, alternative A tried to define what constituted a legal proceeding against a State and alternative B tried to identify the persons and objects that actions against would be considered as actions against a State.

16. He was not entirely happy with the use in alternative A of the term “implead”, although he could appreciate the advantages of using a single word if an appropriate one could be found. Like alternative A, alternative B also attempted a difficult task; the report gave ample evidence of the problems involved in trying to give even a brief description of what that paragraph covered. That aside, if alternative B were to be retained in its present form—and he was not certain that it should be—it ought, if it were not to appear to be establishing a rule of absolute immunity, to contain either a cross reference to article 6 or a qualification similar to that found in both paragraphs of that article.

17. Other matters to be settled with regard to alternative B included the questions whether the phrase “acting as a sovereign authority” was adequate to express the meaning intended, whether the phrase “acts performed by them in their official functions” covered acts that were within the apparent authority of the persons or entities concerned but were actually *ultra vires*, acts performed on behalf of the State, and so on.

18. To sum up, he thought that paragraph 1 of article 7 could certainly be referred to the Drafting Committee, but was uncertain whether the same applied to either alternative for paragraph 2.

19. Describing his general approach to the topic and the general concern he felt about the possible course of the Commission's future on it, he pointed out that the rapid changes in practice would oblige the Commission to proceed with great care if it was to be successful in pinning down the law of the jurisdictional immunities of States. In that respect, there was at least one parallel between the topic under discussion and the law of the sea: in each case, an attempt was being made to freeze at a particular moment of time a swiftly developing field of law. In each case, too, States were likely to be reluctant to see their hands tied, unless it could be demonstrated that the bonds would be sufficiently flexible to take account of unforeseen future developments.

20. In that connection, there were a number of questions to which he hoped the Commission's further discussions would provide answers. Had the considerable changes that had occurred in the law in the last twenty years now come to end? If not, were they continuing because of inertia or for some good reason? Could the Commission devise rules that would be sufficiently flexible and procedural in nature to give States some assurance that they would be valid beyond the day on which they were proposed?

21. Mr. USHAKOV said that there were two points he wished to make clear. With regard to what Mr. Jagota had said, he emphasized that the changes which had taken place in the law and practice of certain States regarding the principle of jurisdictional immunity only affected commercial relations. More precisely, those changes concerned judicial actions relating to commercial relations. The Commission need not consider them, because they did not affect the other categories of inter-State relations and did not shake the principle of the jurisdictional immunity of States. The general rule of immunity which the Commission had been trying to enunciate applied not only to commercial relations, but also to all possible relations between States. In matters of trade, moreover, it would not be enough to deal only with judicial actions in civil law, without taking account of administrative acts and the problems of execution of judgements that might arise.

22. Secondly, he pointed out that, as a State, the Soviet Union did not carry on foreign trade activities. Such activities were carried on by legal persons under private law who were duly authorized to do so and who clearly did not enjoy the jurisdictional immunity of States. The contracts concluded by such legal persons were private law contracts subject to the internal law of the country concerned. Through its trade delegations, which were State organs, the Soviet Union sometimes guaranteed such contracts. In that connection it should be noted that, in accordance with the annex to the 1957 trade agreement between the

Soviet Union and Japan, when a trade delegation of the Soviet Union guaranteed such a contract, the Soviet State did not claim jurisdictional immunity in respect of it.

23. Sir Francis VALLAT, referring to a comment by Mr. Jagota, said he wished to clarify a misunderstanding which seemed to have arisen from a statement he had made at the Commission's 1653rd meeting. It had certainly not been his intention to suggest that the certificates delivered by the Foreign Office to which he had then referred could determine questions of immunity. The United Kingdom position had always been that those certificates determined questions of fact. The matters with which the certificates now dealt were listed in section 21 of the *State Immunity Act 1978*.

24. Mr. SUCHARITKUL (Special Rapporteur), replying to points raised, said that the Commission's rich and constructive debate would greatly assist him in his continuing task. The subject under consideration was difficult, and it was not due to any lack of care on his part that the report had been submitted piecemeal or that many more articles had not been presented. The General Assembly had, however, reiterated its instructions that the Special Rapporteur should concentrate on general principles of jurisdictional immunities and leave certain questions aside for the time being. He had therefore begun at the beginning.

25. He did not think he was being unduly optimistic in noting an emerging consensus on the content of the general principle of State immunity, and it was now clear that State immunity was an exception to the more fundamental question of sovereignty. In that connection, Mr. Ushakov (1654th meeting) had pointed out that every rule of international law was, to some extent, a limitation of sovereignty.

26. With regard to the scope of the inquiry, the question of the wider meaning of "jurisdiction" had been raised. On the basis of over twenty years' experience, he could confirm that there was very little authority, in terms of State practice, for the wider concept of jurisdiction or immunity from jurisdiction; it would be difficult for him to build on that authority and, in so doing, to adopt the inductive method advocated by Mr. Tsuruoka (*ibid.*).

27. Plans for the future work had been set out in the exploratory report of the Working Group<sup>7</sup> and in the preliminary report<sup>8</sup> as well as in the second report (A/CN.4/331 and Add.1) of the Special Rapporteur. He had discussed the use of the terms "jurisdictional immunities" and "jurisdiction", and draft articles 8, 9, 10 and 11 dealt, respectively, with consent of the State, voluntary submission, counter-claims and waiver of State immunity.

<sup>7</sup> See 1653rd meeting, footnote 2.

<sup>8</sup> *Ibid.*, footnote 3.

28. In connection with his third report, there had been some discussion on the relativity of competence and jurisdictional immunity. He might have over-stated the case in his oral presentation (1652nd meeting) by suggesting that competence might have some priority, possibly in terms of time or logic, over immunity. Sir Francis Vallat had pointed out, however, that counsel representing the State would raise a plea of jurisdictional immunity regardless of whether or not there was competence—a view with which he, as Special Rapporteur, fully concurred. If he had introduced the question of competence, it was simply for the benefit of those members who had been trained in the common law jurisdictions. For members from civil law jurisdictions, the question of competence was extremely important and not at all irrelevant. As was apparent from Government replies to the questionnaire (A/CN.4/343 and A/CN.4/343/Add.3 and 4), particularly from those of the Moroccan and Tunisian Governments, in such jurisdictions the court had to determine its own competence, although in practice it could consider various grounds for not exercising jurisdiction in a particular case.

29. When preparing the relevant part of his third report, he had borne in mind the case of the *Libyan American Oil Company v. Socialist People's Arab Jamahiriya*, which was decided in 1980 in the United States Court of Appeals for the District of Columbia Circuit.<sup>9</sup> There had been a waiver of jurisdictional immunity to enable the court to hear the case; but in the event, it had decided not to exercise jurisdiction because an act of State was involved. He raised the point not in argument against the irrelevance of competence, but because the competence of a State was itself a subject of international law.

30. He had been at pains to point out that the subject of jurisdictional immunities derived for the most part from judicial decisions, although State practice and legislation had also been considered in his report. The courts were the first to decide on their own competence and, in so doing, they referred to their rules of competence. Possibly the terminology was not apt, because it derived from private international law, and it might be well to avoid it. Internal law on competence, however, including private international law, was subject to the superior regime of public international law. That had been clearly brought out by those speakers who had referred to the need to balance the various interests involved.

31. Many new criteria had emerged during the discussion. It had rightly been said that the Commission was dealing with a new branch of international law. It had also been said that the Commission should be guided by the principle of friendly relations and co-operation between States. Consideration of friendly relations and co-operation had, however, already been

apparent at the time of *The Schooner "Exchange" v. McFaddon and others* (1812).<sup>10</sup> The ideas expressed in that judgement were not so very different from those of comity, reciprocity, consent and waiver of sovereignty. He had been much encouraged to hear from Mr. Ushakov that there was no absolutism, and that the concept of sovereignty was not sacrosanct.

32. The Commission would no doubt be discussing the scope of the draft articles further, and certain questions pertaining to jurisdictional immunities would have to remain in abeyance for some time. He had, for example, deliberately refrained from examining changes in the law, but he was grateful to Mr. Tsuruoka for his brief account (1654th meeting) of the developments that had taken place in Japan between 1926 and the post-war period, which could not be ignored. Sir Francis Vallat had also referred to the dramatic developments in English law. He (the Special Rapporteur) had decided to refrain from using the terms "restrictive immunity" and "absolute immunity"—though members were, of course, free to use them—so as to leave the way open for compromise and for a more widely acceptable solution. Sir Francis Vallat had referred to a number of interesting cases which indicated that the courts had moved away from the simple finding that the property belonged to the foreign sovereign and were now asking him to prove his title to it.

33. Another recurrent theme throughout the discussion had been commercial activities, on which there had been some very encouraging comment in the Sixth Committee of the General Assembly. What Mr. Ushakov had said was most helpful, but the Commission should consider the statement made in *The "Swift"* case (1813), to the effect that, if the sovereign engaged in commercial transactions and if he had a monopoly of certain commodities, then he should conform to the general rules by which all trade was regulated.<sup>11</sup>

34. He was also grateful to Mr. Jagota for projecting the Commission into the future—for preparing the ground for its ultimate achievement. He could assure the Commission that it would be counter-productive for him to try to reintroduce any doctrine of absolutism into future reports or future draft articles. He reminded members that the preliminary report of 1979 had listed the following possible exceptions to the general rule of State immunity: commercial transactions; contracts of employment; personal injuries and damage to property; ownership, possession and use of property; patents, trademarks and other intellectual properties; fiscal liabilities and customs duties; shareholdings and membership in bodies corporate; ships employed in commercial service; and arbitration. Those items had been listed without any further study because the law

<sup>9</sup> American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. XX, No. 1 (January 1981), p. 161.

<sup>10</sup> See 1653rd meeting, footnote 9.

<sup>11</sup> J. Dodson, *Reports of Cases argued and determined in the High Court of Admiralty*, vol. I (London, Butterworth, 1815), p. 339.

was in process of evolution. He had sought to capture the general principles in the hope that he would be in a position, the following year, to present some of the main articles. In so doing, it was not his intention to impose his own views on the Commission: rather, those articles would be the result of a careful examination of the practice of States, and particularly of their treaty and judicial practice.

35. Referring specifically to draft article 7, he said that it was the logical consequence of draft article 6, and dealt in essence with the obligation to refrain from exercising jurisdiction. The reference to authority under the rules of competence did not mean, as Mr. Aldrich appeared to have understood, that the State could escape responsibility for non-fulfilment of an obligation by having recourse to its own rules of competence. That reference applied in particular to civil law countries, because rules of competence were primary rules and could not be dispensed with. In the draft articles, the words "jurisdiction" and "competence" had been used in the same sense; but in Italian practice, for example, the competence of a particular court was narrow by comparison with national jurisdiction. Earlier reports had described how the law on State immunity had become established in civil law jurisdiction: it was primarily an exception to the rule of competence.

36. A very academic distinction had been drawn by the French Court of Cassation between the theory of "*incompétence d'attribution*" and that of "*immunité de juridiction*". By using two theories, the courts had been able to limit the application of jurisdictional immunity, either by reference to the capacity in which the State or State organ had acted, according to the theory of "*incompétence d'attribution*", or by looking at the nature of the activities, according to the theory of "*immunité de juridiction*". That was a very fine distinction, and he would therefore ask members not to dismiss too lightly the relevance of the competence of the court. In that connection, he was grateful to Mr. Calle y Calle (1654th meeting) and Mr. Díaz González (1655th meeting) for proposing the use of the term "judicial proceedings" in article 7, paragraph 1.

37. With regard to the relevance of competence, the "act of State" doctrine was but one of the many grounds on which a court could decide that it had no jurisdiction under the normal conflict rules. There had to be a sufficient nexus: even in the case of a chosen forum, the court was not required to exercise jurisdiction if it was too remote from, or too unconnected with, the matter to decide the issue, regardless of whether or not one party was a foreign sovereign.

38. A number of members had questioned the use of the word "implead" in draft article 7. One of the meanings ascribed to that word was to bring an action or to prosecute, which denoted a degree of unwillingness on the part of the other party. The equivalent French term "*mettre en cause*" did not have such a connotation, however. He was not alone in using the

word "implead"; Lord Atkin had done so in *The "Cristina"* case,<sup>12</sup> but a better term could perhaps be found by the Drafting Committee.

39. Alternatives A and B for draft article 7, paragraph 2, were not really alternatives. The idea behind alternative A was to explain what was involved in impleading, namely, bringing an action against somebody or something which affected the interests of the State concerned. The Drafting Committee could perhaps be asked to find an appropriate formulation. In alternative B, it had been far from his intention to reintroduce the doctrine of absolutism, but as was clear from the title of the subject, property would have to be dealt with at some point. It had been agreed that, as defined, jurisdictional immunities meant immunity from jurisdiction, not from substantive law. An ambassador must respect the local law; he was not immune from it. He was liable under it, but action could not be brought against him because he benefited from diplomatic immunity, which could be lifted by waiver or some other method of expressing consent.

40. Mr. Quentin-Baxter had raised the question at the previous meeting of property in the possession or control of the State. It should be noted that American practice placed greater reliance on the test of actual possession and control than on ownership when granting immunity. He was not seeking to provide for any absolute immunity, but merely wished to point out that there were two opposing tendencies: on the one hand, the number of beneficiaries of State immunity was increasing; on the other, the content of immunities was becoming more restricted.

41. Mr. Ushakov had compared diplomatic immunity with immunity from jurisdiction, to which there had already been some reference in the 1961 Vienna Convention.<sup>13</sup> It was, however, necessary to be somewhat flexible in that area. In most cases the jurisdiction concerned was civil jurisdiction, but military and criminal jurisdiction should not be excluded. If criminal jurisdiction was possible, then so was immunity from it. A State might have an organ—an embassy, for example—which violated the criminal laws of another country; the extent to which such activities were immune was not outside the scope of the Commission's inquiry. In certain countries, such as Germany and Austria, questions of immunity were decided not by the ordinary civil courts, but by the constitutional court. Such points would have to be examined in detail in due course. The Commission would also have to direct its attention to the different types of immunity to which Mr. Ushakov had referred.

42. Subject to those remarks, he would suggest that the Commission refer draft article 7 to the Drafting Committee.

<sup>12</sup> See 1655th meeting, footnote 9.

<sup>13</sup> See 1654th meeting, footnote 4.

43. Mr. USHAKOV, explaining his position, said he believed that, from the point of view of a single State, international law could be regarded as a set of restrictions on its sovereignty or its capacity. That was what might be called the metaphysical approach. For the community of States, on the other hand, international law was a means of safeguarding sovereignty. The same was true of immunities, which, from the point of view of a single State and, in particular, of the beneficiary State, constituted a restriction on sovereignty. From the point of view of the community of States, on the other hand, the rules of jurisdictional immunity acted as a safeguard for sovereignty.

44. Although he did not accept the idea of absolute sovereignty, he nevertheless considered that a State, as such, enjoyed full sovereignty. The same applied to immunities, for although there could be no absolute immunity, a State could enjoy full immunity.

45. Mr. CALLE Y CALLE said that draft article 7 related to immunity from judicial proceedings and that its scope was thus confined to the action of the courts of a State. He noted, however, that draft article 2<sup>14</sup> defined jurisdictional immunities as “immunities from the jurisdiction of the judicial or administrative authorities of a territorial State”, and that article 31 of the 1961 Vienna Convention granted diplomatic agents immunities from the criminal, civil and administrative jurisdiction of the receiving State.

46. He would like the Commission to take account of those provisions in the text of draft article 7, and not to refer only to immunity from jurisdiction.

47. The CHAIRMAN suggested that the Commission should refer draft article 7 to the Drafting Committee.

*It was so decided.*

*The meeting rose at 1 p.m.*

<sup>14</sup> See 1653rd meeting, footnote 5.

## 1657th MEETING

*Friday, 22 May 1981, at 10.10 a.m.*

*Chairman:* Mr. Doudou THIAM

*Present:* Mr. Aldrich, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yankov.

## Jurisdictional immunities of States and their property (continued) (A/CN.4/331 and Add.1,<sup>1</sup> A/CN.4/340 and Add.1, A/CN.4/343 and Add.1—4)

[Item 7 of the agenda]

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

ARTICLE 8 (Consent of State),  
ARTICLE 9 (Voluntary submission),  
ARTICLE 10 (Counter-claims), and  
ARTICLE 11 (Waiver)

1. The CHAIRMAN invited the Special Rapporteur to present draft articles 8, 9, 10 and 11 (A/CN.4/340 and Add.1, paras. 58, 71, 81 and 92), which read:

#### *Article 8. Consent of State*

1. A State shall not exercise jurisdiction against another State without the consent of that other State in accordance with the provisions of the present articles.

2. Jurisdiction may be exercised against a State which consents to its exercise.

3. A State may give consent to the exercise of jurisdiction by the court of another State under paragraph 2:

(a) in writing, expressly for a specific case after a dispute has arisen, or

(b) in advance, by an express provision in a treaty or an international agreement or in a written contract in respect of one or more types of cases, or

(c) by the State itself through its authorized representative appearing before the Court in a proceeding to contest a claim on the merit without raising a plea of State immunity.

#### *Article 9. Voluntary submission*

1. Jurisdiction may be exercised against a State which has voluntarily submitted to the jurisdiction of a court of another State:

(a) by itself instituting or intervening in proceedings before that court; or

(b) by appearing before that court of its own volition or taking a step in connection with proceedings before that court without raising a claim of State immunity; or

(c) by otherwise expressly indicating its volition to submit to the jurisdiction and to have the outcome of a dispute or question determined by that court.

2. The mere fact that a State fails to appear in proceedings before a court of another State shall not be construed as voluntary submission.

3. Appearance or intervention by or on behalf of a State in proceedings before a court of another State with a contention of lack of jurisdiction on the ground of State immunity, or an assertion of an interest in a property in question, shall not constitute voluntary submission for the purpose of paragraph 1.

#### *Article 10. Counter-claims*

1. In any legal proceedings instituted by a State, or in which a State intervenes, in a court of another State, jurisdiction may be exercised against the State in respect of any counter-claim:

<sup>1</sup> *Yearbook . . . 1980*, vol. II (Part One).

(a) for which in accordance with the provisions of the present articles jurisdiction could be exercised had separate proceedings been instituted before that court; or

(b) arising out of the same legal relationship or facts as the principal claim; and

(c) to the extent that the counter-claim does not seek relief exceeding in amount or differing in kind from that sought by the State in the principal claim.

2. Any counter-claim beyond the extent referred to in paragraph 1 (c) shall operate as a set-off only.

3. Notwithstanding voluntary submission by a State under article 9, jurisdiction may not be exercised against it in respect of any counter-claim exceeding the amount or differing in kind from the relief sought by the State in the principal claim.

4. A State which makes a counter-claim in proceedings before a court of another State voluntarily submits to the jurisdiction of the courts of that other State with respect not only to the counter-claim but also to the principal claim.

#### Article 11. Waiver

1. Jurisdictional immunity may be waived by a State at any time before commencement or during any stage of the proceedings before a court of another State.

2. Waiver may be effected by a State or its authorized representative:

(a) expressly *in facie curiae*, or

(b) by an express undertaking to submit to the jurisdiction of a court of that other State as contained in a treaty or an international agreement or a contract in writing, or in any specific case after a dispute between the parties has arisen.

3. A State cannot claim immunity from the jurisdiction of a court of another State after it has taken steps in the proceedings relating to the merit, unless it can satisfy the court that it could not have acquired knowledge of the facts on which a claim to immunity can be based until after it has taken such a step, in which event it can claim immunity based on those facts if it does so at the earliest possible moment.

4. A foreign State is not deemed to have waived immunity if it appears before a court of another State in order specifically to assert immunity or its rights to property.

2. Mr. SUCHARITKUL (Special Rapporteur) said that draft articles 8 to 11 followed on logically from draft articles 6<sup>2</sup> and 7, and dealt in rather more detail with general and procedural principles. He drew attention to the information and materials submitted by Governments, including the summary of the report submitted by C. C. A. Voskuil to the Netherlands International Law Association (A/CN.4/343/Add.1, p. 46), which was very relevant to the Commission's consideration. Members should also refer to the Government replies to the questionnaire (*ibid.*, part I), in particular, to questions 9 and 10.

3. The consent of a State, in the event that proceedings were brought against it, was highly relevant. In most cases, State immunity was recognized and accorded on the assumption that there was absence of consent and that absence of consent was an essential element in the formulation of the principle of State immunity. Where there was consent, there could be no

question of jurisdictional immunity; and once a State had consented to the exercise of jurisdiction, it could not subsequently claim jurisdictional immunity. The expression of consent was only permissive in character in so far as the court considering the plaintiff's claim might or might not exercise jurisdiction. Consent of the State could, in certain cases, provide the foundation for jurisdiction or, to borrow the terminology of civil law, for the competence of the court, but in most cases the question of jurisdiction or competence was provided for under internal law and, specifically, under the regulations governing the organization of the courts. Consequently, if a case did not fall within its jurisdiction a court was not required to exercise jurisdiction, even if there was consent; and where there was jurisdiction, the expression of consent would permit, but not compel, the court to exercise jurisdiction since, in the last analysis, it was for the court to decide whether it was convenient and opportune to do so.

4. Draft articles 8, 9, 10 and 11 were very similar in effect, and if he had chosen to keep them separate, it was only to bring out certain nuances. The Commission might therefore wish to change the presentation. For instance, the four draft articles could be combined in one article entitled "Consent"; or their subject-matter could be covered by three articles entitled, respectively, "Consent and voluntary submission", "Counter-claims" and "Waiver"; or there could be two articles entitled, respectively, "Consent, voluntary submission and waiver of immunity" and "Counter-claims".

5. Referring to draft article 8, he said that it had become more or less generally accepted in State practice, as also in legislative and treaty practice, that consent could be given in a variety of circumstances. Accordingly, the draft article provided for three ways in which consent could be given. First, it could be given on an *ad hoc* basis after a dispute had arisen, in which case it generally had to be in writing, since there was a requirement that consent should be given by the State organ authorized to give it. Secondly, consent could be given in advance in a written agreement, which could take the form of a treaty or of an international or intergovernmental agreement, or it could be given in a written contract. The extent to which a written contract would be recognized as a method of expressing consent that was binding on a State would depend on the legal requirements of the court concerned. In the case of a treaty, the rules of privity would come into play; the party invoking the obligation under the treaty would therefore have to be a State party to that treaty, although there might well be treaties that were designed to benefit third parties. The third method of expressing consent was by conduct, which must express consent in a very explicit manner; thus if an appearance was entered on behalf of a State contesting a case on the merits, that could be regarded as consent. However, consent to the exercise of jurisdiction was confined to the period extending from the time when legal or

<sup>2</sup> See 1653rd meeting, footnote 4.

judicial proceedings were instituted to the time when judgement was delivered. Separate consent was always required in the case of measures of enforcement or execution.

6. Draft article 9 dealt with voluntary submission. Consent was more passive than voluntary submission, which required the State to take the initiative. The report cited three instances of voluntary submission: instituting or intervening in a legal proceeding, when a State might decide of its own accord to institute proceedings in the court of another State or to intervene in legal proceedings already instituted; entering an appearance on a voluntary basis; and other indications of intention to submit to the jurisdiction, such as consent given in the form of a treaty or of an international agreement. The effect of voluntary submission was similar to, if not identical with, that of consent: it disentitled the State from pleading jurisdictional immunity. It must always be assumed, however, that the court had jurisdiction.

7. The relationship between competence or jurisdiction, on the one hand, and immunity, on the other, was such that it was necessary either for both (competence and immunity) to be present, or neither: where there was no jurisdiction, there could be no question of immunity. It might happen, however, that there was no immunity, in which case that point fell to be decided by the court before it examined the question of competence. That was the more common practice in the common law countries, but the civil law countries always started on the basis of a civil procedure code which conferred jurisdiction. Lastly, appearance to assert an interest in property could not constitute voluntary submission where the State claimed an interest in that property. Such a claim might be akin to a claim of jurisdictional immunity. That was a fine point which the Commission would have to decide. He, as Special Rapporteur, had no preference, but rules would have to be evolved to provide the parties that dealt with the State, whether corporations or individuals, with guidance.

8. Draft article 10 dealt with counter-claims. There were two types: counter-claims by the State and counter-claims against the State. The latter occurred when the State submitted voluntarily to the jurisdiction by instituting proceedings. Once that happened, it laid itself open to a counter-claim although, to be allowable, such counter-claim had to arise out of the same transaction or the same legal relationship or from the same set of facts or circumstances as the principal claim. The same applied to counter-claims by the State. The State, when a defendant, could also submit to the jurisdiction by counter-claiming against the plaintiff. The difference was that, if the State counter-claimed on the basis of the same transaction or legal relationship, or of the same set of facts or circumstances, it also submitted with respect to the principal claim; that was not so if the counter-claim was filed on a different and independent basis. The effect of that difference was

that the State first bringing the action might have a slight advantage, since a counter-claim against the State, even when it arose out of the same transaction or legal relationship or from the same set of facts or circumstances, would operate not offensively but defensively, as a set-off and would not operate to provide extra-judicial remedies or remedies of a different kind. In practice, there might be advantage in inducing a State to submit to the jurisdiction voluntarily, by bringing the action rather than by counter-claiming once the action had started. Accordingly, a rider should perhaps be incorporated in paragraph 4 of draft article 10 to the effect that there was an implied condition that the principal claim arose out of the same transaction or legal relationship as the counter-claim.

9. Another way of expressing consent was waiver, which was dealt with in draft article 11. In a sense, waiver of immunity was an exercise of the sovereign authority of the State, for it could be effected only by and with the authority of the State. Although, under the laws of some countries waiver and voluntary submission had the same kind of effect, waiver was closer to renunciation of immunity by the State, whereas voluntary submission involved a more active initiative of the State in seeking relief from the court of another State. There had been instances of local courts imposing a very rigid requirement for the expression of waiver: for instance, it might have to be express, and performed *in facia curiae* and by a party having authority. The current trend in State practice, however, was not to insist on such a formal waiver, but to permit immunity to be waived, for instance, by a clause in a treaty or in an international agreement or private contract. The difference in nuance, if any, was that the expression "waiver" was used in the treaty itself. Such instances were numerous, and on the increase in treaty practice. There were, in fact, two stages to such waivers, for in a treaty a State undertook to waive not only immunity from jurisdiction, but also immunity from execution in respect of certain property, and sometimes the property in question was listed in the treaty. The Commission was not concerned with waiver as it related to property and immunity from execution, however, but only as it related to jurisdiction.

10. Waiver must always be express. An agreement to arbitrate was not really an agreement to waive immunity, since arbitration differed in nature from the exercise of jurisdiction. Waiver could also be effected by conduct or by implication, once the State decided to enter an appearance without claiming immunity. There were a variety of nuances in practice. In the Netherlands, for example, once a State had entered an appearance without raising the question of immunity it was deemed to have waived such immunity by its conduct. The effect, therefore, was precisely the same as consent by conduct and voluntary submission.

11. Draft articles 8, 9, 10 and 11 were quite straightforward, and the report spoke for itself. He

would, however, be pleased to answer any questions members might wish to raise.

12. Mr. CALLE Y CALLE said that draft articles 8 to 11 specified the conditions in which the jurisdiction of a State could be exercised over another State, that was to say, the conditions for the application of the rules laid down in articles 6 and 7. It appeared from those provisions that consent was the essential element that opened the way for jurisdiction over the other State.

13. By contrast, the regime of "absolute immunity" had not admitted of any exceptions, such immunity being autonomous and always respected. Under that system, the courts had submitted to the will of the executive power to renounce the jurisdiction of the State over the property of a foreign State. There was, however, jurisdiction that could be exercised against the will of the other State, by reason of the matter in dispute. In such a case, the competent court exercised its jurisdiction and the State was subject to it even without its consent.

14. As the Special Rapporteur had indicated in paragraph 51 of his third report (A/CN.4/340 and Add.1), consent expressed by a State was not an exception to State immunity, but extinguished it. Thus exceptions could only be of a general nature, since the territorial State must apply its internal law in the normal way; the effect of that law was, however, limited by the principles of international law when it applied to a foreign State.

15. Moreover, a State which formally consented to submit to the jurisdiction of another State did so only because it recognized that the subject-matter over which the jurisdiction was to be exercised did not impair its sovereignty or its sovereign rights. It thus accepted the jurisdiction of another State because such jurisdiction applied outside the sphere of acts of State or of Government. Furthermore, the principle of consent involved reciprocity, since the receiving State assumed the existence of a regime which made it possible to define the various activities, and the other State assumed the existence of consent to be subject to the relevant rules. In practice, a State which intended to engage in commercial activities also meant to observe the rules governing them.

16. Draft article 7 enunciated the principle that States must refrain from exercising their jurisdiction over other States. Draft article 8 then specified that such jurisdiction must not be exercised without the consent of the other State. Paragraph 1 of that provision indicated the definitive elements of consent. It was not clear, however, whether it referred to the different forms of consent or to the different forms of the exercise of jurisdiction.

17. Paragraph 2 was worded positively, and stated the conditions in which jurisdiction could be exercised. It should nevertheless be stressed that, once a State had expressed its consent to submit to the jurisdiction of

another State, it was for the competent court to decide whether or not it would exercise its jurisdiction. With regard to the wording of paragraph 2, he would prefer the words "against a State", which suggested confrontation, to be replaced by the words "with respect to a State" or "over a State"—the latter being perhaps the most appropriate wording, since reference was made to "submission" to jurisdiction.

18. Article 8, paragraph 3, enumerated certain forms or cases of consent. In subparagraph (a), he did not think that the English word "dispute" was the most appropriate to describe a dispute between States that was brought before a court.

19. In subparagraph (b), he suggested that the Commission should follow the wording of the 1969 Vienna Convention on the Law of Treaties,<sup>3</sup> which defined a treaty as "an international agreement", and adopt the wording "by an express provision in an international agreement".

20. In subparagraph (c), the introductory words "by the State itself" should be deleted, since the three subparagraphs were governed by the introductory wording of paragraph 3. He also noted that subparagraph (c) contained the words "raising a plea of State immunity", while article 9, subparagraph 1 (b) used the words "raising a claim of State immunity"; he proposed that the Commission should harmonize the wording of those two provisions.

21. Mr. ALDRICH said that articles 8 to 11, as proposed by the Special Rapporteur, seemed to contain, not only "general principles", in keeping with the title of the section of the draft articles in which they were placed, but also modalities of implementation. Furthermore, in so far as they did propound general principles, those principles seemed to constitute a system in which the only basis for the loss of sovereign immunity was consent. It was certainly possible to use such a basis, providing one was willing to engage in legal fictions, but he was not sure that such fictions would yield a structure flexible enough to admit of the necessary exceptions. That was a point on which he would reserve judgement until he had seen what exceptions the Special Rapporteur had in mind.

22. In his view, at least one fiction could be found even in the draft articles under consideration, for he doubted whether there was always consent in counter-claim cases. It was, admittedly, not unreasonable to consider a counter-claim as a consent, but it should be recognized that that was a legal fiction. He also wondered whether it was appropriate to limit counter-claims against a State to set-offs.

23. The rigidity of the draft, which caused him some concern, was illustrated by the need for an exception from the rule of consent in the case of States engaging

<sup>3</sup> 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.

in commercial transactions. It might well be hard to reconcile such an exception with the sweeping language of article 8, paragraph 1. True, that provision contained the phrase “in accordance with the provisions of the present articles”, but that phrase seemed, in the context, to be essentially a reference to the ways in which consent might be given. Moreover, paragraph 3 of the same article seemed to say that there were only three ways in which consent could be given, whereas other sections of the document under consideration mentioned procedures such as voluntary submission, counter-claim and waiver, which the Special Rapporteur had recognized could be considered alternative forms of consent.

24. To make everything depend on consent would result in a severe distortion of the balance of interests at which he thought the articles should aim. Basically, the situation with which the articles dealt was that of a conflict of sovereignties between two or more States. It was not simply a matter of stating immunity as a rule and consent as a means of avoiding that rule, and then describing the modalities of signifying consent. Consequently, the Commission should seek a rational means of accommodating conflicting legal interests.

25. Sir Francis VALLAT said that the Special Rapporteur’s summing-up at the previous meeting was relevant to the articles now under discussion. He had found it extremely useful, and thought it should help to alleviate at least some unease of the kind expressed by Mr. Aldrich.

26. There was, perhaps, a temptation to regard articles 8 to 11 as clear and as largely reflecting State practice, and to refer them immediately to the Drafting Committee. It was, however, desirable that there should be some discussion of those provisions in the Commission, for they involved points of principle, and also points of detail and subtleties which such a discussion might, as so often, bring out for the benefit of the Drafting Committee.

27. In that connection, he wished to express his agreement with the comments on drafting which Mr. Calle y Calle had made concerning article 8, and to say that he thought they also applied to some extent to the succeeding articles. He was particularly unhappy about the use of the expression “jurisdiction against another State”; in many instances, proceedings involving State interests were not actions *in personam*, but actions *in rem*, so that for purely technical reasons the expression “jurisdiction against a State” was hardly correct. It would be difficult to find the proper wording, but there might be a key in the United Kingdom *State Immunity Act 1978*,<sup>4</sup> which avoided the dilemma by speaking of situations in which a State was “immune” or “not immune” from jurisdiction. That was all the more likely to be the key because, as Mr. Aldrich had indicated, in article 8 the Commission came up against the fundamental problem of the topic.

28. While he was quite satisfied, after having heard the Special Rapporteur’s summing-up at the previous meeting, that he did not intend, by the wording of article 8, paragraph 1, to preclude any of the questions that remained to be considered, it was none the less the case that that provision contained no reference to State immunity and that, by declaring that “a State shall not exercise jurisdiction against another State without the consent of that other State”, it at least seemed to be propounding a proposition from which all members of the Commission must surely dissent. It might well be that the words “in accordance with the provisions of the present articles” were meant to bring in not only the procedural questions discussed in the remainder of article 8 and in articles 9 to 11, but also, by implication, the concept of the nature of State immunity and the question of its extent; syntactically, however, those words could only refer to “the consent of that other State”. For those reasons, paragraph 1 must be recast so that it accorded far more closely with both the spirit and the nature of articles 6 and 7.

29. He could well understand why, in the case in question, the Special Rapporteur had not tackled the substantive questions before taking up matters of procedure. It seemed a wise course to have begun with one basic idea, and then to have taken the points on which practice was in general accord throughout the world, leaving the more difficult questions of substance until later. That approach should, however, be pursued only on the clear understanding that nothing in the procedural articles should prejudice the conclusions the Commission might reach when it did discuss issues of substance.

30. There was no doubt at all that the underlying theme of articles 8 to 11 was the consent of a State to the exercise of jurisdiction, where that State was entitled to immunity under international law. That being so, there was inevitably some overlapping of the articles, since they were all, in a sense, expressions of different ways of signifying consent. That, in turn, called for the greatest care in drafting the articles, to ensure that they did not conflict with each other. With that in mind, he urged the Commission not to seek economy in drafting at the expense of clarity. As he had often said, there was great benefit in producing on first reading a text that was too long and seeking to reduce the surplus only after hearing the comments of Governments and others.

31. Mr. RIPHAGEN said he agreed with many of the comments made by previous speakers, especially those by Sir Francis Vallat.

32. In reading the document under discussion, he had been struck by the repetition of the idea that the absence of consent to the lifting of its immunity by a State against which proceedings were envisaged was “presumed”. He wondered why that presumption should be made. After all, the topic of the jurisdictional immunities of States involved compromise between two principles of international law, namely, the principle

<sup>4</sup> See 1655th meeting, footnote 10.

that *par in parem imperium non habet* and the principle that one State could not act in the territory of another. While both those principles were based on the idea of the separation of States, they had, especially in modern times, been mitigated by inter-State co-operation. Consent was really a matter of such co-operation; it was in essence always bilateral, not unilateral. Accordingly, it seemed strange and unbalanced to presume in the draft articles the consent of one State to the activities of another within its territory, on the one hand, and, on the other hand, the absence of consent on the part of that other State to the exercise of jurisdiction. Because of that imbalance, he had difficulty in forming an opinion on the draft articles and in commenting on their drafting.

33. It might be better to try to deal with the procedural and substantive aspects of the topic at the same time, and to determine in which cases the "pre-trial consent" of the non-territorial State must be presumed from its activities in, or in connection with, the territorial State, particularly where those activities made use of the territorial State's legal system. That would, admittedly, entail dealing immediately with the substance of the matter, but he feared that to deal first with the procedural aspect might prejudice the subject-matter of what had been called the limits of State immunity.

34. Those comments were perhaps also relevant to some of the detailed subjects discussed in the document under study, particularly the subject of counter-claims, which provided an illustration of the reciprocal relationship involved in the type of cases in question. He wondered whether the limitations set out in draft article 10 were always fully applicable to counter-claims. For example, in a well-known case before the Netherlands Supreme Court, involving a Netherlands bank and the United States of America, the counter-claim entered by the bank had not set off the claim made by the United States.

35. Furthermore, he found the discrepancy to which the Special Rapporteur had referred in the first sentence of paragraph 80 of his report so startling as to make him wonder whether the reciprocal relationship involved in the matters to which the sentence referred was not sometimes overlooked. There was also, he thought, a reciprocal aspect to the activity, namely, the establishment of a representative bureau in a foreign State, which had been the subject of the latest advisory opinion by the International Court of Justice.<sup>5</sup> In short, all instances in which one State was active in the territory of another involved an element of reciprocity, co-operation or the exchange of benefits, which could not always be split up into its "component parts", in the sense of the unilateral acts of one or other of the States involved. The Commission should give thought to that reciprocal aspect of immunity.

<sup>5</sup> Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion: *I.C.J. Reports 1980*, p. 73.

36. Mr. USHAKOV said he would confine himself to some general comments on the articles under consideration, as he thought that all the articles in Part II required thorough study, and it was too early to dwell on their drafting.

37. Article 8, like the following articles, was not, in the Special Rapporteur's view, based on presumptions, since the Special Rapporteur believed that he had stated the rule of immunity in article 6 and could then formulate exceptions to that rule, as was clearly shown by the first sentence of his written introduction to article 8 (A/CN.4/340 and Add.1, paragraph 45). However, article 6 did not state the rule of immunity because, according to that provision, a State was immune from the jurisdiction of another State "in accordance with the provisions of the present articles". The rule was stated not in absolute terms, but in relation to the draft articles. Starting with article 7, all the proposed articles were thus based on a general principle that had not been stated. If that principle was stated, it would apply with exceptions, whereas if it was not stated, both the articles under consideration and the following articles could only be based on presumptions. There would be no justification for those articles if the rule of immunity was not properly established at the beginning of Part II of the draft.

38. It should be noted that civil actions that might be brought would not necessarily be connected with the territory of the receiving State or its area of jurisdiction. Lastly, he found the expression "voluntary submission" unsatisfactory. It might be used in legal literature, but seemed rather too strong for a draft article referring to the position of one State in relation to that of another.

39. The CHAIRMAN, noting that the Commission had not been able to complete its examination of the Special Rapporteur's third report on item 7 within the allotted time,<sup>6</sup> suggested that the discussion should be resumed later in the session.

*It was so decided.*

*The meeting rose at 12.45 p.m.*

<sup>6</sup> See 1650th meeting, paras. 39 and 43.

## 1658th MEETING

*Monday, 25 May 1981, at 3.10 p.m.*

*Chairman:* Mr. Doudou THIAM

*Present:* Mr. Bedjaoui, Mr. Calle y Calle, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

**Expression of sympathy to the Government  
and people of Ecuador**

1. The CHAIRMAN said that the Commission joined with the whole of the international community in presenting to the Government and people of Ecuador its sincere condolences in connection with the tragic air crash in which the President of Ecuador and many members of the Ecuadorian Government had lost their lives.

**Succession of States in respect of matters other than  
treaties (A/CN.4/338 and Add.1-3, A/CN.4/345)**

[Item 2 of the agenda]

INTRODUCTORY STATEMENT BY THE SPECIAL  
RAPPORTEUR

2. The CHAIRMAN invited the Special Rapporteur to introduce his thirteenth report on succession of States in respect of matters other than treaties (A/CN.4/345), which had been prepared with a view to the second reading by the Commission of the draft articles adopted on first reading at its thirty-second session.<sup>1</sup>

3. Mr. BEDJAOUI (Special Rapporteur) said that the Commission had been studying the topic of succession of States in respect of matters other than treaties for thirteen years and, in view of its immensity, had decided to restrict the scope of the articles to State property, archives and debts. One of the Governments which had submitted comments on the draft articles had expressed regret that the mass of information so accumulated had given rise only to a limited number of articles. In his own opinion, the draft articles, which he regarded not as the result of his personal studies but as the fruit of the Commission's joint efforts, unquestionably constituted a worthwhile product. In preparing them, the Commission had aimed at legal soundness and endeavoured to produce an aid to States in settling their problems.

4. The fact that few States had submitted written comments on the draft articles was somewhat disappointing, but it might mean that States had found the draft generally acceptable and had felt no need to criticize it. In the report under examination, he had supplemented the few written comments which had been received with comments made in the Sixth Committee in 1979 and 1980, at the thirty-fourth and thirty-fifth sessions of the General Assembly.

DRAFT ARTICLES ADOPTED BY THE COMMISSION:  
SECOND READING

ARTICLE I (Scope of the present articles) AND TITLE OF  
THE DRAFT

5. Mr. BEDJAOUI (Special Rapporteur) read the text of article I of the draft (Part I: Introduction):

*Article I. Scope of the present articles*

**The present articles apply to the effects of succession of States  
in respect of matters other than treaties.**

6. In connection with that article, he recalled that, in 1979, one representative to the Sixth Committee had said that the scope of the articles should be restricted to the "effects" of succession of States, or the legal consequences of the replacement of one State by another in the responsibility for the international relations of territory. That had always been the view of the Commission. Other representatives had said that it was not immediately clear from the expression "matters other than treaties" to what matters the draft articles referred, and that it might even be thought that the articles applied to all matters other than treaties. That was not the case, however, for the Commission had been obliged to restrict the scope of its work.

7. Four States had submitted written comments on article 1. The German Democratic Republic had approved the article (A/CN.4/338), while expressing the wish that, on second reading, the Commission would seek to define the field of application of the draft more precisely and would amend its title accordingly. It suggested that explicit reference should be made to State property, State archives and State debts. Italy (A/CN.4/338/Add.1) proposed that the title of the draft and article 1 should be amended along the same lines, and considered that the part of the draft on State archives should be distinct from the other two parts and should comprise an autonomous body of rules. Austria (A/CN.4/338/Add.3) would also prefer the title of the draft to be more explicit; it considered that a vague title was not good enough for an international instrument. Czechoslovakia (A/CN.4/338/Add.2) also felt that the title of the draft and the wording of article 1 might be misleading as to the content of the draft. While it shared the desire for harmony with the 1978 Vienna Convention on Succession of States in Respect of Treaties,<sup>2</sup> it believed that the Commission must choose wording that reflected as closely as possible the subject-matter of the draft. The 1978 Vienna Convention applied to treaties between States, whereas the draft articles applied to three other clear-cut matters that could not be defined in relation to such treaties.

8. The Commission had unquestionably gone some way towards meeting the desires of those four States by deciding, with respect to the French version of the article, to replace the expression "*dans les matières autres que les traités*" by the phrase "*dans des matières autres que les traités*" in order to indicate that

<sup>1</sup> See *Yearbook* . . . 1980, vol. II (Part Two), pp. 8 *et seq.*

<sup>2</sup> For the text of the Convention (hereinafter called "1978 Vienna Convention"), see *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III, *Documents of the Conference* (United Nations publications, Sales No. E.79.V.10), p. 185.

the draft covered only some matters other than treaties. However, the new text failed to indicate what those matters were. Concern for parallelism between the draft and the 1978 Vienna Convention had at first led the Commission to give the draft a title by reference to that of the Convention; however, now that the Commission had limited its own field of action, the same concern constrained it to specify the matters covered by the draft.

9. A problem then arose in connection with State archives. Some considered that they were State property so special in character that they must be distinguished from State property. His own view was that State archives did indeed form a special category of State property, but that they were none the less State property in essence. That was why he had proposed the drafting of articles dealing specially with State archives, and the Commission had followed him on that point. If State property, archives and debts were specifically mentioned in the title of the draft and in article 1, there was a risk that State archives might appear to form a category wholly independent from that of State property. The impression might then arise that State archives were governed by rules of their own and not by the rules applicable to State property. However, that risk was not very great, and the Commission could avoid it by stating in one of the provisions relating to State archives that they formed a category of State property.

10. He therefore suggested that the draft should be entitled "Draft articles on succession of States in respect of State property, archives and debts", and that article 1 should be reformulated accordingly (A/CN.4/345, para. 12). With regard to the French text, it would not be necessary to state that the matters covered were "*biens d'Etat, archives d'Etat et dettes d'Etat*".

11. Czechoslovakia had made a comment concerning both article 1 and article 16 (A/CN.4/338/Add.2). It feared a possible contradiction between article 1, as proposed by the Special Rapporteur, and article 16, particularly subparagraph (b) thereof. Czechoslovakia argued that the succession of States—replacement of one State by another in responsibility for the international relations of territory—necessarily entailed an inter-State relationship and that article 16 (b) was, therefore, superfluous, since there was a contradiction between it and the reference to State property, archives and debts in article 1. The Commission could deal with that point when it came to examine article 16.

12. The CHAIRMAN congratulated the Special Rapporteur on his report, which bore the stamp not only of his erudition but also of his experience in a field of special importance to developing countries.

13. Mr. JAGOTA referring to the changes to the title of the draft and to article 1 suggested by the Special Rapporteur, reminded the Commission that a systematic course had been followed in separating the question of State succession from that of the law of

treaties, in dividing that question into the two topics of succession in respect of treaties and succession in respect of rights and duties resulting from sources other than treaties, and, finally, in adopting the title now in use. In proposing the amendment of that title, the Special Rapporteur had said that its present vagueness might create the impression that the rules in the draft articles were merely residual, covering whatever was not covered by the law of succession in respect of treaties, and so lead to the application of articles other than on the specific subjects of State property, archives and debts. His own belief was that that risk was virtually non-existent, since the presentation of the draft, with its division into three sections each containing a definition of the relevant subject matter, should suffice to dispel any false impression concerning the scope of the draft that might be occasioned by the title. In that context, no attempt to extend the application of the draft articles to subjects other than State property, archives and debts could repose on anything more than an argument of analogy: the text offered no basis for an argument of equation. Furthermore, since States were now fully familiar with the subdivision of State succession to which the present title related, they might find a change in that title confusing, particularly if the amendment was unaccompanied by any alteration in the substance of the articles.

14. For those reasons, and although he personally had no objection to the amendments proposed, he believed that the Commission should adopt a cautious approach and postpone action on the proposals until it had heard the comments of Governments and the Sixth Committee of the General Assembly.

15. Mr. ŠAHOVIĆ endorsed in principle the Special Rapporteur's proposal to amend the title of the draft and the wording of article 1.

16. The calls for the Commission to be more precise in indicating the matters covered by the draft articles were justified. Before taking a decision, the Commission might, as Mr. Jagota had proposed, continue the second reading so as to see what advantages might be derived from maintaining the provisions in question unchanged. It seemed obvious, however, that there was some risk of the present text giving the impression that the rules set forth in the draft applied not merely to State property, archives and debts, but to all matters other than treaties. If the expression "in respect of matters other than treaties" were maintained, it would have to be explained somewhere—perhaps in special provisions at the end of the draft—what possibilities there would be of applying the rules contained in the draft to other matters relating to State succession. That appeared to be the logical consequence of Mr. Jagota's suggestion. As each of the main parts of which the draft was composed began with an article defining its scope, the Commission could also meet Mr. Jagota's point by inserting the requisite explanation in those articles. He would, however, prefer the adoption of the wording proposed by the Special Rapporteur.

17. Mr. TABIBI said that the Special Rapporteur had provided, in what, like the topic of jurisdictional immunities of States and their property, could be considered a new field of international law, articles which satisfied all the conflicting interests involved and which third world States could feel proud to have been drafted by a representative of one of their number.
18. While he agreed with the changes which the Special Rapporteur had proposed to the title of the draft and to article 1, he also agreed with Mr. Jagota and Mr. Šahović that those changes should not be made immediately. Since most cases of State succession occurred in the third world, it was there that practical interest in, and experience of, the matters to which the draft articles related were greatest. That being so, and comments having so far been received only from European States, the Commission should leave time for expressions of opinion by third world nations too.
19. Mr. USHAKOV said that the fact that few States had submitted comments on the draft probably meant that the draft had generally been deemed satisfactory.
20. With regard to article 1, he considered it essential to make the amendment suggested by the Special Rapporteur, since the remainder of the draft dealt exclusively with State property archives and debts. As for the title of the draft, it could equally well be left in its present form or amended as proposed by the Special Rapporteur. The question could be decided at a later stage.
21. Mr. FRANCIS observed that the English and Spanish versions of the title and of article 1 could be interpreted as being more comprehensive in scope than the corresponding French originals. Since the changes proposed by the Special Rapporteur would have the dual advantage of removing that ambiguity and of showing, by means of a concise formula, to what the draft referred, his first reaction was to support them. He agreed, however, that a decision on that matter could be postponed until the discussion of the draft as a whole had been completed.
22. Mr. SUCHARITKUL said that he welcomed the Special Rapporteur's suggestion to amend the title of the draft, and hoped that the Commission would both approve it and take account in that respect of the comments made by some of its members, particularly Mr. Jagota. Like Mr. Šahović and Sir Francis Vallat, he thought that the proposed amendment would make for better understanding of the draft and preclude misunderstanding. He recalled that he had himself drawn attention to the question of obligations which arose outside treaties and therefore related not to contractual, but to criminal or penal situations. It could be held that there was State succession in such cases. Consequently, the idea of expressly listing the three matters dealt with in the draft—State property, archives and debts—all three of which were defined in the text, appeared to be logically necessary in the interests of clarity.
23. He also approved the Special Rapporteur's suggestion relating to article 1. He noted that the Commission was concerned only with the effects of State succession, and not with the replacement of one State by another in the responsibility for the international relations of territory.
24. Mr. YANKOV said that the draft articles would make a very important political and legal contribution to the progressive development of international law. Although, in principle, a second reading should not be used to reopen fundamental or conceptual issues, he subscribed to the adage "better late than never" so far as improvements to the draft were concerned. He also agreed that the Commission should not be in a hurry to amend the draft at that stage and that, if time allowed, it should reflect a little more on the issues involved.
25. Where the scope of international treaties was concerned, it could be assumed that, for purely practical considerations, Governments favoured precision and, if only for that reason, it would be advisable to confine the scope of the draft to the three main topics of State property, State archives and State debts. In that connection, the points raised by Mr. Jagota merited further consideration. It would be difficult to make provision in the draft for other matters, apart from State property, State archives and State debts, to be contemplated, and such a provision could lead to vagueness. He therefore supported the Special Rapporteur's proposal.
26. It might, however, be possible at a later stage to rearrange the draft articles in a more logical order, in harmony with the amended title as proposed by the Special Rapporteur in paragraph 12 of his report, so as to deal first with State property and State archives and then with State debts.
27. He urged that all aspects of the issues involved should be considered before any final decision was taken on such changes.
28. Mr. TSURUOKA thought that, when at the stage of second reading, the Commission should endeavour to construct a coherent and harmonious body of legal rules capable of resolving specific problems in the field under consideration.
29. He approved the proposals made by the Special Rapporteur and saw no cogent reason for opposing the suggested amendment. He hoped that the Commission would eschew theoretical discussion on the subject of the title and that, as it examined each of the draft articles, it would succeed in harmonizing the various currents of opinion which co-existed in its midst.
30. Some members had called for the Commission to postpone its decision on the title. While their attitude was not without merit, he felt that it would be preferable to follow a slightly different course by adopting provisionally the title suggested by the Special Rapporteur and reviewing that decision at a later stage should that appear necessary.

31. Mr. RIPHAGEN said that he agreed entirely with the Special Rapporteur's proposed change of title of the draft articles.

32. He was somewhat at a loss, however, to understand how the draft articles might be applied by analogy to the many other questions that arose on a succession of States—for example, to questions of nationality, change of legal order, and currency, as well as the questions to which Mr. Sucharitkul had alluded. In that connection, he would also be grateful for Mr. Jagota's guidance as to the extent to which the draft articles could be applied by analogy to matters with which they did not deal. For his own part, he had some difficulty in seeing any analogy, except with qualifications, in which case such qualifications should be expressed.

33. He agreed that there was no need for haste in the matter and considered that, for the time being, the course outlined by the Special Rapporteur was the best one. He wondered, however, whether, in draft article 1, the word "legal" should be added before the word "effects". It was clear from draft article 17,<sup>3</sup> which referred to the extinction of obligations, that legal effects were involved. On the other hand, State property was defined in draft article 5 as including "interests", a term which did not have an immediate legal connotation. Moreover, the draft articles frequently referred to effects that were more economic than legal in character, all of which threw doubt on whether or not only legal effects were involved.

34. It had been said that the draft articles were concerned with legal effects alone, and not with State succession itself. While, strictly speaking, that was correct, he wondered whether it was really true, in the legal sense, that the draft articles were not concerned with the origins of the State succession. As he saw it, the main thrust of the draft articles related to the specific case of a succession which arose out of the exercise of the right of self-determination of peoples. That was why the term "newly independent State" had been introduced, and why he found it a little strange that draft article 2 used the term "territory" rather than "peoples", who were very important in that respect. After all, the main reason for having rules of international law at all was that they provided a value judgement on State succession. Such a judgement might be neutral (the case of some minor change in territory), or negative (the case of State succession arising out of a wrongful act), positive (the case of State succession arising out of the right of self-determination). Consequently, while a technical distinction could be drawn between State succession and its effects, there remained an important link between those two concepts, which was perhaps the main reason for having the draft articles at all.

<sup>3</sup> For the text of the draft articles adopted by the Commission on first reading, see *Yearbook . . . 1980*, vol. II (Part Two), pp. 8 *et seq.*

35. Mr. VEROSTA reminded the Commission that the present title of the draft articles had never been considered definitive. At a certain stage of its work, the Commission had very wisely decided to restrict the scope of its study to the three major concepts of State property, State debts and State archives, all three of which were defined in the draft.

36. He thought that the title of the draft articles should be brought into line with their concept on second reading, and approved the Special Rapporteur's proposal that the title of the draft articles should be changed and that article 1 should be reformulated accordingly. He had no definite opinion as to the most opportune moment for making that change.

37. Mr. CALLE Y CALLE said that it would be logical to adapt the title of the draft to the substance of the draft articles, and to reformulate article 1 to cover the three main categories of State property, State archives and State debts. It was clear from the wording of draft article 1 that there were other matters affected by State succession which fell outside the scope of the draft.

38. It would perhaps be advisable to show in draft article 1 that the effects of succession in question were effects in law. To that end, it might be better to speak of "juridical" effects rather than "legal" effects, since "legal" referred to the internal order of a country, whereas "juridical" signified the type of relationship between the predecessor and successor States.

39. A second reading was not so much a work of innovation and creation as of adjusting agreed formulations; in that connection, the silence on the part of a number of Governments was to be construed as a tribute to the work done by the Commission and the Special Rapporteur. It was now incumbent upon the Commission to put the final touches to its legal edifice with a view to presenting it in its final form. It was particularly important for the Commission to complete that task at the current session, since the terms of office of its present members were due to expire.

40. The inclusion in the draft articles of a section on State archives was no anomaly. State archives were a part of State property; but they were a special kind of property, in that they presented features which transcended mere economic value and were closely connected with the history and personality of States. It was for that reason that the members of the Sixth Committee of the General Assembly had requested that a special section on State archives should be included in the draft.

41. Sir Francis VALLAT said he felt impelled to express his admiration for the work carried out by the Special Rapporteur. Having provided the Commission with a series of twelve reports of the highest historical value, he had now submitted a set of balanced and clear-cut draft articles in a splendid report.

42. He agreed with the Special Rapporteur that the title to the draft articles and article 1 should be amended. He would, however, state the problem in reverse. The important thing was to ensure that article 1 accurately reflected the scope of the draft articles. Those articles dealt with State property, State archives and State debts; they did not deal with other matters that might be affected by a succession of States. It seemed to him that, in the circumstances, article 1 should reflect only the content of the draft articles, and it followed, as a matter of common sense, that the title should follow along the same lines.

43. Mr. USHAKOV was of the opinion that it would be desirable at the present stage of the Commission's work to prepare a draft safeguard clause. The Special Rapporteur might wish to consider as a possible starting point for the elaboration of such a provision a text reading:

“Nothing in the present articles shall be considered as prejudging in any manner whatsoever any question relating to the effects of State succession in matters other than those dealt with in the present articles”.

*The meeting rose at 6 p.m.*

## 1659th MEETING

*Tuesday, 26 May 1981, at 10.05 a.m.*

*Chairman: Mr. Doudou THIAM*

*Present: Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Diaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.*

### **Succession of States in respect of matters other than treaties (continued) (A/CN.4/338 and Add.1-3, A/CN.4/345)**

[Item 2 of the agenda]

#### **DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (continued)**

#### **ARTICLE 1 (Scope of the present articles)<sup>1</sup> AND TITLE OF THE DRAFT (concluded)**

1. Mr. DÍAZ GONZÁLEZ said that he agreed entirely with the Special Rapporteur's proposed amendment to the title of the draft articles (1658th meeting, para. 10). He was not sure, however, whether the Commission was not limiting the draft articles unduly by confining them to the three topics of State property, State archives and State debts, or whether, if

on the contrary it did not stop there, the draft articles would not be too broad in scope. Since, however, it had been made quite clear at the first reading that the draft articles would deal only with those three topics, and, in addition, the comments submitted by States had been to the same effect, he thought that the Commission should accept the title as amended.

2. Mr. QUENTIN BAXTER said that he had been much impressed by the wealth of the documentation which the Special Rapporteur had laid before the Commission, and he recognized that the variety of ways in which States arranged their affairs had caused many problems for the Special Rapporteur in his endeavour to reduce the huge volume of State practice to the measurable compass of a set of rules.

3. He shared the general feeling that it should be made clear that the Commission had dealt with three subdivisions of what could be regarded as an integral, yet extensible subject. It went without saying that what the Commission had done within those subdivisions would be helpful to lawyers faced with problems in other areas of the subject of succession, but the responsibility for drawing analogies must be theirs and not the Commission's.

4. In the final analysis, archives were, of course, State property, but the comparison between their value as property and their value as archives could be likened to the face value of a postage stamp that had achieved an enormous price tag in the world of philately. Sometimes archives would have to be measured not in terms of their commercial value, but, like rare stamps, of their intrinsic value, for their value to nations and peoples was so great that it was only right to single them out for special attention and, in so doing, give the draft articles an entirely new dimension.

5. It seemed to him that at second reading the Commission should give some thought to the way in which the reader could be guided as to the relationship between archives as archives and archives as property. The main point, however, was to stress that the rules relating to archives as archives took priority over the residual rules affecting their status as property.

6. Mr. JAGOTA said that he had indicated at the previous meeting his preference for the title and text of article 1 as drafted, mainly because of the categorization that had been attempted. It was, however, no more than a preference, and he was fully prepared to abide by the majority view.

7. With regard to Mr. Riphagen's question (1658th meeting) as to what he had meant by his reference to analogy, he was well aware that the concept of analogy could be abused. In that connection, he would remind members that article 33 of the draft articles on the succession of states in respect of treaties adopted by the Commission, which provided for an analogy between a State that had separated from another State and a newly independent State, had not been adopted in

<sup>1</sup> For text, see 1658th meeting, para. 5.

that form by the United Nations Conference on Succession of States in Respect of Treaties.<sup>2</sup> The Commission's recommendation with regard to a separated State had been that, if there had been dependence on the State from which it had separated, then the rules should apply *mutatis mutandis*. In other words, it had sought to extend the concept of newly independent State to another category of new State. The Conference had not agreed, because it thought that the analogy might be abused: it considered that a new State created by a separation was in an entirely separate category, and that any difficulties that arose should be taken care of by some other means, and not by way of analogy under a convention.

8. His own argument was, however, somewhat different. It was to the effect that, where the law was perhaps not directly applicable, the Commission's work would have persuasive force so far as the three topics dealt with in the draft articles were concerned, irrespective of the exact wording of the title; and that persuasive force could be invoked by way of analogy. Two examples could be cited in support of that proposition.

9. First, during the Second World War, prisoners of war taken by one of the parties to the conflict had been sent to India, which had not been independent at the time. Upon India's becoming independent, the question arose who was to pay for the upkeep of those prisoners of war in India. The metropolitan State had disclaimed responsibility, stating that the cost should be met from the colony's accounts. The colony had argued that it had not even been a party to the conflict. It had then become a "newly independent State". It would be possible under the draft to invoke article 11 (1) (b)<sup>3</sup> and to argue that only such movable State property would pass as was connected with the activity of the predecessor State in respect of that territory. The metropolitan State had, however, argued, as it had been entitled to, that it had left such money as it had had in the predecessor State and that, consequently, the movable property to which the newly independent State had succeeded included the money which the metropolitan State was required to pay (if indeed it was required to pay at all). If, on the other hand, the cost of the prisoners' upkeep was deemed to be not property but a debt, it would be possible to invoke articles 16, 17 and 18, and to argue that the debt, if debt there was, was not a financial obligation of one State to another State that would pass to the newly independent State.

10. If article 11 or articles 16, 17 and 18 were successfully invoked, the question of analogy would not arise; if, however, it were argued that the case was not one of succession *per se*, but of liability to pay,

then, in his submission, the concepts developed in the Commission as well as in various treaties regarding newly independent States could still apply by analogy. Those concepts were: that a newly independent State was a previously dependent territory; that the activities of the metropolitan State in relation to that territory were not the activities of that territory; and that, in any case of doubt, equity should apply. In the event, the metropolitan State had agreed to pay the cost of the prisoners' upkeep.

11. Another more recent example concerned the seizure by the metropolitan Power, by way of retaliation, of property belonging to foreigners in a colony. That colony had subsequently been granted independence and had become a newly independent State. If such seizure of property prior to independence was a wrongful act, if the persons to whom the property belonged should be compensated and if, moreover, the State of their nationality had a cause of action, the question arose whether the amount due fell to be paid by the newly independent State or by the metropolitan State. Again, the articles could be interpreted as placing an obligation on the newly independent State, but it was also possible that the issue might turn more on whether or not the seizure was wrongful. The metropolitan State could argue that, even though it had seized the property of foreigners, that property had passed to the newly independent State and the newly independent State should therefore pay.

12. In his submission, if the principles relating to the rights and obligations of a newly independent State were directly applicable, the question of analogy might not apply; but if they were not directly applicable, then they would have value by way of analogy. It was in that sense that he had used the word "analogy", although it would also be possible to refer to the persuasive value of the Commission's work in interpreting the draft articles liberally. Whatever value, however, those articles might have by way of analogy, it would be unaffected by the wording of the title.

13. Mr. BEDJAOUI (Special Rapporteur) said that he noted that a large majority of the Commission appeared to be in agreement with his suggestion that the wording of article 1 should be amended by listing in it the topics actually dealt with in the draft articles: State property, State archives and State debts.

14. There was, however, less unanimity among the members concerning the title, since some had proposed that a decision should be deferred and others that the title should be amended provisionally, while it had even been suggested that the topics dealt with should be listed between brackets both in the title and in article 1. The comments that had been made would undoubtedly facilitate the work of the Drafting Committee.

15. It was always extremely difficult to assign a title to a draft. He recalled that the Commission had hesitated for a long time in that regard, and that the

<sup>2</sup> See *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.79.10), pp. 160-161, document A/CONF/80/30, paras. 87-96.

<sup>3</sup> See 1658th meeting, footnote 3.

title of the topic had been amended for the first time in 1968 and changed once more in 1979, when the Commission had replaced the words “*dans les matières*” by “*dans des matières*”.<sup>4</sup> The best moment for finalizing the title of a draft was as near as possible to the completion of the work, since it was then that the subject-matter was really known. The Commission had now reached that final stage and, since it had declared in favour of amending the wording of article 1, it would be desirable to avoid any contradiction between the definitive title and the contents. Consequently, the decision to amend the wording of article 1 ought to entail a decision to change the title also.

16. To retain the title unchanged might, it was true, offer some advantages. First of all, it would show that the Commission's work was not really complete, since the draft articles covered only the three topics specified. It would also enable some States to proceed by analogy in seeking a solution to problems arising in areas other than those specifically forming the subject of the draft articles. The arguments adduced by Mr. Jagota in that regard were not without cogency.

17. However Mr. Šahović (1658th meeting) had rightly stressed that, in order to impose the use of analogy, the Commission should draft transitional provisions or expand the general introduction in such a way as to encompass all instances of successions of States in respect of matters other than treaties—but it no longer had sufficient time to do so. Moreover, the desire to suggest the use of analogy in other matters would lead it to go still further than Mr. Jagota advocated and to amend the title of the draft articles, reverting to the title used prior to 1979 with the expression “*dans les matières*”. He was nevertheless convinced that States which might have to resolve problems of succession of States in respect of matters not covered by the draft articles would take that set of rules into account and would proceed by analogy even when there was no formal obligation to do so. It was obvious that the Commission had not exhausted in its draft articles the question of the succession of States in respect of all matters other than treaties, and that reasoning by analogy could and should be applied to a whole range of matters which had of necessity been left aside because of their extreme specificity and complexity.

18. Noting that Mr. Ushakov (*ibid.*), supported by Mr. Díaz González, had proposed the insertion of a saving clause among the first articles of the draft, he said that the Drafting Committee would be able to examine that possibility.

19. He considered it worth recalling, as Mr. Riphagen (*ibid.*) had done, that the Commission was concerned with the effects of succession and not with succession itself. He noted that draft article 3 specified that the cases of succession of States covered by the

articles were those occurring in conformity with international law, and in particular with the principles of the Charter. He was in favour of the proposal to insert the adjective “legal” before the word “effects” in article 1, the better to specify the scope of the articles.

20. Regarding the order in which the three topics should be cited, he would like property to be mentioned first, then archives, and finally debts. He noted that some members of the Commission had pointed out that archives constituted a subdivision of State property, and thought that, at the appropriate time, the articles in the draft concerning archives should be placed after those dealing with property.

21. Noting the comments by Mr. Quentin-Baxter, who had pointed out that the historical value of archives was quite unrelated to their commercial value, he said that he was in favour of that attitude, which incidentally, most members of the Commission appeared to share. He suggested that the Drafting Committee might study the possibility of drawing up a provision specifying that the rules concerning archives had some degree of priority over the somewhat residual rule worked out for State property.

22. Lastly, he accepted the proposal by Mr. Tabibi (*ibid.*) that the Commission should allow the African and Asian States enough time to formulate comments on the draft articles before the Commission's next session. Such comments would be welcome and would certainly be useful for the final review of the draft before its possible submission to an international conference.

23. Mr. TABIBI suggested that, to assist the Special Rapporteur in his work and the Sixth Committee in its discussion at the next session of the General Assembly, Member States should once again be invited to submit their comments.

24. The CHAIRMAN proposed that the Commission should refer the title and draft article 1 to the Drafting Committee.

*It was so decided.*<sup>5</sup>

## ARTICLE 2 (Use of terms)

25. The CHAIRMAN invited the Special Rapporteur to introduce article 2, which read:

### *Article 2. Use of terms*

#### 1. For the purpose of the present articles:

(a) “*succession of States*” means the replacement of one State by another in the responsibility for the international relations of territory;

(b) “*predecessor State*” means the State which has been replaced by another State on the occurrence of a succession of States;

(c) “*successor State*” means the State which has replaced another State on the occurrence of a succession of States;

<sup>4</sup> See *Yearbook ... 1979*, vol II (Part Two), p. 10, para. 21; and p. 15, para. (3) of the commentary to art. 1.

<sup>5</sup> For consideration of the text proposed by the Drafting Committee, see 1692nd meeting, paras. 47–48 and paras. 50–51.

(d) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

(e) "newly independent State" means a successor State the territory of which, immediately before the date of the succession of States, was a dependent territory for the international relations of which the predecessor State was responsible;

(f) "third State" means any State other than the predecessor State or the successor State.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

26. Mr. BEDJAOUI (Special Rapporteur) said that the article had elicited from Governments five comments of equal importance.

27. First, the Commission had been asked to maintain the closest possible parallelism between the draft articles under consideration and the 1978 Vienna Convention.<sup>6</sup> He wished to emphasize that it had been the Commission's constant concern to do so.

28. It had also been suggested that, with regard to the successions of States considered, the case of new States which came into being as a result of a separation should be assimilated to that of newly independent States. He was not in favour of such assimilation, and recalled that the Commission had itself taken the view that the situation of newly independent States differed from that of States created by a separation in that it was essentially characterized by a previous dependence which, throughout its duration, had created a distortion to the detriment of the new State. Consequently, it did not seem possible to combine the two cases.

29. The definition of the expression "third State" in paragraph 1, subparagraph (f) had been considered insufficiently clear, but he doubted whether it could be improved on without risk. He also considered that the proposal to delete paragraph 2 of article 2, thought by some to be superfluous, would not be justified; such a provision served a specific purpose and was entitled to a place in the draft articles.

30. Lastly, he drew attention to the suggestion by the Government of Czechoslovakia that definitions of State property, State archives and State debts should be included among those given in article 2 (A/CN.4/338/Add.2). He emphasized, however, that the definitions in article 2 applied to the draft articles as a whole, whereas the parts devoted to State property, State archives and State debts contained specific definitions applicable to the provisions they contained and not to the draft articles as a whole. It was hard to imagine any argument that could justify the grouping of all definitions in article 2.

31. Sir Francis VALLAT said that he agreed in general with the Special Rapporteur's comments.

32. With regard to the definition of a newly independent State, as laid down in draft article 2, subparagraph 1 (e), he said that, had the question arisen five years earlier, he might have shared the view that the definition should be a different one, since there was indeed a factual analogy between some cases of the separation of a State and some cases of newly independent States. But, as Mr. Jagota had pointed out, the Commission's view on that particular point had not been upheld by the United Nations Conference on Succession of States in Respect of Treaties.

33. It was difficult to ascertain the exact reason for the Conference's stand, but he thought that the underlying feeling had been that the position of the newly independent State had come to have special recognition in the international community, as expressed through the General Assembly, that there should be no confusion regarding that very special position, and that it would be out of keeping with the general attitude to newly independent States if another aspect were introduced by analogy—in other words, if the separation of part of a State was treated in the same way as a newly independent State. He believed that the Conference had also felt that there was a risk of abuse, coupled with the difficulty of determining cases in which the analogy should be applied. It had therefore reached a clear-cut decision to reserve the position taken by the Commission, and had refused to extend the special advantages granted to newly independent States to cases where part of a State had become independent, even where the circumstances were similar.

34. In the face of that decision by the Conference, he wondered whether it would be wise for the Commission to change the position it had adopted at the first reading and to re-open that controversial question. It seemed to him that the better course for the Commission was to follow the 1969 Vienna Convention on the Law of Treaties<sup>7</sup> on that point and not to take the initiative, particularly at that stage, in re-opening the question of the application of the concept of the newly independent State by analogy to other cases. In spite of the fact that there were advantages in so applying that concept, he thought that, in the context of the draft articles, the Commission should adhere to the definition laid down in article 2, subparagraph 1 (e).

35. Draft article 2, paragraph 2, served a useful purpose, in his view, and should be retained.

36. It would be appropriate to keep the definitions on State property, State archives and State debts in the

<sup>6</sup> See 1658th meeting, footnote 2.

<sup>7</sup> For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5.), p. 287. The Convention is hereinafter referred to as "1969 Vienna Convention".

parts of the draft to which they were related. It would only give rise to problems of drafting and possibly cause confusion if they were inserted in the general definition. The point could, however, be dealt with by the Drafting Committee.

37. Mr. CALLE Y CALLE said he noted that the requisite parallelism with the 1978 Vienna Convention had been respected to a large extent throughout the draft, and particularly in draft article 2, where the definition of a newly independent State was worded in exactly the same terms as in that Convention. That wording should be retained, for it was important not to confuse newly independent States with new States. Basically, the former emerged from a condition of dependence to acquire a new status of independence, which made them masters of their own destiny. The fact that a new State was formed as a result of unification did not mean that it attained independence, although it did obtain a new personality. The same applied to States which were formed on the separation of territory that had previously formed part of the dependent territory.

38. He also noted that the 1978 Vienna Convention contained no definition of a third State, although it did contain a definition of the "other State party". It was important for the structure of the draft articles to have a definition of a third State, because, in matters of property, third States—in other words, States that were not privy to the special relationship that existed between predecessor and successor States—could and did have rights.

39. Draft article 2, paragraph 2, was designed to protect the meaning accorded under the internal law of States to the terms used in the draft articles. The terms defined in the text under consideration, however, unlike those defined in article 2 of the 1978 Vienna Convention, were generally to be found in international treaties and not in the internal law of States. He therefore suggested that, in paragraph 2, the words "treaties and in" be added before "the internal law of any State".

40. Lastly, since no substantive change was required in draft article 2, he recommended that it be referred to the Drafting Committee for such minor adjustments as might be necessary.

41. Mr. ŠAHOVIĆ said he supported the comments made by Mr. Calle y Calle, and would like to hear the Special Rapporteur's reactions to the proposal made in connection with article 2, paragraph 2.

42. Mr. BEDJAOUI (Special Rapporteur), summing up the discussion, said that the three members of the Commission who had spoken on article 2 had confined themselves to recalling past facts and offering explanations.

43. Sir Francis Vallat had given the Commission the benefit of the experience he had acquired as Special Rapporteur on the topic of the succession of States in

respect of treaties; he had given the background of the typology question in relation to newly independent States and other new States. The Commission had no need to dwell on that problem, which would come up once again when it considered the provisions relating to newly independent States under the various headings of State property, State archives and State debts. The decision as to how the problem should be resolved could be left to a future conference of plenipotentiaries, or else it could be discussed in the Drafting Committee or the Sixth Committee.

44. Both Sir Francis Vallat and Mr. Calle y Calle had expressed the view that article 2, paragraph 2, was genuinely useful and should not be deleted. As to the insertion in that paragraph of the words "treaties and in" before the words "the internal law of any State", he had no objection to that proposal. In the last analysis, everything—subject to questions of *jus cogens*—was a matter for agreement. Two States could agree between themselves on whatever they wished, it being understood that their agreement was not opposable to third parties. Any definition appearing in an international instrument was by its nature conventional, and depended on the object of that instrument. If the definitions in the article under consideration gave rise to any difficulties, they would do so in a field related to the actual object of the draft articles. Since the draft articles were of an international nature, any danger of confusion or contradiction could arise only at the international level. If the existence of past or future treaties containing different definitions really involved such a danger, the proposed qualifications could be added to article 2, paragraph 2, so that States would remain free to give a different meaning in treaties to the definitions set forth in that article.

45. As for the question of the repercussions of those definitions on the internal law of States, that formed part of a problem which was much more general and could be discussed endlessly, namely, that of the relationship between international law and internal law. In that connection, he pointed out that once an international instrument had been ratified by a State it was received into the internal law of that State. The reference to internal law which appeared in article 2, paragraph 2, applied therefore to States that had not ratified the convention which might emerge from the draft articles.

46. The CHAIRMAN proposed that article 2 should be referred to the Drafting Committee.

*It was so decided.*<sup>8</sup>

ARTICLE 3 (Cases of succession of States covered by the present articles)

47. The CHAIRMAN invited the Special Rapporteur to introduce article 3, which read:

<sup>8</sup> For consideration of the text proposed by the Drafting Committee, see 1692nd meeting, para. 52.

**Article 3. Cases of succession of States covered by the present articles**

The present articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.

48. Mr. BEDJAOUI (Special Rapporteur) said that the article which was modelled on article 6 of the 1978 Vienna Convention, did not appear to give rise to any major problems. Some representatives in the Sixth Committee had, however, asked whether the proposed text did not call into question some older successions which might not be in conformity with the principles of international law incorporated in the Charter of the United Nations or with international law in general. On that point, he remarked that the Commission was legislating for the future, and should not concern itself with such situations. It had also been suggested in the Sixth Committee that the reference to the principles of international law embodied in the Charter of the United Nations should be deleted, the Charter being an instrument of an essential political character. For their part, the German Democratic Republic (A/CN.4/338) and Czechoslovakia (A/CN.4/338/Add.2) had judged article 3 to be acceptable in their written comments.

49. In his own view, the Commission should beware of mutilating the article under consideration by deleting the reference to the Charter, not only because the text of the article was modelled on article 6 of the 1978 Vienna Convention but also because a mere reference to conformity with international law would be insufficient—the more so in that there was a danger that it might revive the controversy that had arisen over the reference to international law in the draft Charter of Economic Rights and Duties of States. On that occasion, the industrialized countries had maintained that nationalization should be carried out “in accordance with the applicable rules of international law”,<sup>9</sup> but the provision had been deemed inadequate by the Group of 77.

50. The last phrase of the article under examination was thus in conformity with the current aspirations of the international community. While it was true that the Charter was an essentially political document, it was not entirely without a juridical framework. Moreover, it was not the first time that an international legal instrument had referred to the Charter. It should be noted that any reference to the principles embodied in that instrument also covered the principles contained in those General Assembly resolutions considered to be interpretative of the Charter, such as resolution 2625 (XXV), containing the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

51. Mr. USHAKOV said that, while he had no difficulty with the article under consideration, he wished to emphasize the link between article 6 of the 1978 Vienna Convention and the next article, which concerned the temporal application of that instrument. If in due course the Commission proposed that a convention be prepared on the basis of its draft articles, the question of the temporal application of that convention would also arise. According to the law of treaties, a convention applied, in principle, only to situations subsequent to its entry into force; yet a newly independent State, or any other new State, could not become a party to a convention on State succession until it had come into being. That was why it had been provided, in article 7 of the 1978 Vienna Convention, that the rules set forth in that instrument could, by agreement among the States parties concerned, be applied retroactively to a succession of States which had occurred after its entry into force. The drafting of a similar article could be left to any plenipotentiary conference which the General Assembly might convene, but it would be better for the Commission to draft an article itself.

52. Mr. TABIBI said he endorsed the opinions concerning article 3 which the Special Rapporteur had expressed in his report and his statement, and that they fully justified the maintenance of the article in its existing form. He believed that it would be very helpful if there were discussion in the Sixth Committee and at the possible plenipotentiary conference of the nature of the international law relevant to the topic, for the principles in question included not only those embodied in the Charter of the United Nations but also rules which had evolved in keeping with the expansion of the international community since the drafting of that instrument.

53. Mr. CALLE Y CALLE was of the opinion that no change should be made to the existing text of article 3: the few States which had felt it necessary to comment on the article had declared it acceptable, and the provision reproduced the text of the corresponding article of the 1978 Vienna Convention.

54. Moreover, by its reference to “a succession of States occurring in conformity with international law”, the article implied that “anomalous” succession (in which, as in the case of Namibia and certain other areas in southern Africa, there was no more than fictitious transfer to a territory of responsibility for its international relations) was illegal. He further interpreted the reference to “international law” as meaning the international law currently in force, an opinion in which he was comforted by the particular mention of the “principles of international law embodied in the Charter of the United Nations”. He noted that, in the report under consideration, the Special Rapporteur deemed that reference to include the interpretative developments of the Charter to be found in various United Nations declarations, such as General Assembly resolution 2625 (XXV) (see A/CN.4/345, para. 30).

<sup>9</sup> TD/B/AC.12/4 and Corr. 1, p. 10.

55. A space should be left between article 3 and the existing article 4 for the insertion of safeguard clauses and provisions on retroactivity. The drafting of such articles would be a complex and sensitive matter and could, therefore, more appropriately be undertaken by the Commission than by a conference of plenipotentiaries.

56. It was clear that the codification of the rules relating to succession entailed some form of retroactive application of those rules if successor States desirous of subscribing to them were not to be deprived of many of their benefits. The effects of succession might well arise for a new State before, or at the moment of, its birth, and hence before it had had any opportunity of becoming a party to the instrument by which it wished its rights and obligations to be governed. The 1978 Vienna Convention provided, with respect to its own temporal application, for a system of declarations and acceptances of declarations, and the Commission should give thought to the advisability of including a similar provision in the current draft articles.

57. Mr. JAGOTA said he agreed that article 3 should be retained as it stood.

58. With respect to the question of temporal application mentioned by Mr. Ushakov and Mr. Calle y Calle, he observed that the 1978 Vienna Convention had departed from the traditional rule of the non-retroactivity of international instruments as expressed in, for example, article 4 of the 1969 Vienna Convention. It was his impression that the change had been occasioned by the emergence of the concept of the "newly independent State", and that the relevant article of the 1978 Vienna Convention (art. 7) thus represented a major contribution by the Commission to the progressive development of international law.

59. The alterations which had been made to that article, as compared with article 4 of the 1969 Vienna Convention—namely, the addition to the residual rule in the first paragraph of the words "except as may be otherwise agreed", the introduction in paragraphs 2 and 3 of the system of declarations concerning definitive or provisional retroactive application of the convention, and the statement in paragraph 4 of the modalities for the making of such declarations—had, he believed, all been made in order to ensure that the benefits of the 1978 Convention were extended to newly independent States. If that belief was correct, it would be appropriate for the Commission to look into the possibility of incorporating similar provisions in the current draft articles, for the subject matter was akin to that of the 1978 Vienna Convention, and the situation of newly independent States was again of importance.

60. He had no firm opinion as to whether the provisions in question should be drafted by the Commission itself or by a conference of plenipotentiaries.

61. Sir Francis VALLAT said that his recollection was that the question of the retroactivity or otherwise of what had become the 1978 Vienna Convention had originally arisen, in an acute form, in the Commission, and that the cause of that situation had been the rule concerning the non-retroactivity of treaties which was set out in article 28 of the 1969 Vienna Convention. Without the inclusion in the 1978 Convention of some kind of provisions such as those which had ultimately been incorporated in article 7, article 28 of the 1969 Vienna Convention would effectively have blocked the retroactivity of the later instrument. That would, as Mr. Jagota had said, have been particularly hard on newly independent States, but the situation would not have been confined to such States, any more than it would be in the case of the potential treaty which the Commission was currently drafting.

62. The draft article which the Commission had eventually proposed to the United Nations Conference on Succession of States in Respect of Treaties had looked more to retroactive activity than non-retroactivity, because it had been obvious that, without such an emphasis, any convention adopted by the Conference would have been useless to newly independent States. However, the Commission had been very much aware that the draft article in question was not wholly satisfactory; it had therefore taken the attitude that, while it ought to draw the attention of the Conference to the problem of temporal application, the solution of that problem was properly a matter for the Conference itself. That attitude had been motivated by concern not only over the question of principle that had been at issue, but also over the formal matters involved, particularly those that had ultimately been regulated in paragraphs 2 and 3 of article 7 of the 1978 Vienna Convention. That article had been one of the two to give rise to major difficulties at the Conference, and a compromise had been reached on its wording only after considerable effort by a specially created Informal Consultations Group.

63. It was his personal impression that the considerations which had applied in the case of the draft articles on succession in respect of treaties also applied in the current case. If the draft articles currently under consideration became a treaty, they would be subject to article 28 of the 1969 Vienna Convention, thereby precluding the retroactive application of the new instrument to facts and events that had preceded the entry into force of that instrument for a newly independent State or any other new State.

64. He agreed that if the Commission could contribute to the resolution of that problem it should do so. He was, however, uncertain whether it should put forward a draft article or merely draw attention to the problem of temporal application. On balance, he thought that it should try to prepare a draft article, at least as a basis for discussion by itself and by the Drafting Committee. Whatever its final decision, the Commission should make use of the term "temporal

application", because, as the 1978 Vienna Conference had recognized in choosing that expression, the problem at issue was a problem both of retroactivity and of non-retroactivity.

65. Mr. VEROSTA suggested the establishment of a small working group composed, in particular, of members of the Commission having a special knowledge of the question, to assist the Special Rapporteur in working out a draft article on the question of the temporal application of the articles.

*The meeting rose at 1.00 p.m.*

## 1660th MEETING

*Wednesday, 27 May 1981, at 10.05 a.m.*

*Chairman:* Mr. Doudou THIAM

*Present:* Mr. Aldrich, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

### Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/338 and Add.1-3, A/CN.4/345)

[Item 2 of the agenda]

#### DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

#### ARTICLE 3 (Cases of succession of States covered by the present articles<sup>1</sup> (*concluded*))

1. Mr. SUCHARITKUL said that he agreed entirely with the arguments adduced by the Special Rapporteur in favour of retaining the existing wording of article 3.

2. With regard to the question of the temporal application of the draft, which Mr. Ushakov had raised in connection with that article at the previous meeting, it appeared essential to draft a new article, since the temporal aspect was a constituent element of any rule of international law: no such rule could exist outside the framework of time. The drafting of the new article could be entrusted to the Special Rapporteur, who might base himself on article 7 of the 1978 Vienna Convention.<sup>2</sup>

3. When formulating the new article, regard should be had to the fact that the question of the retroactive application of the draft did not arise in cases of

succession entailing the disappearance of the predecessor State. Account must be taken, however, of the interests of third States. If the draft gave rise to a convention, the States which would become parties to that instrument would in the main be third States. Moreover, several of the draft articles referred expressly to third States, either as creditors or as debtors.

4. Mr. JAGOTA said that, since his statement on the problem of the temporal application of the draft articles at the previous meeting, he had noticed that the difficulty to which he had alluded was at least partly resolved in the case of State property by the provisions of draft article 7.<sup>3</sup> However, there were no corresponding provisions in the sections of the draft dealing with State archives and State debts. He hoped that the Commission would look into the justification for that distinction when considering the problem of temporal application.

5. Mr. USHAKOV pointed out that the applicability of article 7 was dependent on the applicability of the convention as a whole. It was precisely to ensure that all the articles could be applied that a new article was required.

6. Mr. JAGOTA, referring to the statement by Mr. Ushakov, said that the point which he himself had been trying to make was that, if the draft articles became a treaty, article 7 would dispense any successor State which became a party to that instrument from the need to take any special action—such as the formulation of a declaration—in order to succeed to State property from the date of the succession of States. He had further drawn attention to the fact that the draft did not provide for any such dispensation in the case of succession to State archives and State debts.

7. Mr. BEDJAOU (Special Rapporteur) noted that the discussion on article 3 had brought out two problems: that of irregular successions and that of the temporal application of the draft.

8. The first of those difficulties was resolved by article 3, which provided that the draft did not apply to the effects of a succession not in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations. The problem of the temporal application of the draft arose only in respect of regular successions, and was not, therefore, directly linked to article 3. Its solution might require the Commission to supplement the draft and so establish closer parallelism with the 1978 Vienna Convention. At the previous meeting, Sir Francis Vallat had drawn a comparison between article 3 of the draft and article 28 of the 1969 Vienna Convention<sup>4</sup> by stating that each constituted a barrier to retroactive application. While that was quite true of article 28 of the Convention, the article under consideration was not

<sup>1</sup> For the text, see 1659th meeting, para. 47.

<sup>2</sup> See 1658th meeting, footnote 2.

<sup>3</sup> See para. 70 below.

<sup>4</sup> See 1659th meeting, footnote 7.

concerned with retroactive application; it had to do only with the conformity of a succession with international law. In point of fact, article 3 established a prerequisite with respect to the problem of temporal application. That being so, he thought that the article might be referred to the Drafting Committee.

9. With regard to the second problem, there appeared to be general agreement in the Commission that a new article should be formulated, that the Commission itself should do the drafting and that it should take as its starting point article 7 of the 1978 Vienna Convention.<sup>5</sup> The Commission might make the deciding factor in the new provision either the date of the succession, the date of entry into force of the future convention, or the date on which a particular State acceded to that convention. As Mr. Jagota had pointed out, the draft answered that particular problem only in relation to State property. In that case, the determinant was the date of the succession of States. However, the Commission would be well advised to draw up a more general provision, to be inserted after article 3 and drafted in the light of article 7 of the 1978 Vienna Convention, and, perhaps, of any new article that might be devised concerning State archives and State debts. The task could be entrusted to the Drafting Committee, which might, if need be, set up a small working group.

10. With respect to irregular successions, Mr. Calle y Calle had referred, at the previous meeting, to the case of Namibia under South African occupation; that was not really a case of succession of States, but one of annexation pure and simple. Immediately after the territory of present-day Namibia had been placed under South African mandate, after the First World War, South Africa had stated its intention of annexing it, alleging that its mandate entitled it to do so. In the advisory opinion it had handed down in 1950,<sup>6</sup> the International Court of Justice had stated that the essence of a mandate precluded any form of annexation. Since then, and particularly since the International Court had stated in its advisory opinion of 1971<sup>7</sup> that South Africa was an illegal occupier, the international community had been striving to end the occupation of Namibia. The Security Council and the General Assembly had requested South Africa to respect Namibia's State property. In 1974, the United Nations Council for Namibia had issued an order<sup>8</sup> designed to protect the State property of Namibia, particularly, its natural resources, against plunder. One member of the Council had even called on that

occasion for South Africa to compensate Namibia for the plunder of its State property. That question was, in any case, one which would arise when Namibia became independent.

11. For the sake of completeness, mention must be made of the possibility that, following an irregular succession, the successor State might express its willingness to comply with the future convention. It would then have to be able to ratify the convention, if the instrument were to apply to the legal effects of the succession. What would become of article 3 in such a case? Since the hypothesis in question was almost certainly purely academic, the Commission need not dwell on it.

12. Sir Francis VALLAT assured the Special Rapporteur that nothing he himself had said at the previous meeting concerning article 7 of the 1978 Vienna Convention had in any way been intended to suggest any conceivable change in article 3 of the present draft. His comments had been designed solely to remind the Commission that the question of temporal application had arisen out of what had become article 7 in the Commission's draft on succession of States in respect of treaties.

13. In that respect, the background to the Commission's ultimate proposal concerning the non-retroactivity of the draft articles on succession in respect of treaties was clearly explained in the commentary to the article 7, paragraph (1) of which read:

During the discussion of article 6 at the present session of the Commission, some members expressed doubts as to the possible implications of the article with respect to events that had occurred in the past. It was observed that reference to the Charter of the United Nations might not have the effect of limiting these implications to recent events or even to those which had occurred since the Charter came into force. One member of the Commission attached particular importance to establishing beyond doubt that article 6 had no retroactive effect. Accordingly, he submitted a draft article which, after consideration and some redrafting by the Commission, is now included as article 7.

Paragraph (4) of the same commentary read:

Although the draft of the article was submitted to the Commission in relation to article 6, it is cast in general terms. This is necessary because, if an article were to provide for non-retroactivity in respect of one article alone, this would obviously raise implications and doubts as to the retroactive effect of the other articles. Accordingly, article 7 is drafted as a general provision and is placed in Part I of the draft immediately after article 6.<sup>9</sup>

14. The United Nations Conference on Succession of States in Respect of Treaties had been entirely in accord with the opinion thus expressed by the Commission, and its only problem in discussing article 7 had been with its substance.

<sup>5</sup> See 1658th meeting, footnote 2.

<sup>6</sup> International Status of South West Africa, Advisory Opinion: *I.C.J. Reports 1950*, p. 128.

<sup>7</sup> 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.

<sup>8</sup> *Official Records of the General Assembly, Twenty-ninth session, Supplement No. 24A (A/9624/Add.1)*, para. 84.

<sup>9</sup> *Yearbook ... 1974*, vol. II (Part One), p. 182, document A/9610/Rev.1, chap. II, sect. D.

15. The CHAIRMAN suggested that draft article 3 should be referred to the Drafting Committee.

*It was so decided.*<sup>10</sup>

16. The CHAIRMAN suggested that the Drafting Committee should be asked to prepare—if necessary, by setting up a small working group—a new article on the temporal application of the draft.

*It was so decided.*<sup>11</sup>

ARTICLE 4 (Scope of articles in the present Part) and  
ARTICLE 5 (State property)

17. The CHAIRMAN invited the Commission to proceed to Part II of the draft articles (State property), beginning with section 1 (General provisions), and to consider articles 4 and 5, which read:

*Article 4. Scope of the articles in the present Part*

The articles in the present Part apply to the effects of a succession of States in respect of State property.

*Article 5. State property*

For the purposes of the articles in the present Part, "State property" means property, rights and interests which, at the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State.

18. Mr. BEDJAOUÏ (Special Rapporteur) said that in 1979, one representative to the Sixth Committee had suggested that articles 4 and 5 should be combined. In its written comments, the German Democratic Republic (A/CN.4/338) had found article 4 acceptable, whereas Czechoslovakia (A/CN.4/338/Add.2) had proposed that article 4 and article 15,<sup>12</sup> its equivalent in respect of State debts, should be deleted. In the view of Czechoslovakia, the Commission could dispense with articles 4 and 15 if it mentioned expressly in article 1 the topics covered in the draft.

19. He believed that article 4 was justified by the need to specify the field of application of the articles in Part I of the draft. The same justification applied to article 15 in Part III of the draft.

20. With regard to article 5, there had been a proposal that State property should be defined not only with reference to the internal law of the predecessor State, but also with reference to public international law or private international law. The hope had been expressed that the expression "State property" would be supplemented by the words "movable or immovable".

21. Those who wished a reference to be made to public international law argued that State property might be owned by two or more States or be part of the common heritage of mankind. In his view, it was not

absolutely essential to refer to public international law, any more than to private international law, since the relevant texts of international law were necessarily subject to "absorption" by the internal law of the predecessor State.

22. The Commission had always been mindful of the difficulties that might be created by referring solely to the internal law of the predecessor State and excluding the internal law of the successor State. When article 5 had been formulated, he had cited cases in which the law applied had been the internal law of the successor State or international case law, rather than the internal law of the predecessor State. However, in the interests of simplification, and because it was easier to determine the attribution of State property from the internal law of the predecessor State, it was for that law that he had opted.

23. It had sometimes been said in the Sixth Committee that the phrase "property, rights and interests" was unsuitable. The phrase was one which the Commission had discussed at length and which was useful for referring to assets without limiting them to movable and immovable property. Furthermore, it was not a new expression, for it had been used in international treaties and, in particular, in the Treaty of Versailles.<sup>13</sup>

24. Since the expression "State property" was defined in article 5 by reference to the internal law of the predecessor State, it must mean the State property of the predecessor State; there was no need to spell that out. It would, however, be inexpedient to use that expression in other parts of the future convention—particularly when speaking of the State property of a third State. The difficulty should not be exaggerated, however, since the Commission had taken the precaution of stating that the definition of the expression "State property" appearing in article 5 was applicable for the purposes of the articles in that part of the draft which concerned State property. It could therefore retain the words "State property" in the other parts of the draft even if they did not apply to the State property of the predecessor State, but it would have to delete the words "of the predecessor State" qualifying "State property" in article 8, since that article was in the part of the draft concerning State property.

25. Mr. USHAKOV said that, while he found draft article 4 acceptable, article 5 called for a drafting comment.

26. As the Special Rapporteur had pointed out in his thirteenth report (A/CN.4/345, para. 35), the fact that the articles on each matter applied exclusively to that matter raised the problem of whether the articles on State property applied to State archives if the latter were regarded as constituting a special category of State property. That question arose mainly in con-

<sup>10</sup> For consideration of the text proposed by the Drafting Committee, see 1692nd meeting, para. 53.

<sup>11</sup> *Idem*, paras. 54–55.

<sup>12</sup> See 1658th meeting, footnote 3.

<sup>13</sup> See *British and Foreign State Papers, 1919* (London, H.M. Stationery Office, 1922), vol. CXII, p. 7.

nection with the general articles on State property, articles 4 and 9. There were two possible solutions: the articles concerning State archives could be treated either as a separate part of the draft or as a section of the part dealing with State property. In the latter case, the general articles concerning State property would be applicable to State archives, and that would inevitably give rise to drafting problems. In the former case, the part dealing with State archives would have to be supplemented by general articles. He preferred that course, for it had the advantage of simplicity. In any event, the question would require the attention of the Drafting Committee when it dealt with articles 4 and 5.

27. With respect to the definition of the expression "*biens d'Etat*" appearing in article 5 and the inappropriateness, pointed out by the Special Rapporteur, of the phrase "*biens d'Etat de l'Etat prédecesseur*" contained in article 8, he noted that the English version of article 8 presented no problem, since the phrase was there translated as "State property from the predecessor State".

28. Perhaps the reference in article 5 to the "internal law of the predecessor State" was not quite accurate, inasmuch as law other than metropolitan law might be applicable in the territory to which succession related. It might, therefore, be wise to provide for that possibility too, either by amending article 5 to suit or by mentioning the possibility in the commentary to that article. The same question would arise in connection with article 9, as well as with certain articles relating to State archives.

29. Finally, it would be preferable, in order to avoid reopening discussion on the matter, not to refer in article 5 to private international law.

30. Mr. ŠAHOVIĆ said that he understood the reasons adduced by the Special Rapporteur for maintaining article 4, but felt that it would not be illogical to delete it, since the matters with which it dealt were enumerated in article 1.

31. With respect to article 5, he wondered if the definition of the expression "State property" would not be better placed in article 2. The reason the Commission had set the definition in article 5 was that it had drafted it while preparing the draft part by part. The Drafting Committee should examine the question without delay.

32. The Drafting Committee should also consider the possibility of combining the ideas expressed in articles 4 and 5 into a single provision. A more comprehensible article might result.

33. With respect to the articles concerning State archives, he felt that since the Commission had decided in principle to mention State archives in article 1, there would have to be a separate part of the draft on that subject. That part should obviously be aligned with the part concerning State property, but combining those two parts was impossible.

34. Mr. Ushakov's remarks concerning the notion of internal law of the predecessor State deserved attention. Since the expression "internal law" appeared in several provisions of the draft, the Commission might try to define it in article 2; it was clearly likely to give rise to numerous problems of interpretation.

35. Mr. JAGOTA said that he found draft article 4 acceptable. Mr. Šahović's comments concerning that article could appropriately be discussed by the Drafting Committee.

36. With regard to article 5, it might be helpful if a clearer indication was given of what was meant by the "internal law" of a predecessor State. Since the article did not stipulate that the State property to which it referred must be located in the territory to which the succession of States related, he considered that the "property, rights and interests" in question might include, for example, the exclusive economic zone established by the emerging law of the sea. The Special Rapporteur discussed such matters in paragraph 43 of his thirteenth report (A/CN.4/345). To the suggestion that the internal law of the predecessor State might not be relevant to title to property or to the validity of rights and interests, the Special Rapporteur had responded in that paragraph by stating that, where such rights and interests arose out of an international instrument, that instrument would, in fact, become part of the internal law of the predecessor State upon its ratification by that State. That response was only partially adequate, for, in some countries, treaties to which the State had become a party did not formally become part of internal law until the parliament or its equivalent had passed some kind of enabling legislation. Accordingly, it must be made clear that the term "internal law of the predecessor State" as used in article 5 included treaties which had been ratified by that State, irrespective of any national requirement for enabling legislation in their regard.

37. In addition, it should be stated in the commentary that draft article 5 entailed no requirement concerning the validity of the internal law of a predecessor State. He had in mind in that respect the present situation with regard to the law of the sea, where both an international draft convention and the internal law of certain States sought to regulate the same activities in the international sea-bed Area, and the question whether, in that and similar situations, the international convention or the internal law of the predecessor State would apply in the event of a succession of States.

38. Mr. CALLE Y CALLE said that on first sight article 4 did not seem likely to cause any difficulties. However, as Mr. Šahović had pointed out, the need for the article had been somewhat reduced by the definition of the scope of the draft articles given in article 1 and by the formulation of the title of the draft as a whole. The same effect resulted from the inclusion in the draft of articles relating to State archives, which

were, after all, a form of State property, albeit of a special kind.

39. Article 5 contained a definition of State property sufficiently broad to cover all the forms which such property might take. Concerning the criticism made of the use of the phrase "property, rights and interests", he observed, like the Special Rapporteur, that those words had been widely employed in other international instruments, including the Treaty of Versailles, which had dealt with the disposition of substantial amounts of State property. However, it should perhaps be made clear in the article that the phrase "rights and interests"—which obviously could not include the rights, such as the right of sovereignty and the right to conclude treaties, that could not be the subject of succession because they were inherent in the nature of a State—meant the patrimonial rights of the predecessor State.

40. Mr. Jagota had been right to mention the need for some statement of what was meant by the "internal law" of a predecessor State, for that expression occurred not only in article 5, but also elsewhere in the draft. In his opinion, everything that international law recognized to States formed part of their internal law. To refer in article 5 to private international law or international law at all would complicate matters unnecessarily. For example, while a State had sovereignty over the ecological and sea-bed resources present within its exclusive economic zone, he did not think that it could be held, for the purposes of a succession of States, that property in the fish living in that zone was transmitted to a successor State. Since title in the area of the sea-bed and the ocean floor denoted as "the common heritage of mankind" would be shared by all States, it was clearly not an appropriate matter for regulation by the Commission's draft articles.

41. Mr. FRANCIS said that he had no argument with draft article 4.

42. So far as draft article 5 was concerned, however, he assumed that the intent was to identify the *corpus* of property, rights and interests out of which that portion relating to the succession of States might be drawn. While he endorsed the substance of the Special Rapporteur's comments on that article, he agreed with Mr. Jagota and Mr. Šahović that the expression "internal law" should be clarified. In particular, he subscribed to the view that some of the current negotiations on the law of the sea—and indeed on other matters—might be relevant to the article.

43. The internal law of the State could be narrowly construed to mean such law as had been incorporated in its statutes, decrees and legal text-books. In some of the common law countries, international law had automatic application as internal law, and in certain Commonwealth countries, when international law was deemed to form part of internal law, the doctrine of incorporation applied.

44. The question arose, however, how was the expression "internal law" to be applied in cases where an international instrument having a bearing on article 5 had been ratified, but had yet to be incorporated into statute law. For that reason, he considered that a definition of "internal law" was necessary and that it should be sufficiently elastic to take account of such cases.

45. Sir Francis VALLAT said he agreed that it would be more satisfactory from the drafting point of view to place the articles on State archives in a separate part of the draft. That should be the lead given to the Drafting Committee, although not as a binding direction.

46. With regard to the expression "internal law", it seemed to him that it did require clarification. Since the expression should be treated with a degree of flexibility, he was inclined to think, for the time being, that it would be better to deal with the matter in the commentary rather than by a definition. That, however, was a matter which called for further reflection.

47. One point that had emerged from the discussion, though not in any articulate form, was that the expression "internal law" in fact performed two functions, which represented two aspects of one legal situation: first, internal law determined the existence of title to property, rights and interests; and, secondly, it determined the attribution of that title to a State. Those two functions could involve different considerations in any particular case, and he therefore suggested that the Drafting Committee should bear that in mind when examining the expression "internal law".

48. The role of private international law was clearly important in connection with determination of title. There would, however, have been no need to worry about private international law had it not been for the use of the word "internal", which could have different effects under different legal systems. There was a risk that the courts might take the view that the word "internal" was deliberately used to exclude private international law, with the result that they would look only to local law and not to the law of another State. That, clearly, was not the intent of draft article 5. It should therefore be specified in the commentary that, in using the word "internal", the Commission did not mean to exclude the application of the rules of private international law in accordance with the law of the State concerned.

49. The other issue of substance concerned the question that arose in independent territories. He was inclined to think that that question answered itself, because unless title was vested in the predecessor State, under the law of that State, no question of succession to the property could really arise. If property were vested in accordance with local law, it must also be vested in accordance with the law of the predecessor State. Consequently, the reference to the law of the

territory did not really matter. If, on the other hand, the property were vested in the local Government and not in the predecessor State, the problem once again settled itself, for in that case there was no real question of succession: the property remained exactly where it had been before—or, if there was a question of succession, it was not really of the type with which the Commission was concerned. The problem was a difficult one, requiring careful consideration in the Drafting Committee.

50. Mr. ALDRICH said that he agreed almost entirely with the general points raised by Sir Francis Vallat. On the point regarding the potential for conflict between internal law and international law, however, he considered, so far as property beyond the national jurisdiction, such as the seabed, was concerned, that Mr. Jagota had correctly stated the case. The draft was not concerned with the legality or illegality under international law of any particular internal law. If the internal law of a State gave a title that was internationally worthless, then the successor State would acquire an internationally worthless title too. That point could perhaps best be dealt with in the commentary.

51. Mr. VEROSTA said that he found draft article 4 acceptable.

52. Draft article 5, on the other hand, could give rise to difficulties, and the Commission should refrain from adding to it new elements such as an explanation of the concept of internal law or a reference to private international law. It would unquestionably be preferable to leave the Special Rapporteur to supplement the wording of the provision with an appropriate commentary.

53. Like Sir Francis Vallat, he believed that the rules on archives should be kept separate from those concerning State property, as otherwise considerable complications might ensue. Since it was conceivable that States might one day decide to conclude a convention relating to State property, State archives or State debts, it was preferable to separate the rules relating to each of those subjects.

54. Mr. BEDJAOUI (Special Rapporteur) observed that draft article 4 had not given rise to any problems, apart from the proposal made by a number of members to delete it and to incorporate in draft article I a list of the topics dealt with in the articles.

55. In his view, draft article 4 was both useful and necessary, since it served to show that Part II of the draft, which was concerned with State property, contained articles applicable only to such property. Similarly, article 15, which was the first provision of the part dealing with State debts, Part III, stated that that part also contained provisions which applied only to such debts. The Commission should define at the beginning of each part the field of application of the articles it contained.

56. All members appeared to agree that draft article 5 should not be complicated by the addition of a reference to public or private international law. Moreover, most members were of the view that the nature of the concept of internal law referred to in article 5 should be clearly explained (for example, in draft article 2).

57. In that regard, the observations made by members of the Commission appeared to coincide. He was especially grateful to Mr. Ushakov for having referred to the problem of determining which internal law was to be taken into account. He recalled that in 1970 he had himself come up against that question, and that in his third report he had cited a number of situations that had arisen in the practice of States<sup>14</sup> which might help the Commission in reaching a decision on the matter. In 1970, attention had been drawn to the existence, in the statutes of colonies, of the principles of legislative specialization and treaty specialization, whereby laws or treaties of the administering State were not directly applicable in a colony without the approval of the competent local authority. Apparently, then, the system entailed choosing between the legislation of the territory to which the succession related and the internal law of the predecessor State. In the event, the Commission had considered it preferable to employ the more general notion of internal law, according to which the law of the metropolitan Power served both as the internal law of the colonizing State itself and the law applicable to the colonized territories. That fiction had been reflected in draft article 5 ever since. Nevertheless, he was at the disposal of the Drafting Committee, should it wish to take up the question again.

58. Mr. Ushakov had again raised the fundamental problem of the placement of the question of archives in the draft. It was important for the Commission to provide the Drafting Committee with some guidance in that regard.

59. All members of the Commission seemed to be of the view that the articles devoted to State archives should be placed after those relating to State property. However, the Commission must also decide whether those provisions should be incorporated into the part of the draft relating to State property, of which they would constitute only one section, or whether they warranted the maintenance of a separate part concerned solely with State archives.

60. He was inclined to favour the former solution. However, Mr. Ushakov had pointed out that such an association would call for substantial recasting of the draft by the Commission, since it would be necessary first to bring together the articles applicable to both questions, and then to separate into two additional sections the provisions relating solely to State property on the one hand, and those relating to State

<sup>14</sup> See *Yearbook . . . 1970*, vol. II, pp. 136 *et seq.*, document A/CN.4/226, part two, commentary to art. 1, sect. III.

archives on the other. The Commission did not have time for such an undertaking.

61. Consequently, his preference went to the option which would avoid excessive disruption of the general order of the draft: dealing with State property and then with State archives in two separate parts, and connecting those parts by a provision stipulating that State archives were a category of State property having special characteristics.

62. In conclusion, he urged Mr. Calle y Calle not to press the point concerning the patrimonial aspect of the expression "property, rights and interests" which he had raised in his statement. He himself had endeavoured to avoid the use of the concept of patrimony throughout his work, because of the uncertainty surrounding it and the inextricable disputes to which its use would inevitably give rise.

63. The CHAIRMAN suggested that draft articles 4 and 5 should be referred to the Drafting Committee.

*It was so decided.*<sup>15</sup>

ARTICLE 6 (Rights of the successor State to State property passing to it)

64. The CHAIRMAN invited the Commission to examine draft article 6, which read:

*Article 6. Rights of the successor State to State property passing to it*

**A succession of States entails the extinction of the rights of the predecessor State and the arising of the rights of the successor State to such of the State property as passes to the successor State in accordance with the provisions of the articles in the present Part.**

65. Mr. BEDJAOUI (Special Rapporteur) said that draft article 6 had provoked little reaction.

66. In the Sixth Committee of the General Assembly, a number of representatives had asked whether the extinction of the rights of the predecessor State had as its corollary the extinction of responsibilities or obligations encumbering the property. Actually, article 6 was concerned with the assets of the State rather than its liabilities, which were dealt with in the provisions on State debts and all other obligations. It might therefore be preferable to leave that question aside, since it concerned an area which the Commission had not explored and which it would not have time to consider in detail.

67. It had also been pointed out in the Sixth Committee that the terms "extinction" and "arising" of rights did not take sufficient account of the situation of the colonized territories which had been States before colonization and with respect to which it would have been more accurate to refer to the restoration or resurgence of rights by saying that they had "arisen

<sup>15</sup> For consideration of the texts proposed by the Drafting Committee, see 1692nd meeting, paras. 58–59.

once again". The argument was not without merit, and it might be as well to reflect the concern in question in the text of article 6. He noted, however, that the delegation that had made the comment in the Sixth Committee had itself proposed wording which ran counter to its own position, since it had retained the expression "the obtaining . . . of those same rights" (see A/CN.4/345, para. 48), which expressed the idea of acquisition rather than restoration.

68. He himself was of the view that the current wording of draft article 6 had at least the tacit support of members of the Sixth Committee, and he hoped that it would gain similar approval in the Commission.

69. Mr. USHAKOV proposed that draft article 6 should be referred to the Drafting Committee.

*It was so decided.*<sup>16</sup>

ARTICLE 7 (Date of the passing of State property)

70. The CHAIRMAN invited the Commission to examine draft article 7, which read:

*Article 7. Date of the passing of State property*

**Unless otherwise agreed or decided, the date of the passing of State property is that of the succession of States.**

71. Mr. BEDJAOUI (Special Rapporteur) recalled that in his fourth report he had cited, in connection with article 7, a number of cases in which succession had occurred at very different dates as the result of a treaty between the parties.<sup>17</sup> Consequently, he regarded the wording proposed in draft article 7 as a minimum, which would be subject to revision if the Commission decided to draft a new article 3 *bis* or 4 concerning the date of succession.

72. Of the States which had commented on the draft articles, Austria (A/CN.4/338/Add.3) had criticized the expression "unless otherwise agreed or decided". In that connection, he pointed out that in many instances of succession the States concerned had agreed to set a date for the passing of property in the light of the special circumstances of the case. In practice, as the numerous examples given in his fourth report confirmed, the time allowed under such agreements could be very long; disputes concerning archives could, indeed, last more than a hundred years.

73. It would be difficult to lay down a more restrictive provision than that contained in draft article 7, for the States concerned must have sufficient freedom to be able to adapt to circumstances. The inclusion of the word "decided" was justified by way of a reference to a possible decision of an institution or international court.

<sup>16</sup> For consideration of the text proposed by the Drafting Committee, see 1692nd meeting, paras. 60–61.

<sup>17</sup> *Yearbook . . . 1971*, vol. II (Part One), pp. 170 *et seq.*, document A/N.4/247 and Add.1, commentary to article 3.

74. He would like the Drafting Committee to consider draft article 7 in conjunction with a possible new article 3 *bis* or 4.

75. Mr. CALLE Y CALLE said that the passing of State property was not such an automatic operation as it might seem to be, for it necessarily involved an identification of the property that was to pass. Moreover, the time it took for State property to pass could vary widely. The rule that in the absence of an agreement or decision the date of the passing of State property was that of the succession of States was, of course, residual. Whereas an agreement presupposed a meeting of minds, a decision could be unilateral. In his view, the reference in the article was to the decision of a court or of some body such as the Security Council or General Assembly. He considered the draft article to require no change whatsoever.

76. The CHAIRMAN suggested that draft article 7 should be referred to the Drafting Committee.

*It was so decided.*<sup>18</sup>

ARTICLE 8 (Passing of State property without compensation)

77. The CHAIRMAN read out the text of draft article 8, as follows:

*Article 8. Passing of State property without compensation*

Subject to the provisions of the articles in the present Part and unless otherwise agreed or decided, the passing of State property from the predecessor State to the successor State shall take place without compensation.

78. Mr. ŠAHOVIĆ proposed that draft article 8 should be referred to the Drafting Committee.

*It was so decided.*<sup>19</sup>

*The meeting rose at 1 p.m.*

<sup>18</sup> For consideration of the text proposed by the Drafting Committee, see 1692nd meeting, para. 62.

<sup>19</sup> *Idem*, para. 63.

## 1661st MEETING

*Thursday 28 May 1981, at 10.05 a.m.*

*Chairman:* Mr. Doudou THIAM

*Present:* Mr. Aldrich, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

## Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/338 and Add.1–3, A/CN.4/345)

[Item 2 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:  
SECOND READING (*continued*)

ARTICLE 9 (Absence of effect of a succession of States on third party State property)

1. The CHAIRMAN invited the Commission to consider article 9, which read:

*Article 9. Absence of effect of a succession of States on third party State property*

A succession of States shall not as such affect property, rights and interests which, at the date of the succession of States, are situated in the territory of the predecessor State and which, at that date, are owned by a third State according to the internal law of the predecessor State.

2. Mr. BEDJAOUÏ (Special Rapporteur) said that in the course of the Commission's discussions it had been deemed necessary to make it clear in the draft that a succession of States had no effect on third party State property.

3. In the Sixth Committee, however, proposals had been made either to delete article 9, for it was considered to be axiomatic, or to retain it but simplify it, in particular by deleting the words "which . . . are situated in the territory of the predecessor State" (see A/CN.345, paras. 71–72). It had also been proposed, as in the case of article 5, to add a reference to private international law (*ibid.*, para. 73).

4. Among the States which had made written comments, the German Democratic Republic had approved article 9 (see A/CN.4/338), whereas Czechoslovakia had considered it superfluous, because it was self-evident from the definition in article 5 that succession of States affected only the rights of the predecessor State and not those of third States (see A/CN.4/338/Add.2).

5. He was not inclined to accept those suggestions, since they were of minor importance and were not likely to improve the text.

6. In particular, the argument for deleting the words "which . . . are situated in the territory of the predecessor State" could easily be turned back on itself. Obviously, third State property situated in the territory of the predecessor State must be protected from the effects of State succession. Deletion of the phrase would make article 9 completely superfluous. Furthermore, the problem of the possible effects of the succession on State property of a third State could arise only in connection with property that was situated in the territory of the predecessor State. When it was stipulated that the rights of third States could be determined only by reference to the internal law of the

predecessor State, the property must necessarily be situated in the territory of the predecessor State.

7. In the matter of inserting a reference to private international law in article 9, he believed that, as in the case of article 5, it was better to avoid complicating the text. On the other hand, it would again be possible to make it clear, as the Commission had appeared to wish in connection with article 5, that the internal law to which reference was being made was the internal law “applicable in the territory to which the succession of States relates”.

8. With that clarification, he was in favour of retaining article 9 in the draft.

9. Mr. RIPHAGEN said that, in his opinion, article 9 was superfluous, and it was apparent from the last sentence of paragraph 76 of report (A/CN.4/345) that the Special Rapporteur shared that view. Stating the superfluous always created problems in law.

10. In his oral introduction, the Special Rapporteur had emphasized the value of the phrase “situated in the territory of the predecessor State”, but had been referring to the territory that passed to the successor State, which was not necessarily all of the predecessor State’s territory. Personally, he was also unsure about the last sentence of paragraph 77 of the report, since he did not see why any legal system had to be applicable to property, when that term was used in the sense of “property, rights and interests”. For those reasons, it would be better to omit the draft article in its entirety.

11. Mr. CALLE Y CALLE said that, while draft article 9 admittedly stated the obvious—namely, that a succession of States as such did not affect the property, rights and interests owned by a third State and situated in the territory of the predecessor State—it was none the less preferable to say so.

12. Article 9 posed two conditions: first, the property must be owned by the third State in accordance not with the law of that State but with the law of the predecessor State; and second, such property must be situated in the territory of the predecessor State. So far as the second condition was concerned, it seemed to him that the property in question should be the property that was situated in the territory to which the succession related, and not in the territory of the predecessor State, but it was the internal law of that State that was to govern the status of the property.

13. On that point, he would be grateful for clarification from the Special Rapporteur.

14. Mr. SUCHARITKUL said that article 9 was useful and met the specific objective of safeguarding the rights of the third State over its property. Of course, the effect of that safeguard was confined to the property situated in the territory of the predecessor State at the time of the succession.

15. Article 9 raised the particularly interesting question of the balance between the interests of the

third State and those of the successor State. At the 1660th meeting, Mr. Jagota had spoken of the supremacy of the rule of international law over the rule of internal law with respect to the validity of a title to State property. Mr. Tabibi had raised the question of the permanent sovereignty of a newly independent State over its natural resources even before the transfer of sovereignty. In that respect, his own view was that the Commission must take account of such an important matter, which reflected a principle proclaimed by the United Nations General Assembly.

16. In his opinion, article 9 should not contain any reference to private international law.

17. Mr. USHAKOV said that draft article 2, like article 14 of the 1978 Vienna Convention<sup>1</sup> stated something that might seem obvious, as did draft article 9. Nevertheless, it would be advisable to retain draft article 9 in order to remove any legal doubts.

18. For all that, changes of form could be made in the proposed wording. First of all, in response to Mr. Sucharitkul’s comments, he pointed out that the expression “as such” afforded an opportunity to invoke the application of general principles such as that of permanent sovereignty over natural resources. On the other hand, the expression “at the date of the succession of States” seemed ill-advised since, in theory, the date of the succession of States was the date on which the property passed, and some confusion could ensue with regard to the property, rights and interests referred to in article 9. It would be better to say “before the date”, for the succession of States produced its effects from the actual date of succession.

19. Furthermore, the phrase “in the territory of the predecessor State” excluded a dependent territory, which, under modern international law, was not the territory of the predecessor State before the date of the succession of States. That formula thus excluded from article 9 property which might be situated in a territory under the trusteeship of the predecessor State. He suggested adopting the formula: “which have been or are situated in the territory of the predecessor State or in the territory to which the succession of States relates”.

20. Finally, he agreed with the Special Rapporteur that the words “or according to the internal law applicable in the territory to which the succession of States relates” could be added at the end of article 9.

21. Mr. JAGOTA said that he had no difficulty with article 9 and could accept the Special Rapporteur’s comments as set forth in paragraphs 76 and 77 of the report. He would, however, be grateful for clarification on three points of drafting.

22. First, did the use of the word “affect” mean that the provision was couched in neutral terms, or did it imply protection? Second, what was the precise

<sup>1</sup> See 1658th meeting, footnote 2.

meaning of the word “owned” in reference to property, rights and interests? For instance, what about rented property let on a long lease? Third, how was the phrase “according to the internal law of the predecessor State” to be interpreted? Did it cover encumbrances? Specifically, would article 9 cover the kind of right referred to in paragraph 46 of the report, namely, the right arising out of a concession granted for the instalment of kiosks and snackbars in the stations of the predecessor State’s State-owned railway system?

23. Mr. ALDRICH said he agreed with those who thought that it would be better to delete article 9.

24. Initially, his feeling had been that, if a saving clause was necessary for the protection of third States, why was some provision not needed to protect private parties? He had then realized that Part II of the draft dealt solely with State property. He therefore assumed that the type of question raised by Mr. Jagota was not really one to be dealt with in the draft since, in any event, private rights were not affected by the provisions relating to the passing of State property. If, however, State property and State property alone was involved, he could understand why the State property of some other State might be thought to be affected; yet, given the very clear definition of State property contained in article 5, it was difficult to see how State property owned by third States could be affected in the slightest. Admittedly, it was always possible to be doubly protective by stating the obvious for the benefit of those who did not read all the definitions, but because article 9 also raised obvious drafting problems, it would be better to omit it. On the other hand, if the article was retained, he agreed that the drafting required careful examination.

25. Sir Francis VALLAT, endorsing the remarks made by Mr. Aldrich, said that, having regard to the definition of State property, which was clearly limited to property owned by the predecessor State at the date of succession, article 9 stated something that was clearly unnecessary. In a treaty it was extremely unwise to say the same thing twice in different ways. If article 9 was in fact unnecessary in the light of the definition of State property, by implication its sole purpose must be to extend the effects of the succession to private interests in the property concerned, something which would be very unwise indeed. Assuming, for example, that a foreign bank, which was a private concern, had a lien over gold bars that belonged to the predecessor State and were deposited in another bank, the clear effect of article 9, according to his reading of it, was that the foreign bank’s interest in those gold bars would be affected by a succession of States; they were the property not of a third State but of a private concern, whose rights and interests must necessarily be affected by the succession of States.

26. Hence, article 9 was not only superfluous but, in his opinion, positively objectionable.

27. Mr. USHAKOV said that it was easy to admit the obvious facts that State succession did not affect State property situated in the territory of the predecessor State or in the territory to which the succession related. On the other hand, article 9 could in no way be interpreted as applying to private property and it could not be claimed that it was equally obvious that State succession did not affect private property. The provision under discussion had nothing to do with private international law.

28. Just as article 14 of the 1978 Vienna Convention

Nothing in the present Convention shall be considered as prejudging in any respect any question relating to the validity of a treaty,

no provision of the draft articles prejudged in any respect the validity of private law contracts which fell under civil law and not public international law. Nevertheless, the silence maintained on that point did not mean that succession of States changed nothing with respect to contracts, but it should be obvious that succession of States as such did not affect the rights of private persons. The draft articles, however, sought to regulate the situation regarding the State property of the successor State and of the predecessor State, and the question naturally arose as to whether succession of States as such affected third party State property, rights and interests in the territory of the predecessor State, which alone justified the existence of article 9.

29. Again, the definition of State property in article 5 of the draft—which applied only to the property of the predecessor State that passed to the successor State—was not valid in the case of article 9, which related to different property.

30. In his opinion, article 9 did not infringe the private rights of foreign individuals. At the same time, it was impossible to introduce into the draft articles concepts that were alien to public international law.

31. Sir Francis VALLAT said that the relationship between article 5 and article 9 was at the very root of the difficulty, for in that respect the Commission stood at the cross-roads between public international law and private law.

32. If the argument that the Commission was concerned only with international law was taken to its logical conclusion, article 5 would contain no reference to property which, at the date of the succession, was “according to the internal law of the predecessor State” owned by that State. The situation regarding property, rights and interests under internal law was the very substance of the draft, and that was why he had always been concerned to ensure that nothing was done to imply that the rights of private persons could be adversely affected by the succession. His worry about article 9 was that those rights did seem to be affected, for the article was directly related to article 5. In the light of the definition contained in article 5, it was clear that article 9 was unnecessary since, by definition, succession of States did not affect

the property, rights or interests of a third State. Consequently, by implication, article 9 meant that the passing of the property to the successor State could or would have the effect of extinguishing the rights of private persons who were nationals of third States.

33. He believed in the preservation of such rights and, therefore, could not possibly advise a Government to accept draft articles 5, 6 and 9 unless it was made quite clear that those articles were without prejudice to the interests of private persons.

34. Mr. ŠAHOVIĆ said that, before taking a position on the matter of deleting article 9, he would like to know whether there was a connection between article 9 and article 18<sup>2</sup> and between the effects of those two articles.

35. Mr. RIPHAGEN, noting that the first of the three questions which Mr. Jagota had put to the Special Rapporteur was particularly relevant, pointed out that articles 11 and 12 of the 1978 Vienna Convention employed exactly the same formula—in the English text—as did draft article 9. The two articles in question were in fact protection articles and the question therefore arose whether draft article 9 was not a protection article too. It was difficult to see how it was possible to provide that a succession of States should not have certain specific effects when it involved a change of sovereignty which affected everybody. A superfluous provision would only lead to difficulty, since it would inevitably give rise to a *contrario* reasoning.

36. Accordingly, he would reiterate his suggestion that the draft article be deleted.

37. Mr. QUENTIN-BAXTER said he agreed that there was nothing to be gained by retaining an article which did not serve a definite and logical purpose within the draft.

38. His thinking was along the lines of the views expressed by Mr. Šahović, who had asked whether there was a necessary connection between article 9 and article 18, which latter concerned State debts. His own impression was that article 9 had been included largely to reflect the fact that in the part of the draft dealing with State debts, there was an obvious need to consider the third State, whereas that clearly was not the case in the part dealing with State property. In that sense, the question raised in the views exchanged by Mr. Ushakov and Sir Francis Vallat was entirely relevant, and should be considered in substance in relation to article 18. He did not, however, think there was any need to consider it in the context of article 9 if it could be agreed that the article was superfluous.

39. Mr. BEDJAOUI (Special Rapporteur) pointed out that article 9 had been introduced into the draft by the Drafting Committee at the Commission's request. From the outset, his own intention had been to deal

with all of the problems encountered by the successor State after the succession of States by covering both the relationships which derived from public international law and those which were formed between the successor State and private persons, such as creditors. He had even devoted his second report<sup>3</sup> entirely to the problem of acquired rights in an attempt to determine whether or not they were to be maintained by the successor State. For his own part, he had favoured the disappearance of such rights, but many members of the Commission—and particularly those from the Western countries—had wanted the draft articles to protect acquired rights. The discussions in the Commission had become deadlocked when some other members, and primarily Mr. Ushakov, had proposed as a way out that the Commission should deal only with problems pertaining to public international law. That solution had finally been adopted, but one article or another on acquired rights had appeared in the draft over the years, revealing a re-emergence of the idea of protecting private law creditors. He had repeatedly attempted to curb that trend, without always succeeding. During the second reading, it was for the Drafting Committee to decide whether to retain or delete article 9—an article which did create difficulties but was not necessarily superfluous, because it had always been maintained that the rights, property and interests of third States had to be protected.

40. Unfortunately, he could not follow Mr. Riphagen in that regard, and took the view that the *a contrario* interpretation of article 9 was neither cogent nor legitimate. Part II of the draft related to State property and article 9 therein was naturally devoted to such property, but that necessary specialization in terms of the content did not signify that protection of private rights was being renounced.

41. If the Drafting Committee decided to retain article 9, it would have to improve the wording. Like Mr. Ushakov, he deemed it advisable to adopt the formula "before the date of succession". He also endorsed the suggestion that "the territory to which the succession of States relates" should be mentioned, for in modern international law a dependent territory was not a part of the national territory of the State which administered it, as is made clear 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, approved by the General Assembly.<sup>4</sup>

42. The many observations made by the members of the Commission regarding article 9 showed that the concept of property, rights and interests was hard to define. It was taken from the wording of article 5, but he recognized that it left intact the question of the right of peoples to sovereignty over their natural wealth.

<sup>2</sup> *Ibid.*, footnote 3.

<sup>3</sup> *Yearbook ... 1969*, vol. II, p. 69, document A/CN.4/216/Rev.1.

<sup>4</sup> Resolution 2625 (XXV), annex.

However, other provisions of the draft safeguarded that principle by expressly reserving, in the case of newly independent States, the right to dispose of their natural resources. Furthermore, the fate of property under lease or concession would appear to be beyond the concern of the Commission if its work was confined to State property, but such property would certainly have to be protected under article 9 if the concepts of rights and interests were regarded as extending to relationships arising out of leasing.

43. He could agree either to deletion or retention of the provision under consideration, and shared Mr. Šahović's hesitations on that point. However, if the Commission decided to protect the property of third States, it would have to explain that clearly in an express provision and exclude, through the effects of the commentary, the possibility of an *a contrario* interpretation of the provision finally formulated. If instead the Commission should decide to delete article 9, it would be only logical to delete article 18, paragraph 1, as well and to reconsider article 19 and article 16 (b), because they too reflected the concern which had been expressed in the course of the work with respect to the fate of private debts in a case of succession of States. Paragraph 2 of article 19 in particular illustrated that tendency, because it established a link between the passing of the liabilities and the passing of the assets to the successor State.

44. In conclusion, he proposed that article 9 should be referred to the Drafting Committee.

45. Mr. VEROSTA suggested that, as an alternative to deleting article 9, a similar but slightly modified provision could be maintained in order to satisfy some apprehensions by introducing a formula which might be drafted to read: "... the property, rights and interests which ... are owned by a third State or by private persons ...".

46. Mr. BEDJAOU (Special Rapporteur) said that the Drafting Committee might examine that proposal, one which none the less troubled him because it was unacceptable to declare that the successor State was bound hand and foot to private law debts.

47. The CHAIRMAN suggested that the Commission should refer article 9 to the Drafting Committee.

*It was so decided.*<sup>5</sup>

#### ARTICLE 10 (Transfer of part of the territory of a State)

48. The CHAIRMAN invited the Commission to take up section 2 of Part II of the draft, entitled "Provisions relating to each type of succession of States" and to consider article 10, which read:

#### *Article 10. 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 property of the predecessor State to the successor State is to be settled by agreement between the predecessor and successor States.

2. In the absence of an agreement:

(a) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

(b) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State.

49. Mr. BEDJAOU (Special Rapporteur) said that article 10 of the draft had not prompted any comments in the Sixth Committee, except by one representative who had reserved his Government's position.

50. Among the States which had submitted written comments, the German Democratic Republic had expressed its agreement (A/CN.4/338), while Italy had questioned the categorization of succession adopted in section 2 and suggested that separation of part or parts of the territory of a State should be assimilated to transfer of part of the territory of a State (see A/CN.4/338/Add.1).

51. In his view, such a change was impossible because of the complexity of the situations involved. The Commission had considered that article 10 covered the case of transfer of a very small part of the territory of one State to another. Three situations had to be distinguished: the transfer of part of the territory of one State to another, covered by article 10; the case in which part or parts of the territory of a State separated from that State and formed another State, covered by article 13, paragraph 1; and the case of a dependent territory which, instead of acceding to independence, became part of a pre-existing State, covered by article 13, paragraph 2.

52. Article 10 should remain unchanged, because it had not prompted any particular comment. To review all the types of succession at the present stage in the Commission's work would be neither advisable, useful nor warranted. Article 10 could therefore be referred to the Drafting Committee.

53. Mr. USHAKOV said that he fully supported the position of the Special Rapporteur.

54. The case covered by article 10 was one in which part of the territory of a State was transferred by that State to another by agreement between the States concerned. In an instance of that kind, the State should be in a position to effect the transfer, because it involved no problem of self-determination. Article 13, however, covered a situation in which part of the territory of a State separated from that State and united with another State, a completely different situation, because the separation took place at the wish of the territory's population.

<sup>5</sup> For consideration of the text proposed by the Drafting Committee, see 1692nd meeting, paras. 64-67.

55. He therefore expressed the hope that the Commission would retain the categorization it had established previously.

56. Mr. QUENTIN-BAXTER said that he fully agreed with the views expressed by the Special Rapporteur and Mr. Ushakov.

57. He reminded members that when the Commission had considered the draft articles on first reading it had left open the question whether the order of the articles in Part II should be re-arranged. Possibly that question too could be considered by the Drafting Committee.

58. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 10 to the Drafting Committee.

*It was so decided.*<sup>6</sup>

#### ARTICLE 11 (Newly independent State)

59. The CHAIRMAN invited the Commission to consider article 11, which read:

##### *Article 11. Newly independent State*

###### 1. When the successor State is a newly independent State:

(a) movable property, having belonged to the territory to which the succession of States relates and become State property of the predecessor State during the period of dependence, shall pass to the newly independent State;

(b) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;

(c) movable State property of the predecessor State other than the property mentioned in subparagraphs (a) and (b), to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of the dependent territory;

(d) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State.

2. When a newly independent State is formed from two or more dependent territories, the passing of the State property of the predecessor State or States to the newly independent State shall be determined in accordance with the provisions of paragraph 1.

3. When a dependent territory becomes part of the territory of a State, other than the State which was responsible for its international relations, the passing of the State property of the predecessor State to the successor State shall be determined in accordance with the provisions of paragraph 1.

4. Agreements concluded between the predecessor State and the newly independent State to determine succession to State property otherwise than by the application of paragraphs 1 to 3 shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources.

60. Mr. BEDJAOUI (Special Rapporteur) said that in the Sixth Committee several representatives had noted with satisfaction that the Commission had taken full account in article 11 of the Charter of Economic

Rights and Duties of States<sup>7</sup> and of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States. Some of them had taken the view that the rules set forth in the article were rules of *jus cogens*.

61. With regard to paragraph 1, a request had been made in the Sixth Committee that the provisions concerning movable property should be preceded by those concerning immovable property, as in the case of articles 10, 13 and 14. In connection with subparagraph 1 (d), one representative had raised the question of whether immovable property which had belonged to a territory forming the subject of the succession prior to the territory's colonization should revert to it once it had acceded to independence, irrespective of the location of the property.

62. As to paragraph 4, a request had been made that the Commission should refer to the permanent sovereignty of every people not only over its natural resources but also over its economic activities. In his opinion, the Commission should comply with that request.

63. In its written comments, Italy (A/CN.4/338/Add.1) had stressed that the words "movable property, having belonged to the territory" in subparagraph 1 (a) were unsatisfactory, since property belonged not to a territory but to a natural or legal person. It had added that the predecessor State might have temporarily loaned or ceded works of art to the dependent territory, and had taken the view that the successor State was then not entitled to keep them. That conclusion was correct, since the draft as a whole and article 5 in particular were based on the concept of ownership of State property. If the predecessor State temporarily ceded or loaned a work of art to a territory which later formed the subject of a succession of States, its right of ownership over such a work of art was in no way brought into question. Italy had also considered (*ibid.*) that the French term "*part contributive*" used in subparagraph 1 (c) was less clear than the corresponding English term, namely, "contribution". In his view, the term was not so imprecise as to give rise to any confusion.

64. In the written comments of Governments, the German Democratic Republic (A/CN.4/338) had endorsed article 11, and Czechoslovakia (A/CN.4/338/Add.2) had welcomed the reference to the principle of sovereignty over wealth and natural resources. Czechoslovakia had also pointed out that the Commission had employed two different criteria in article 11, subparagraph 1 (c) and in article 13, subparagraph 1 (c), for determining the proportion in which certain movable property could pass to the successor State, and had indicated a preference for the wording of article 11.

<sup>6</sup> *Idem*, paras. 68-70.

<sup>7</sup> General Assembly resolution 3281 (XXIX).

65. Turning to the comments on which he had not as yet taken a position, he stressed that the obligation to restore to the newly independent State precious stones, works of art and historical artifacts could hardly be expressed more explicitly than it was in subparagraph 1 (a). The statement that such property “shall pass to the newly independent State” ought to forestall any difficulties.

66. The fate of immovable State property situated outside the territory to which the succession related, but to which the colony had made its contribution, should be considered by the Drafting Committee, which might be guided by the wording he had proposed in his thirteenth report (A/CN.4/345, para. 105). With regard to the idea underlying “contribution”, it had to be pointed out that, in the view of the Commission, the term referred to the special contribution made by a former colony to the creation of property.

67. As the situations referred to in article 11, subparagraph 1 (c) and article 13, subparagraph 1 (c), were completely different, there was no reason to bring those provisions into line with each other. In the case covered by article 13, the part of the territory of a State that separated from it had had no separate identity making it possible to determine its contribution, whereas in the case of article 11, the former colony had enjoyed some degree of autonomy, at least in the budgetary and administrative fields.

68. In conclusion, he thought that article 11 might be referred to the Drafting Committee, which should be instructed to try to take account, as far as possible, of the drafting improvements that had been suggested.

69. Mr. USHAKOV drew attention to a discrepancy between the English and French versions of the last phrase of paragraph 4.

70. Mr. DÍAZ GONZÁLEZ said that he agreed completely with the views expressed by the Special Rapporteur in his report and his oral introduction. The Commission’s earlier discussion of article 11 had clearly shown the importance of that provision with respect to natural resources and the right of peoples to dispose thereof. The article reflected the emergence in recent years of new law, or at least the progressive development of existing law, beneficial more particularly to newly independent States and developing countries.

71. As to the actual wording of the article, the words “and economic activities” should be added at the end of paragraph 4 because, as had repeatedly been stressed in the Sixth Committee and elsewhere, political independence was of no value without economic independence.

72. Mr. EVENSEN said that he had no quarrel with the substance of article 11, which provided an eminently equitable solution to the problems that

could arise when a dependent or Non-Self-Governing Territory became an independent State.

73. In matters of form, it might be advisable to follow the example given in other articles and to make some reference—for example, by using the phrase “Unless otherwise agreed or decided”—to the possibility of the conclusion of agreements between the successor and predecessor States. He pointed out in that respect that paragraph 4 was designed to regulate such agreements.

74. Sir FRANCIS VALLAT said that, as in the case of the draft articles on succession of States in respect of treaties, the present draft, being designed for the modern world, must contain an article providing for separate and special treatment of newly independent States. Nevertheless, he continued to experience difficulty with the wording of paragraph 1 (a).

75. First, some alternative should be found for the word “belonged”, which did not express exactly what he believed the Commission had in mind. In a legal context, the notion of “belonging” implied ownership. Hence, it was not, strictly speaking, an appropriate concept to employ in connection with the “property” with which he believed the subparagraph was principally concerned, namely objects that originated and remained in the dependent territory and were still there at the time of independence—in other words, objects that were in a general sense an integral part of the heritage of that territory. To express that idea in a legal draft would, admittedly, be very difficult.

76. The same subparagraph (a) also posed a more serious problem in that it took no account whatsoever of how the property in question had become the property of the predecessor State. As a lawyer, he found it very difficult to accept that all objects which had been the property of the predecessor State, however legitimate the method of their acquisition, should, automatically and without compensation, pass to the successor State.

77. Mr. CALLE Y CALLE said that the text of the article was acceptable. He also considered that the addition to paragraph 4 proposed by the Special Rapporteur in paragraph 109 of his report was justified, although the notion of sovereignty over economic activities implied that the State concerned enjoyed a right of *imperium*, or regulation, over those activities.

78. Mr. TABIBI said that he very much agreed with the principle underlying article 11, which could now be referred to the Drafting Committee.

79. Concerning one comment made by Sir Francis Vallat, his own view was that it should be made perfectly clear in subparagraph 1 (a) and in the commentary to the article that all objects originating in the territory to which a succession of States related should pass to the successor State. That was a most important point for newly independent States because

colonial Powers, as evidenced by the richness of their museums, had appropriated—in most instances by direct action or the acceptance of what had delicately been termed “gifts”—much of the heritage of the territories under their domination.

80. Mr. ALDRICH said that the Special Rapporteur was to be congratulated on having largely surmounted the immense difficulties with which he had been faced in drafting article 11.

81. One point to be noted was that from the legal standpoint paragraph 4 was not an integral part of the article, since it concerned not what happened to State property but the extent to which a predecessor State and a newly independent State could, by agreement between themselves, derogate from the rules laid down in the preceding paragraphs. Presumably, the paragraph had been included to fulfil the valuable purpose of ensuring some constraint on the making of agreements in situations when the parties were likely to have very uneven bargaining power. Should that assumption be incorrect, he would appreciate an explanation of the true reason for the presence of the paragraph.

82. With regard to the drafting, although the contexts were similar, the French word “*devoir*” had been rendered into English in paragraph 4 of article 11, paragraph 6 of article B, paragraph 4 of article E and paragraph 4 of article F by the mandatory “shall”, and in paragraph 2 of article 20 by the word “should”. He hoped that whichever translation was closer to the sense of the French original would be used throughout the draft.

83. Mr. JAGOTA said that the article constituted a major example of the progressive development of international law and the Commission’s most important contribution to the draft as a whole. Furthermore, he considered the comments on the article by the Sixth Committee, Governments and the Special Rapporteur to be the best part of the Special Rapporteur’s thirteenth report. In saying that, he was motivated both by objective considerations and by a sentiment akin to that expressed by Mr. Tabibi.

84. With regard to the drafting of the article, he would make to the Drafting Committee a number of suggestions concerning the difficulties regarding subparagraph 1 (a) referred to in paragraph 103 of the Special Rapporteur’s report. To allay the concern expressed by Sir Francis Vallat over the use of “belonged”, the best course might still be to retain that word, for it implied the necessity of some legitimate link between the property in question and the territory to which the succession of States related.

85. He agreed with the opinion expressed by the Special Rapporteur in paragraph 108 of the report that it would be unwise to attempt to bring the wording of article 13, paragraph 1 (c), into line with that of article 11, subparagraph 1 (a). The present subparagraph 1 (d) of article 11 should become subparagraph 1 (a),

with the other subparagraphs being redesignated accordingly. As suggested in paragraph 105 of the Special Rapporteur’s report, the new subparagraph 1 (a), should cover immovable property, whether that property was situated inside or outside the territory to which the succession of States related.

86. He considered the limitation on treaty-making power set forth in paragraph 4 to be a kind of *jus cogens*. Lastly, since the proposal was in keeping with the progressive development that had been apparent in recent years, he agreed that the paragraph could be supplemented by adding the words “and economic activities”, although such an amendment did not seem entirely necessary.

87. Mr. BEDJAOUI (Special Rapporteur) said that when it had taken up the question of succession of newly independent States the Commission had wished to make a positive contribution to the progressive development of international law. That was why it had aimed at special treatment for those countries, to compensate them for the acts of violence and plunder to which they had frequently been subjected. It had acted not out of resentment but out of sympathy, in order to reflect more particularly that importance that the third world countries attached to their natural wealth.

88. During the discussion on article 11, a proposal had been made to use a verb other than “belong” in subparagraph 1 (a). He concurred with that proposal, provided that it made for greater possibilities of rendering justice to newly independent States. The concept of belonging was indeed inappropriate. A territory might well have possessed undiscovered archaeological wealth before falling under the control of a colonizing State. If that State subsequently undertook excavations, it was not possible to maintain in legal terms that the property thus discovered had previously belonged to the territory. However, as a matter of logic and justice, that property should revert to the territory. The Drafting Committee should therefore look for a more suitable formulation.

89. Elaborating on the comments by Mr. Tabibi and Mr. Jagota on the wealth that had been taken away from former colonial territories, he drew attention to a large consignment of valuable documents in Sanskrit which was located in London and was the subject of a long-standing dispute between the United Kingdom, on the one hand, and Pakistan and India on the other.

90. Mr. Evensen had expressed the hope that any agreements concluded between the predecessor State and the successor State would be mentioned at the beginning of article 11, paragraph 4, as was the case in other articles. The Commission had deliberately refrained from following that course. In its view, succession involving newly independent States should not in principle be settled by agreements between the predecessor State and successor State, for fear of one-sided agreements favourable to the former

administering Power. It was none the less true that the interests of both parties usually overlapped to such an extent that some problems could be resolved only by means of agreements. That was why they were referred to in second place. Furthermore, such agreements should not infringe the right of peoples to dispose of their wealth and natural resources. The reference made to that right in paragraph 4 of the article was based on the relevant resolutions of the General Assembly, and should be supplemented by a reference to economic activities, which were also alluded to in the Charter of Economic Rights and Duties of States.

91. As to whether it was better to speak of the right of every "people" or of every "State", both expressions were used interchangeably in General Assembly resolution 1803 (XVII) on permanent sovereignty over natural resources, whereas the term "State" alone appeared in the Charter of Economic Rights and Duties of States. It seemed better to retain the word "people" in paragraph 4, since it might well provide better protection of the rights of newly independent States.

92. As far as immovable property was concerned, a distinction could be made according to whether the property was situated in the territory of the former colony, in metropolitan territory or in another territory. Certain immovable property was created by the metropolitan State with the assistance, financial or other, of a colony. However, property of that kind was not necessarily situated in the territory of the colony or in that of the metropolitan State, and history afforded a number of examples of that kind. The Drafting Committee would therefore have to reconsider the problem.

93. Lastly, he recognized the need pointed out by Mr. Ushakov for better concordance between the English and French versions of the last phrase in paragraph 4.

94. The CHAIRMAN suggested that article 11 should be referred to the Drafting Committee.

*It was so decided.*<sup>8</sup>

#### ARTICLE 12 (Uniting of States)

95. The CHAIRMAN invited the Commission to consider article 12, which read:

##### *Article 12. Uniting of States*

1. When two or more States unite and so form a successor State, the State property of the predecessor States shall pass to the successor State.

2. Without prejudice to the provision of paragraph 1, the allocation of the State property of the predecessor States as belonging to the successor State or, as the case may be, to its component parts shall be governed by the internal law of the successor State.

<sup>8</sup> For consideration of the text proposed by the Drafting Committee, see 1692nd meeting, paras. 71–75.

96. Mr. BEDJAOUI (Special Rapporteur) pointed out that article 12 had not elicited comments from States, with the exception of the German Democratic Republic (A/CN.4/338), which had found it to be acceptable.

97. If such was the opinion of the members of the Commission, and since he himself had no suggestions to improve it, the article might be retained in its present form.

98. The CHAIRMAN suggested that article 12 should be referred to the Drafting Committee.

*It was so decided.*<sup>9</sup>

*The meeting rose at 1.05 p.m.*

<sup>9</sup> *Idem*, para. 76.

## 1662nd MEETING

*Friday, 29 May 1981, at 10.20 a.m.*

*Chairman: Mr. Doudou THIAM*

*Present: Mr. Aldrich, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Diaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.*

### **Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/338 and Add.1–3, A/CN.4/345)**

[Item 2 of the agenda]

#### **DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)**

**ARTICLE 13 (Separation of part or parts of the territory of a State) and ARTICLE 14 (Dissolution of a State)**

1. The CHAIRMAN invited the Commission to examine articles 13 and 14, which read:

##### *Article 13. 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) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(b) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory

to which the succession of States relates shall pass to the successor State;

(c) movable State property of the predecessor State, other than that mentioned in subparagraph (b), shall pass to the successor State in an equitable proportion.

2. Paragraph 1 applies when part of the territory of a State separates from that State and unites with another State.

3. The provisions of paragraphs 1 and 2 are without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

#### *Article 14. 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) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(b) immovable State property of the predecessor State situated outside its territory shall pass to one of the successor States, the other successor States being equitably compensated;

(c) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territories to which the succession of States relates shall pass to the successor State concerned;

(d) movable State property of the predecessor State other than that mentioned in subparagraph (c) shall pass to the successor States in an equitable proportion.

2. The provisions of paragraph 1 are without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

2. Mr. BEDJAOUÏ (Special Rapporteur) recalled that articles 13 and 14 had been the subject of a joint commentary by the Commission. No Governments had commented on article 13, except for the German Democratic Republic, which had endorsed the article (A/CN.4/338).

3. As to article 14, one representative to the Sixth Committee, referring to the draft code of international law by E. Pessoa quoted in the commentary,<sup>1</sup> wondered if priority could not be given to the successor State which might have "retain[ed] or perpetuate[d] the personality of the State which has ceased to exist". The idea of the successor State retaining or perpetuating the personality of the State which had ceased to exist was actually self-contradictory, for there was no disappearance if personality was retained or perpetuated.

4. In its written comments (A/CN.4/338/Add.1), the Italian Government had wondered whether the provision made in article 14, subparagraph 1 (b) for the passing of immovable State property of the predecessor State situated outside its territory to one of the successor States, the other successor States being equitably compensated, might not bring successor States into competition with each other. Such competition was certainly conceivable, and the Commission had never been so naive as to think that the solutions it was proposing, particularly in the provision

in question, would never give rise to problems and would exempt States from concluding agreements among themselves to settle them. But the Commission could not go into detail and weigh down article 14 with all sorts of criteria for designating one successor State rather than another. While the comment by the Italian Government was relevant, the Commission could not take it into account without complicating article 14.

5. Articles 13 and 14 could be referred to the Drafting Committee without change.

6. Mr. USHAKOV said that in his opinion both the articles could be referred to the Drafting Committee.

7. However, he believed that paragraph 3 of article 13 and paragraph 2 of article 14, the contents of which were similar, were each worded rather abstractly. In particular, they did not indicate between whom a "question of equitable compensation" could arise. Moreover, article 14 mentioned equitable compensation in subparagraph 1 (b) as well as in paragraph 2, and it was open to question whether the compensation meant was the same in each case.

8. Mr. JAGOTA said that he found the text of articles 13 and 14 basically acceptable and that the question raised by Mr. Ushakov could probably be resolved by the Drafting Committee.

9. He himself had one suggestion to make concerning article 14, subparagraph 1 (b), which differed from the comment by the Government of Italy to which the Special Rapporteur had replied in paragraph 114 of his report (A/CN.4/345). As he saw it, the problem to which the subparagraph gave rise was not the question what factors should be taken into account in disposing of the property of the predecessor State, but the question who should determine which of the successor States was entitled to the property and which to compensation. He did not think that the inclusion in the introductory portion of paragraph 1 of the phrase "and unless the successor States concerned otherwise agree" could be held to be an advance answer to that question; instead, he saw that phrase as authorizing successor States to derogate from the broad principles set out in the succeeding subparagraphs.

10. Consequently, he felt that it might be useful to add at the end of subparagraph 1 (b) a phrase such as "as may be agreed between them".

11. Mr. SUCHARITKUL supported the referral of articles 13 and 14 to the Drafting Committee.

12. He wondered, however, whether the interests of third States had been taken sufficiently into consideration in each case. He cited the example of the Federation of Malaya, a newly independent State created in 1957 which had subsequently joined other States to form Malaysia. In 1965, the State of Singapore separated from Malaysia. Malaysian Airways had been an airline having the status of a State enterprise and had owned buildings abroad. Following the separation of Singapore, problems had arisen with

<sup>1</sup> See *Yearbook* . . . 1979, vol. II (Part Two), p. 38, para. (7).

respect to those buildings, and the only solution had been to establish a joint company, Malaysian Singapore Airways, with the result that, at least until an alternative had been devised, the buildings had been owned both by the predecessor State and by the successor State. As for immovable State property belonging to third States and situated in the territory of Singapore, it was inconceivable that any of the numerous successions of States of which that territory had been the subject should have affected the right of ownership of those States; the situation in question was dealt with in draft article 9.

13. Finally, he cited as an example of the perpetuation of the personality of the predecessor State the fact that the Socialist Republic of Viet Nam, a unified State, had considered itself to be the successor to the Republic of Viet Nam within the Committee for Co-ordination of Investigations of the Lower Mekong Basin.

14. Mr. TABIBI subscribed to the view that articles 13 and 14 could be referred to the Drafting Committee.

15. He did, however, wish to know whether the Special Rapporteur considered the articles adequate to cater for the possibility of multiple claims to the property of a predecessor State when that property was situated outside the territory to which the succession of States related. As an illustration of such claims, he cited the situation which persisted with regard to embassies of the former British colony of India that had been built in Nepal and Afghanistan. Following partition of the colony, both India and Pakistan had claimed that those embassies had been built with their resources. Settlement of those claims had yet to be achieved, and had been complicated by the claims that Bangladesh had entered in the same connection when it had, in its turn, become independent.

16. He also wished to emphasize that he considered it vitally important to show in the body of article 13 and in the commentary to that article that the provisions of the article would apply only in the event of a separation of part or parts of the territory of the State in application of the principle of the self-determination of peoples. Separations occurring otherwise than in accordance with that principle should be considered illegal and incapable of entailing the effects listed in article 13.

17. Sir FRANCIS VALLAT said that he did not think that the Commission should devote too much time to the question of the appropriateness of the use of the word "equitable" in relation to the proportion in which property should pass or to compensation for the non-receipt of property. It had already had an extremely long debate on that subject and had examined innumerable possibilities of providing concrete indications of what might be considered equitable. The conclusion of the Commission itself and of the Drafting Committee in that respect had been that

to attempt to draw attention to specific points might destroy the balance of the term "equitable" itself, and that it was therefore better to retain the general formula. Furthermore, the use of the word had elicited little comment from States.

18. Mr. Jagota's proposal for an amendment to article 14, subparagraph 1 (b), had drawn his attention to certain inconsistencies in the drafting of the articles in general. In addition to the phrase which might be added (at the end of that subparagraph) at Mr. Jagota's instigation, article 14, paragraph 1, contained the words "and unless the successor States concerned otherwise agree", while article 13, paragraph 1, contained a similar formula, and article 11, paragraph 4, referred to agreements for which no foundation was laid elsewhere in the article. He hoped that the Drafting Committee would take those comments into account in reviewing the articles and would seek to provide texts that were as harmonious as possible.

19. Mr. BEDJAOU (Special Rapporteur), summing up the discussion, observed that in the situation dealt with in article 14 there were two essential considerations: the need for an agreement between successor States and the need for compensation. Whatever the provisions that might be envisaged, an agreement in due form between the successor States was absolutely necessary; without it the States could not settle their succession problems. Such an agreement should therefore be mentioned in article 14.

20. Since the rules being drafted by the Commission were residual, article 14 contained, in the introductory portion of paragraph 1, the reservation "unless the successor States concerned otherwise agree". A few members of the Commission felt that that reservation was not sufficient and that another should be added at the end of subparagraph 1 (b). While he fully agreed with that suggestion, the Drafting Committee would have to try to find wording that avoided all contradiction between the two reservations.

21. It had also been said that the articles under examination showed a certain lack of uniformity. That had, in fact, been the Commission's intention. The same concern had led it deliberately to favour the newly independent successor State, in the case of article 11 and to permit an agreement between the predecessor State and the successor State only if that agreement was not abusive and did not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources. However, the Drafting Committee should try to make the texts of the articles as homogeneous as possible.

22. As to the idea of compensation, it was absolutely necessary whenever two or more successor States were involved. The general principle of the passing of State property without compensation was stated in article 8, but that rule was liable to exceptions, as was apparent from the first clause of the article. That was why both article 13 and article 14 referred to equitable compen-

sation. Such compensation was mentioned twice in article 14 because, in the first case, compensation was inevitable: the immovable State property of the predecessor State was situated outside its territory and could not, therefore, be physically divided among the successor States.

23. Mr. Tabibi's remarks concerning immovable State property of the predecessor State situated outside its territory were relevant, but the example that he had given to illustrate them came under the situation treated in article 11. He himself had drawn attention to the problem in question in connection with article 11. Just as the Commission should supplement article 11, it should supplement article 13 to cover the case mentioned by Mr. Tabibi.

24. However, article 13 concerned the separation of part or parts of the territory of a State, a process which should take place within the context of the self-determination of peoples. In that case, the predecessor State could not be deprived of State property situated in the territory of a third State. It would have to be seen how far the part of the territory that separated had contributed to the creation of the property in question. If that part could show proof of its contribution, it would be right for the property to pass to the successor State. It was, however, unlikely that any such demonstration of proof could be made, for article 13 assumed the existence of a unitary State, and a part separating from the territory of such a State would not necessarily have enjoyed any degree of autonomy before its separation. On the other hand, in the case referred to in article 11 a colony was not considered to be an integral part of the territory of the metropolitan State, and enjoyed a degree of autonomy which might have enabled it to contribute to the acquisition of immovable State property abroad.

25. Consequently, the Drafting Committee should either seek appropriate wording for the text of article 13 or provide the necessary explanations in the commentary.

26. The CHAIRMAN suggested that articles 13 and 14 should be referred to the Drafting Committee.

*It was so decided.*<sup>2</sup>

*The meeting rose at 11.10 a.m.*

<sup>2</sup> For consideration of the texts proposed by the Drafting Committee, see 1692nd meeting, paras. 77-82 and paras. 83-84.

## 1663rd MEETING

*Monday, 1 June 1981, at 3.10 p.m.*

*Chairman:* Mr. Doudou THIAM

*Present:* Mr. Aldrich, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, 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,<sup>1</sup> A/CN.4/340 and Add.1, A/CN.4/343 and Add.1-4)

[Item 7 of the agenda]

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

ARTICLE 8 (Consent of State),  
ARTICLE 9 (Voluntary submission),  
ARTICLE 10 (Counter-claims) and  
ARTICLE 11 (Waiver)<sup>2</sup> (continued)

1. Mr. SUCHARITKUL (Special Rapporteur) recalled, for the benefit of members who had not been present during the Commission's earlier consideration of his third report (A/CN.4/340 and Add.1), that draft article 7 had been referred to the Drafting Committee (1656th meeting) and that the Commission had then gone on to consider draft articles 8, 9, 10 and 11 (1657th meeting).

2. In attempting, in draft article 7, to define the concept of proceedings against a State, the Special Rapporteur had pointed out that State practice appeared to indicate that there was in normal circumstances, an assumption of fact in favour of the absence of consent. In other words, in proceedings involving the interests of a foreign State, it would be correct to assume, in the absence of any indication to the contrary, that the foreign State did not consent to submit to the jurisdiction of the territorial State. There was thus a possibility of the principle of State immunity coming into play. However, it followed as a corollary that, if there was an indication of consent, there could be no question of State immunity.

3. The existence of consent could be viewed as an exception to the principle of State immunity, and had been so viewed in certain national legislation and regional conventions; but, for the purpose of the draft articles, he preferred to consider consent as a con-

\* Resumed from the 1657th meeting.

<sup>1</sup> Yearbook . . . 1980, vol. II (Part One).

<sup>2</sup> For texts, see 1657th meeting, para. 1.

stituent element of State immunity; immunity came into play when there was no consent, subject, of course, to other limitations and exceptions to be considered in future. Draft articles 8, 9, 10 and 11, which constituted different ways in which consent could be expressed, could thus be viewed as qualifications of the principle of State immunity.

4. Mr. FRANCIS said that it was logical for the provisions that followed draft article 7 to deal with the question of the consent of the State in respect of which immunity was claimed. With regard to draft article 8, he drew attention to the Special Rapporteur's second report (A/CN.4/331 and Add.1 para. 61), which made the important point that "With the consent of the foreign State, the judicial or administrative authorities of the territorial State will not be constrained from exercising their otherwise competent jurisdiction". It seemed to him that account should be taken of that point in draft article 8. Indeed, draft article 8 might be dangerously misleading if it was left in the very general terms in which it was now couched. Accordingly, the Commission would do well to recall the Special Rapporteur's statement in paragraph 27 of his second report to the effect that "it is in the area of trading activities that the question of jurisdictional immunities of States and their property most frequently arises", that such activities would be dealt with, in the light of State practice, in part III of the draft articles.

5. Since it should be clear from draft article 8 that no sweeping generalization was being made concerning the capacity of the territorial State to exercise jurisdiction, and the words "in accordance with the provisions of the present articles" in draft article 8, paragraph 1, did not make the text sufficiently precise, he was of the opinion that those words should be deleted and it should be indicated that draft article 8 was subject to the articles contained in part III. He agreed with Mr. Calle y Calle and other members of the Commission that the word "against" in draft article 8, paragraph 1, was unfortunate and should be replaced.

6. Mr. ŠAHOVIĆ felt that draft article 8 could be referred to the Drafting Committee, for whose benefit he wished to make some comments.

7. In his third report (A/CN.4/340 and Add.1), the Special Rapporteur had indicated the main elements which made State consent a general rule in the field of the jurisdictional immunities of States. However, paragraphs 1 and 2 of article 8 did not appear to cover all the aspects of that rule. Their defect was not that they were too general, but rather that they were insufficiently precise concerning the elements that constituted a general rule. As its title indicated, the second part of the draft should contain a set of provisions having the value of general rules, and it might be unfortunate if article 8 did not fully reflect the content of paragraphs 46, 47 and 48 of the third report which appeared under the heading "Absence of consent as an essential element of State immunity". It

would, indeed, seem advisable to deal with the absence of consent in article 8, because of the consequences of that question for the exercise of jurisdictional immunity.

8. From the drafting point of view, it might be wise to combine paragraphs 1 and 2 of the article in a single provision, so as better to express the notion of consent. Lastly, it would be preferable if the content of paragraph 3 were placed in another part of the draft concerning rules, general practice or procedure, or in other words, the rights and duties of the States involved in a problem giving rise to questions of jurisdictional immunity. That would make for a more coherent draft, particularly in the light of the structure of articles 9 to 11, which the Commission was to examine next. Article 8 should be devoted exclusively to as full a formulation as possible of the general rule of consent.

9. Mr. TABIBI said that it was quite logical for draft article 8 to follow on from draft articles 6 and 7 and enunciate the principle that a State was immune from the jurisdiction of another State unless it had consented to submit to that jurisdiction. That independent principle was not derived from the principle of the sovereignty of States. Indeed, just as the principle of sovereignty was not absolute, neither was the principle of jurisdictional immunity, to which consent constituted the basic exception.

10. In his view, the principle of consent should be very clearly stated in draft article 8, paragraphs 1 and 2. The method of expressing consent provided for in paragraph 3 might, as Mr. Šahović had suggested, be stated in a separate article. That was a matter for the Drafting Committee to decide.

11. Mr. JAGOTA said he appreciated the fact that the Special Rapporteur, in his statement at the 1656th meeting, had said that he would be dealing in due course with the question of the consent of State immunity. It was thus clear that the wording of draft article 7 did not imply absolute immunity in every respect, and that the realities of the present-day world would be borne in mind when the Commission came to elaborate the final version of the draft articles.

12. Like the wording of draft article 7, that of draft articles 8, 9, 10 and 11 was somewhat absolute. For example, draft article 8, paragraph 1, provided that "A State shall not exercise jurisdiction against another State without the consent of that other State". What would happen if a State expressly said that it did not give consent? Could the courts of another State still exercise jurisdiction—particularly if the law of that State had conferred jurisdiction on them? There could be cases where the question of a State not giving consent might not be relevant at all, especially if the immunity in question related to a particular subject-matter. He therefore assumed that when article 8, paragraph 1, was discussed by the Drafting Committee

it would be brought into line with draft article 6,<sup>3</sup> and that the Commission would have an opportunity to consider it again once the contents of State immunity had been elaborated.

13. Account must also be taken of the fact that the concepts of consent, voluntary submission and waiver overlapped in many respects, despite the subtle distinction between express consent and voluntary submission drawn by the Special Rapporteur in paragraph 57 of his report. The Commission would therefore have to decide whether it was necessary or desirable to have separate articles on those concepts, as it now did, or whether it could combine draft articles 8 to 11 in a single provision, for example, by following Mr. Šahović's suggestion and removing substantive elements, such as paragraph 3 of article 8, and avoiding any undue repetition. In that connection, he noted that the concepts of waiver and counter-claims and the distinction between immunity from jurisdiction and immunity from execution had all been covered in article 32 of the 1961 Vienna Convention.<sup>4</sup>

14. Referring specifically to draft article 8, subparagraph 3 (c), he said he agreed with other members of the Commission that the words "by the State itself" were superfluous and that they could be deleted by the Drafting Committee. Moreover, if a foreign State submitted an argument on the merit of a case, even by raising a plea of State immunity, its argument did not amount to a waiver of immunity. As soon as a State contested a claim on the merit, it had submitted to jurisdiction, as was made clear in the second sentence of paragraph 56 of the report. The present wording of article 8, subparagraph 3 (c), thus contradicted the conclusion which the Special Rapporteur had reached in paragraph 56 of his report. The correct conclusion was that the State could consent to the exercise of jurisdiction by the court of another State, under article 8, paragraph 2, through its authorized representative appearing before the court in a proceeding to contest the jurisdiction of that court without raising a plea of State immunity. The words "to contest a claim on the merit" in draft article 8, subparagraph 3 (c) should therefore be deleted.

15. Mr. REUTER observed that draft article 8 gave rise only to drafting problems. However, since it referred to the exercise of jurisdiction with regard to a third State, he did not agree with either of the alternatives for draft article 7 considered earlier.

16. The notion of a proceeding which in fact implicated one State or property in its control before the courts of another State was too broad. In fact, if one State voluntarily placed itself under the jurisdiction of another by acquiring assets that were subject to the jurisdiction of that other State, it would certainly be an exaggeration to assert that proceedings could not be taken against the first State without its consent as

the owner of the assets. To maintain otherwise would mean that a State which acquired property in a manner that was not in accordance with the local law, for example, *a non domino*, could not be the subject of proceedings before the courts of the State in which that property was located. In his view, while it was acceptable that no one should have the right to take measures of enforcement against the State in question, it was not acceptable that the possibility of drawing attention to the irregularity of its legal operation should be precluded.

17. To sum up, he could accept draft article 8, which was a technical provision on consent, but not draft article 7.

18. Mr. RIPHAGEN said that, in his view, draft articles 8 to 11 were essentially incomplete, and it would be difficult for the Drafting Committee to deal with them without knowing what other matters the Special Rapporteur intended to consider in subsequent draft articles.

19. Thus, while a sweeping statement had been made in article 8, paragraph 1, both article 9, on voluntary submission (which was, after all, more a matter of implied waiver than anything else), and article 10, on counter-claims, provided for the exercise of jurisdiction in cases where there was manifestly no express consent. How could a State consent to a counter-claim when it did not even know that there would be one? Furthermore, draft article 11 was drafted not in terms of jurisdiction, but, rather, in terms of waiver. Those were all drafting points, but they were bound to give rise to serious problems of substance.

20. As he had stated at the 1657th meeting, he believed that there was something like implied "pre-trial consent", which was limited to a particular kind of relations and was one of the various types of consent which had, for example, been discussed in connection with the element of consent in State responsibility—which was not the same as consent to be bound by a treaty. He did not quite see how the Drafting Committee would be able to draft articles on express consent if it did not take account of the implied "pre-trial consent" that resulted from the voluntary participation of one State in the legal life of another.

21. Mr. USHAKOV said that, in principle, draft article 8 was acceptable. However, he did not think that the wording was sufficiently precise; in particular, it should be expressly indicated whether the notion of jurisdiction referred to in the article was the general concept that covered all exercise of its sovereignty by the receiving State, or the special concept that denoted the competence of the courts. He pointed out in that context that the draft provisions proposed by the Special Rapporteur were drawn more or less directly from the 1972 European Convention on State

<sup>3</sup> See 1653rd meeting, footnote 4.

<sup>4</sup> See 1654th meeting, footnote 4.

Immunity,<sup>5</sup> article 15 of which referred to the absolute or full immunity of a State from jurisdiction of the courts of another State, except in certain specific cases. He felt that the Commission should state unequivocally in the opening provisions of its draft articles that the text concerned immunity from action in the courts of the receiving State.

22. Paragraph 3 of draft article 8 concerned the way in which a State could give its consent, which it could do either expressly or by its conduct. The paragraph made it clear that the consent in question was consent to "the exercise of jurisdiction by the court of another State". However, it left a number of questions unanswered, particularly with regard to the form and the addressee of written consent and the scope of the consent given in a particular matter, which could in no circumstances be interpreted broadly. It should also be made clear that, in consenting to the jurisdiction of a court for a specific case, a State in no way implied acceptance of an authority to enforce a court judgement. Similarly, the expression "after a dispute has arisen" lacked precision, and the concept of "authorized representative" required clarification.

23. Lastly, since draft article 8, like draft article 11, concerned the express consent of a State, he would prefer those two provisions to be placed in succession before articles 9 and 10, which concerned consent by conduct.

24. Mr. ALDRICH said that, as previous speakers had noted, article 8, paragraph 1, could be understood either as creating a somewhat absolute system of consent, or, because of the words "in accordance with the provisions of the present articles", as providing for a regime of consent which was subject to other exceptions. If the paragraph was to be consistent with subsequent elements of the text, it should begin with the words "except as otherwise provided in these articles", since provision would certainly have to be made for exceptions to immunity that were completely unrelated to consent.

25. He agreed with other speakers that it would be helpful to have clarification as to whether article 8 was intended to apply solely in judicial proceedings. He understood it as having a broader application, in which case each of the paragraphs gave rise to drafting problems.

26. He noted that paragraph 3 of the article presented an exhaustive list of the ways in which consent could be expressed. Since the other articles contained in the current report all dealt, at least in part, with various types of consent, he was not sure that paragraph 3 was either necessary or desirable. If it was to be included, it, too, would occasion a number of significant drafting problems.

27. While he had no objection to its referral to the Drafting Committee, it would be difficult for that body to reach any conclusion on article 8 until it had some idea of what the major exceptions were to be. Consequently, the Committee should refrain from active consideration of the draft article for the time being.

28. Mr. QUENTIN-BAXTER said that it really was not possible to consider the four draft articles satisfactorily in isolation. Indeed, he wondered whether the nuances contained in those texts were of such fundamental importance that they must be treated in separate articles.

29. It was his understanding that the Commission was not dealing with the broad question of the area in which the rule or principle of immunity applied, but was concerned with drafting a set of articles which would apply only in judicial proceedings. The Commission was dealing with rules of international law, which were applied as such by national courts. Consequently, there was a need for considerable detail, precision and refinement. At the same time, the Commission should not lose sight of the advantages, in drafting legal instruments that were intended to have universal application, of stating provisions in broad terms which individual legal systems and States could adapt to their own circumstances. Moreover, given the substantial conceptual differences existing between the legal systems of civil law, common law and that in yet other countries, care must be taken not to produce a text which was so influenced by the practices of national courts of well-developed legal systems that it could not be adapted to other circumstances.

30. In paragraph 1 of draft article 8, it was assumed that other concepts, particularly that of voluntary submission, would be assimilated to the concept of consent. The distinction drawn by the Special Rapporteur, in paragraph 59 of the report, between the concepts of voluntary submission and consent was an extremely subtle one. There would seem to be enormous advantages, from the drafting point of view, in refraining from separating the two concepts. Furthermore, paragraph 3 of article 8 and paragraph 1 of article 9 both dealt with modalities and, in some instances, were almost identical in content. Since draft articles 8 to 11 were closely interrelated, it might be advantageous to combine them all under one rubric. The Drafting Committee would certainly be unable to draft provisions covering every possible contingency without some simplification of that kind. In any event, the Committee should consider the articles jointly.

31. Mr. SUCHARITKUL (Special Rapporteur) noted that many members of the Commission had expressed concern with regard to the approach which had been adopted in dealing with the topic of jurisdictional immunities. In that connection, he pointed out that different approaches had been adopted in the various national legislations studied. While he shared the many misgivings expressed by those members of

<sup>5</sup> Council of Europe, *European Convention on State Immunity and Additional Protocol*, European Treaty Series, No. 74 (Strasbourg, 1972).

the Commission who would like to have all the draft articles at hand before giving them even preliminary approval, he did not regard such an approach as possible at present. The Commission must proceed step by step.

32. Referring to observations made by Mr. Reuter and others with regard to draft article 7, he said that he was prepared to redraft the article so as to preclude any suggestion of absolutism, while retaining the concept of full sovereignty as far as immunity was concerned. That concept must nevertheless be subject to many limitations, such as those of ownership or use of immovable property.

33. Turning to comments made by Mr. Riphagen, he said that he was sorry if he had appeared to favour assuming the absence of consent on the part of a defending State. It might have been preferable to state that consent was not to be readily assumed.

34. On the question whether the draft articles contained in the report should be dealt with jointly or separately, he shared the views expressed by Mr. Jagota and Mr. Quentin-Baxter. He had presented the articles separately because different approaches had been followed in the various legal systems studied. It was for the Commission to decide whether some or all of the articles could be combined under a single rubric without the loss of subtle distinctions.

35. As Sir Francis Vallat (1657th meeting) and other members had pointed out, it would be preferable to redraft article 8 to preclude the idea of absolute or unqualified immunity.

36. Concerning Mr. Aldrich's suggestion for an addition to article 8, paragraph 1, he said that the present wording of that provision had been adopted after lengthy consideration in the Drafting Committee at the previous session. However, he was quite prepared to accept the amendment.

37. Referring to observations made by Mr. Calle y Calle (*ibid.*), he said that the exercise of jurisdiction referred to in article 8 related only to judicial proceedings. He agreed that the expression "exercise jurisdiction against another State" might appear somewhat inimical. Perhaps it would be better to say "exercise jurisdiction in proceedings against a State as defined in article 7".

38. With reference to article 8, paragraph 3, he said that, while he agreed with the views expressed by Mr. Šahović, draft article 8 should be regarded as a general introduction to the following articles, which went into greater detail.

39. In conclusion, he said that the articles could perhaps be referred to the Drafting Committee jointly, as they had been submitted jointly.

40. Sir Francis VALLAT expressed concern regarding the piecemeal approach adopted in considering the draft articles. The Commission had already encoun-

tered difficulties as a result of following a similar approach in its consideration of the articles on State responsibility. An attempt should be made to devise a procedure which would enable the Commission to have an over-all picture of the substance of the draft; otherwise it would be very hard for it to reach even provisional conclusions concerning individual articles.

41. As far as draft articles 8 to 11 were concerned, he understood very well the concern of the Special Rapporteur regarding the different approaches adopted under the legal systems of various States. However, one fundamental consideration to be borne in mind in drafting treaties was that better results might be achieved by expressing concepts in general terms than by attempting to reflect individual legal systems.

42. Mr. CALLE Y CALLE, supported by Mr. USHAKOV, said that, for the moment, only article 8 should be referred to the Drafting Committee. Articles 9, 10 and 11 doubtless still called for a great many comments by the members of the Commission.

43. Mr. REUTER agreed that only article 8 should be referred to the Drafting Committee.

44. On the subject of consent, he wondered whether the Commission would have to deal with interventions before the courts. So far, the Special Rapporteur had only touched on the question indirectly, but he might regard consent as being quite different depending on whether it was expressed in a treaty, a contract or a procedural instrument. Perhaps the Commission would ultimately lay down a general principle whereby a procedural instrument signified consent when it necessarily implied that the State from which it emanated accepted jurisdiction. It would probably be unable to go into details, since procedure, unlike the rules governing treaties and contracts, varied widely from country to country. In extremely formal systems, such as those of common law, an instrument might have other effects than in a civil law system. To interpret the wishes of the State, the Commission might, therefore, have to rely on internal law.

45. The CHAIRMAN suggested that the Commission should refer article 8 to the Drafting Committee.

*It was so decided.*

#### **Expression of sympathy on the death of Lady Waldoock**

46. The CHAIRMAN, announcing the death of Lady Waldoock, wife of Sir Humphrey Waldoock, member of the International Court of Justice and former member of the Commission, said he had sent Sir Humphrey a telegram of condolence on behalf of the Commission.

*The meeting rose at 6.05 p.m.*

## 1664th MEETING

Tuesday, 2 June 1981, at 10.05 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Aldrich, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, 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,<sup>1</sup> A/CN.4/340 and Add.1, A/CN.4/343 and Add.1—4)

[Item 7 of the agenda]

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

ARTICLE 8 (Consent of State),  
ARTICLE 9 (Voluntary submission),  
ARTICLE 10 (Counter-claims), and  
ARTICLE 11 (Waiver)<sup>2</sup> (continued)

1. Mr. SUCHARITKUL (Special Rapporteur) said that, in the light of the discussion, he had a number of amendments to suggest in respect of draft article 8, with a view to facilitating the Commission's subsequent deliberations. The amendments represented an attempt to state the draft article in general terms, rather than to reflect differences between various municipal legal systems. Accordingly, paragraph 1 might begin with the words "Unless otherwise provided in the present articles", or "Subject to the provisions of Part III of the draft articles", along the lines proposed by Mr. Aldrich (1663rd meeting) and Sir Francis Vallat (1657th meeting), so as to prevent the statement from being too sweeping. In addition, the words "in legal proceedings" might be inserted after the word "jurisdiction", as suggested by Mr. Calle y Calle (*ibid.*).

2. In paragraph 3, it might be appropriate to indicate that the methods of expressing consent enumerated in subparagraphs (a), (b) and (c) did not constitute an exhaustive list, and therefore to insert the words "by various methods, including notably" after the words "paragraph 2". In subparagraph (b), it might be preferable to omit the words "a treaty or" and to replace the word "cases" by "activities". Finally, in order to avoid unnecessary confusion, subparagraph (c) might be reworded on the lines suggested by Mr. Jagota at the previous meeting, to read:

"by appearing before the court through its authorized representative in a proceeding . . . without invoking a plea of State immunity".

3. The concept of voluntary submission, as expressed in draft article 9, was simply one aspect of the concept of consent, and certain distinctions could be drawn between the concepts dealt with in articles 9, 10 and 11. If the Commission proceeded from the premise that it was dealing with the question of State immunity from the jurisdiction of the courts, a clear relationship would be seen to exist between the existence of jurisdiction and the existence of immunity, for, logically speaking, where there was no jurisdiction, there could be no immunity. In practice, however, that was not the case, since parties to a dispute could enter a plea of immunity. Again, if no immunity existed, it was logical that a waiver of immunity was unnecessary. Yet a State might, in practice, agree to waive its immunity, whether it existed or not, for immunity could be waived in advance in certain areas that were customarily or traditionally regarded as being covered by limitations or exceptions. Furthermore, a waiver of immunity did not necessarily create jurisdiction, but consent might form the very foundation of jurisdiction, which could be based not only on the principle of territoriality but also, in many cases, on the principles of private international law.

4. The terminology used in article 9 was intended to invite comment from the Commission. The concept of voluntary submission was widely accepted, and references to it could be found in the legislations of the United Kingdom and the United States of America and in the 1972 European Convention on State Immunity.<sup>3</sup>

5. Mr. REUTER said that the Special Rapporteur appeared to feel with regard to article 8 that paragraphs 1 and 2 stated principles, whereas paragraph 3 contained a programme. It was an interesting idea, but the end result ought to be a programme based on a time criterion. It would be better to reverse the order of subparagraphs (a) and (b) of paragraph 3, so as to begin with the first possible manifestation of consent, that which preceded all disputes, go on to the subsequent manifestation upon the arising of a dispute, and end the paragraph with the judicial phase.

6. There remained the question raised by Mr. Ushakov at the very beginning of the examination of article 8, namely, the need to be more specific about certain eventualities than others, Subparagraph (b) required little elaboration, but that was not true of the content of subparagraph (a), which covered the case of a dispute between a governmental or administrative authority of one State and another State or an individual. The authorities of a State that were competent to give consent and those which handled a matter when it came before a court were not necessarily the same. In some countries, representation of the State's interests even before a foreign or

<sup>1</sup> Yearbook . . . 1980, vol. II (Part One).

<sup>2</sup> For texts, see 1657th meeting, para. 1.

<sup>3</sup> See 1663rd meeting, footnote 5.

international court, as opposed to action in conventional matters, was the responsibility of specialized agents. Perhaps the Special Rapporteur intended to expand in other provisions on the case covered by subparagraph (a). If that was so, article 9 would give rise to problems, for it seemed to be more than a detailed statement of the means of expressing consent before a court. Subparagraphs 1 (a) and (b) did indeed refer to procedural situations, but subparagraph 1 (c) was far broader: it referred back to the subject-matter of article 8, subparagraph 3 (a), namely, written expression of consent after the arising of a dispute. Paragraphs 2 and 3 of article 9 both clearly concerned procedure. To judge from the Special Rapporteur's explanations concerning article 8, the Commission should delete, or at least reword, article 9, subparagraph 1 (c).

7. In fact, the Special Rapporteur's reasoning was clear, and everything hinged on terminology. A term must be found to serve as a title for article 9 and to cover all the cases envisaged therein. It must be neutral with respect to the terminology of internal law, but cover all the systems of such law. Personally, he had nothing against the term "voluntary submission", but he thought that it would have to be defined in article 9. The Special Rapporteur seemed to have in mind a procedural act, of whatever nature, by a State, and it was true that until a State had taken a procedural measure it had not given its consent. That point must be clearly indicated. As the Special Rapporteur had pointed out, the procedural measures that a State could take varied greatly. It could appear and defend on the merits or defend its jurisdictional immunity; it could intervene in a case between two other States, or even intervene as *amicus curiae*. Consequently, it must be made clear that procedural action, of whatever nature, implied consent only if it emanated from a competent authority and clearly expressed the will of the State. The Commission could not go much further in that respect. Admittedly, when a State agreed to defend on the merits or when it appeared to maintain its immunity, there was manifestly consent. In other cases, however, there must be no room for doubt as to the proper interpretation of the State's action.

8. If article 9, subparagraph 1 (c) was maintained, he would find it hard to subscribe to the statement in paragraph 61 of the report (A/CN.4/340 and Add.1) that "the question whether such expression of volition could be said to be manifest must ultimately be determined by the judicial authority in accordance with its own established practice or its own rules of procedure, having regard to the circumstances of each case". It was true that a State which undertook a procedural action ran a risk, for it ought not to act unless it had sufficient knowledge of the applicable procedural law; it submitted to some degree to the local law. The word "ultimately" meant that a State could not place on that procedural law an interpretation that was contrary to judicial practice. That view was valid with respect to procedure, but not with

respect to consent given in a treaty or in the form of a governmental act.

9. Consequently, the passage he had quoted was not correct in the case covered by article 9, subparagraph 1 (c). A State's courts could not "ultimately" interpret the text of a treaty; such interpretation was a matter for the States parties to the treaty, and any disagreement between them must be settled by one of the means of settlement provided by international law. In the case of a contract, the situation was more complex. If the applicable law was the *lex fori*, a State accepting it took the risk that its expression of volition would be interpreted in accordance with that law. But even when some other form of law was applicable, it was doubtful whether it could be said that a decision would ultimately be taken by the judicial authorities.

10. Mr. CALLE Y CALLE noted that the distinction between voluntary submission, dealt with in article 9, and the expression of consent, dealt with in article 8, was a very fine one. In a case of voluntary submission, the State concerned took the step either of choosing a forum or of initiating proceedings. In that connection, the Special Rapporteur had stated in paragraph 59 of his report that:

The State is considered as being impleaded in either event, whether it has itself freely and voluntarily submitted to the jurisdiction, or merely consented to the exercise of such jurisdiction by a court of another State, as in article 8.

However, the fact of being impleaded did not result solely from consent to jurisdiction, but could take other forms. The paragraph cited went on to say that: "Once jurisdiction becomes exercisable without the need to compel the State to submit to it", that State could not subsequently object to the exercise of jurisdiction on the grounds of an absence of consent. It could be wrongly inferred from that passage that there were instances in which one State could be compelled to submit to the jurisdiction of another.

11. Referring to paragraph 64 of the report, he said that he could not see how a jurisdiction could be imposed upon a State which was not a party to the dispute concerned and simply intervened as *amicus curiae*. The notion of submission to jurisdiction was linked less to the entry of appearance than to the judicial examination of certain questions. To submit to a jurisdiction was to accept in advance the results of its exercise. In that respect, consent was not the same as waiver. In cases of waiver, a State renounced a manifest right of immunity. Voluntary submission included an element of interest.

12. With regard to the structure of article 9, paragraph 1 was drafted as a permissive provision. It said that one State might exercise its jurisdiction against another State which had voluntarily submitted to the jurisdiction of one of its courts. Paragraph 2 stated an obvious rule: a failure to appear did not imply voluntary submission, but was evidence of an absence of such submission. Thought must be given to cases in which advance provision was made in a treaty

or a contract for voluntary submission but the State did not appear when proceedings began. Could the action then continue?

13. Lastly, paragraph 3 concerned a case which did not in fact fall under the heading of voluntary submission, namely, that of appearance or intervention by a State following the institution of proceedings before a court of another State, in order to oppose further exercise of the court's jurisdiction or to assert an interest in a property in question.

14. Mr. JAGOTA said that the amendments to article 8 suggested by the Special Rapporteur appeared to deal with most of the matters raised during the discussion. His own point regarding subparagraph 3 (c) (1663rd meeting) had been that any State contesting the merits of a claim would, whether it invoked the plea of State immunity or not, be deemed to have given consent. In any event, that question could be considered by the Drafting Committee.

15. He was still not sure whether articles 8 and 9 should be kept separate. Mr. Reuter had stated that draft article 8 enunciated the basic norm of consent, whereas article 9 was concerned with voluntary submission in specific legal proceedings before a court, and, consequently, the modalities of voluntary submission should be set out in article 9, while article 8 should deal with the broader aspects of consent expressed either in a treaty or before a court. If the Commission accepted that reasoning, it would have good grounds for keeping the two articles separate. However, it should consider carefully whether such a distinction could be made and whether it would be of practical utility. For example, insertion of the words "in legal proceedings" in paragraph 1 of article 8 might make the distinction pointless.

16. Article 9, paragraph 1, was in effect a combination of paragraphs 2 and 3 of article 8. In other words, the effects and modalities of voluntary submission were essentially the same as in the case of consent. Moreover, as Mr. Reuter had pointed out, article 9, subparagraph 1 (c), seemed to deal with the same subject-matter as article 8, subparagraphs 3 (a) and (b), while article 9, subparagraph 1 (b) corresponded to article 8, subparagraph 3 (c).

17. Article 9, paragraph 2, was an explanatory clause and, as such, was probably useful. Its paragraph 3 merely stated in negative terms what was already stated in positive terms in article 8, subparagraph 3 (c) and article 9, subparagraph 1 (b), but even if the two articles were to be kept separate, consideration might be given to the possibility of including the provision contained in article 9, paragraph 3, in article 8 for the purposes of greater clarity. However, the second part of article 9, paragraph 3, as currently drafted, was expressed in absolute terms, whereas the example cited in the report, namely, article 13 of the European Convention on State Immunity, was expressed in qualified terms. Accordingly, if that

paragraph was intended to be limited in scope, that intention should be made clear by inserting the words "in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it" after the word "question".

18. Mr. USHAKOV said that, at the outset of its work on the jurisdictional immunity of States and their property, the Commission had made a regrettable and retrograde choice in taking the view that the principle of jurisdictional immunity did not exist. Draft article 6 established that a State was

immune from the jurisdiction of another State in accordance with the provisions of the present articles,

meaning that jurisdictional immunity existed only to the extent that the draft articles said that it existed. In the case of consent, however, the articles proposed by the Special Rapporteur were based on the existence of the principle of immunity, for they were designed as exceptions to the application of that principle consequent upon consent by a State entitled to jurisdictional immunity. If the existence of the principle was denied, the consent would have to come from the receiving State, since it was that State which would consent not to exercise its jurisdiction over the sending State, or in other words, which would consent to confer upon the sending State immunity from jurisdiction. The European Convention on State Immunity laid down, in article 15, the principle that a State was entitled to immunity from jurisdiction, except in a number of cases mentioned in articles 1 to 14 of the Convention. In his view, the Commission was acting contrary to existing international law by starting from the opposing principle. Hence it was engaging in regressive, rather than progressive, development of international law.

19. As he had said at the previous meeting, the consent given by a State was necessarily voluntary. There was no need to say, as did article 9, paragraph 1 (b), that the State gave the consent "of its own volition", for any consent given under constraint from another State would be contrary to modern international law. It could therefore be assumed that all the expressions of consent mentioned in the draft articles were voluntary.

20. Again, a distinction should be made between an express manifestation of consent and consent resulting from conduct. In article 9, subparagraph 1 (a), and perhaps also subparagraph 1 (b), concerned cases in which consent could be inferred from conduct, whereas subparagraph 1 (c) had to do with an express manifestation of conduct. In the case covered by subparagraph 1 (a), a State instituted, or intervened in, proceedings before a court. Several members of the Commission had raised the question of whether such intervention related to title to property or to the substance of the case. On that point, the European Convention on State Immunity was clear: a State was not entitled to immunity from jurisdiction if it moved

on the merits. It was very dangerous to adopt a general approach in such matters.

21. Article 9, subparagraph 1 (b), dealt with the case in which a State appeared before the court, but it did not specify in what proceedings or for what purpose the appearance was made. There again, vague wording was not enough. The subparagraph went on to refer to the case in which a State took an unspecified "step in connection with proceedings" before the court. Did that mean that a State which contacted a court because it was interested in documents submitted in the course of proceedings committed an act that could be interpreted as acceptance of the court's jurisdiction? It was essential to determine which acts could be interpreted as implying acceptance of jurisdiction, and that depended, in the final analysis, on the municipal law. In addition, he wondered which of the many stages of the jurisdictional process had to be taken into consideration.

22. The case covered by article 9, subparagraph 1 (c), should be considered separately, because it related to an express manifestation of consent. The approach followed in paragraphs 2 and 3 of the article was not entirely satisfactory either. The paragraphs concerned voluntary submission, whereas the real question was that of the existence or absence of immunity from jurisdiction.

23. Mr. EVENSEN said that, in his opinion, the wording of article 9, paragraph 2, was too vague. In practice, one of the main reactions of States to proceedings in which they considered that they were entitled to claim immunity was to fail to appear before the court of the other State, and he therefore suggested that the Commission should either amend paragraph 2 to read:

"The failure of a State to appear in proceedings before a court of another State shall not be construed as voluntary submission"

or go one step further and make a more positive assertion.

24. In that connection, he agreed with the view that the last phrase of article 15 of the European Convention on State Immunity, "the court shall decline to entertain such proceedings even if the State does not appear", would afford national courts greater clarity and guidance than did draft article 9, paragraph 2.

25. He also shared Mr. Jagota's opinion that article 9, paragraph 3, should use the very succinct wording of article 13 of the European Convention on State Immunity, which read:

Paragraph 1 of Article 1 shall not apply where a Contracting State asserts, in proceedings pending before a court of another Contracting State to which it is not a party, that it has a right or interest in property which is the subject-matter of the proceedings, and the circumstances are such that it would have been entitled to immunity if the proceedings had been brought against it.

26. Sir Francis VALLAT said that all members of the Commission were obviously entitled to their own

interpretation of what was meant by progress, as distinct from the progressive development of international law. However, when Mr. Ushakov had referred in essentially monolithic terms to "regressive development", his own impression had been that the Commission was being taken back generations in its concept of the State—which had after all made great progress in developing its activities in the interests of mankind and had gone far beyond its ancient functions of maintaining order within and defending itself from attack from without. It was those changed conditions and the realities of the modern-day world that the Commission needed to reflect in the draft articles it was preparing. That, in his view, was the meaning of progressive development.

27. As a result of the statements made by other members of the Commission, he had come to the conclusion that articles 8 to 11 all dealt in one way or another with the concept of consent to the exercise of jurisdiction. The element of consent was present even in article 10, for when a State instituted proceedings in the courts of another State it was in a sense consenting to the consequence of having a counter-claim brought against it in respect of the subject-matter of the dispute. Thus, the underlying distinction in the draft articles under consideration was between consent that was expressed and consent that flowed from the conduct of the State—conduct which, in normal circumstances, took the form of some participation in proceedings before the court of the territorial State.

28. It therefore seemed to him that much of the overlapping and repetition to be found in the draft articles could be avoided if the Commission recognized that it was dealing with different aspects of consent, and that it needed to distinguish between express consent and consent implied from participation in proceedings. Admittedly, such an approach might mean that the draft would not have separate articles on voluntary submission and waiver, which could be subsumed under a general heading; but it would avoid the kind of situation in which, for example, article 8, subparagraph 3 (c), was very close to the subject-matter of article 9, subparagraph 1 (b), and article 9, paragraph 3, basically expressed the same idea as article 11, paragraph 4. It might be worthwhile for the Special Rapporteur to prepare redrafts of the articles under consideration on the basis of the suggestions made by members of the Commission.

29. Mr. ALDRICH said that, as a general approach, he was reserving judgement as to whether draft articles 8 to 11 should be combined. Instinctively, he felt that the articles should be fewer in number, but the Special Rapporteur had been wise to submit them to the Commission in an extended form, and the Commission itself would be wise to deal with them one by one, looking at their interconnections and then deciding whether or not they should be merged.

30. With regard to article 9, he considered that subparagraph 1 (b) was somewhat different from subparagraph 1 (a) and subparagraph 1 (c). Indeed, the basic rule of voluntary submission was the one stated in subparagraph 1 (c). The rule enunciated in subparagraph 1 (b) might or might not be one of voluntary submission, and it struck him that, since legal advisers to Governments were only human and could make mistakes, they might be caught out by article 9, subparagraph 1 (b), without ever voluntarily submitting to anything.

31. In his opinion, paragraph 2 of article 9 was quite unnecessary, partly because it would look strange to the casual reader, who might ask how failure to appear in proceedings could conceivably be regarded as voluntary submission to those proceedings or what greater contempt there could be for the proceedings than to stay away from them. Many questions and misunderstandings would be avoided if that paragraph was deleted.

32. Mr. VEROSTA said that, since the Special Rapporteur was more or less bound to formulate general principles of State immunity before enunciating the exceptions to them, he had not been able to follow the model of the European Convention on State Immunity, in which article 15 stated the general principle but articles 1 to 14 stated the exceptions thereto. Although the Commission might well request the Special Rapporteur to merge draft articles 8 and 9, which meant nearly the same thing, it should remember that, at the present stage in its work, it had to avoid burdening the draft articles with details that might, so to speak, suffocate the general principles that were being elaborated.

33. The Commission might also try to decide whether it shared the view expressed in the second preambular paragraph of the European Convention on State Immunity, which read:

Taking into account the fact that there is in international law a tendency to restrict the cases in which a State may claim immunity before foreign courts.

34. Mr. ŠAHOVIĆ said that the Commission should be grateful to the Special Rapporteur for having offered it such a wide choice of formulas for dealing with the question of jurisdictional immunities. On the other hand, he was somewhat perplexed by article 9, which had led the Commission to take up again a number of fundamental problems that should have been settled earlier in connection with articles 6 and 7. In that respect, Mr. Ushakov's comments concerning the need to select a clearly defined point of departure confirmed, if confirmation was needed, that the Commission had not yet determined a crucial matter, namely its attitude to the general principle of State immunity.

35. Since the Special Rapporteur's argument at the beginning of paragraph 59 of his report (A/CN.4/340 and Add.1) tended to prove that there was virtually no

difference between voluntary submissions and the consent of a State, it might be thought surprising that the draft should contain a separate provision on voluntary submission. In fact, another course seemed feasible: to start with voluntary submission based on the consent of the State and reverse the order of the provisions, because consent was the expression of the will of the State. Such a method might make it possible to reach agreement within the Commission.

36. Like Sir Francis Vallat, he thought that the Commission should look only to international law as revealed by practice and devise general rules falling within the context of international law as such, with no reference to the internal law of States.

37. He therefore suggested that a single article should be formed from the opening paragraphs of articles 8 and 9 and practical questions should be left to succeeding articles. The advantage of such a procedure would be that, once it had distilled from the Special Rapporteur's proposals one or two general rules—which would be logical candidates for inclusion in the second part of the draft, which was devoted to general principles—the Commission could use the results of its discussions concerning articles 8 and 9 to draft other articles.

38. Mr. QUENTIN-BAXTER said that the alternatives for paragraph 2 of draft article 7 covered cases in which a State that was not named as a party was nevertheless involved in legal proceedings. That question of the nature of the State's involvement was, of course, a difficult and technical one and had not yet been considered by the Commission. Articles 8 to 11 also took account of such a possible case. For example, article 9, paragraph 3, and article 11, paragraph 4, related not only to a claim of lack of jurisdiction on the ground of State immunity but also to an assertion of an interest in the property in question.

39. However, the articles now under consideration do not seem to take sufficient account of the quite common situation in which a party—for example, a reserve bank with quasi-governmental functions—claimed to be the State itself in another guise and to have the immunity which attached to the State. The court of the territorial State would then have to decide whether such a claim was well-founded. He wondered how some of the negative provisions of articles 8 to 11, particularly article 11, paragraph 3, would apply in such a case, and what the position of the State would be when the agency against which a case was brought did not raise a plea of immunity. When redrafting the present articles, the Special Rapporteur might try to decide how the negative provisions would apply in cases in which the State itself was not "on stage" in its own capacity, but in which it was none the less substantially involved.

40. Mr. RIPHAGEN drew the attention of the Special Rapporteur to the fact that article 9, sub-

paragraph 1 (b), was akin to the first sentence of article 3, paragraph 1, of the European Convention on State Immunity, which read:

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if, before claiming immunity, it takes any step in the proceedings relating to the merits.

That sentence seemed to embody the idea that if a State voluntarily participated in proceedings it had to accept the consequences of such participation.

41. Again, the second sentence of article 3, paragraph 1, of the European Convention read:

However, if the State satisfies the court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it has taken such a step, it can claim immunity based on these facts if it does so at the earliest possible moment.

That sentence served a useful purpose because, in the European Convention, there were a number of situations of fact in which the State could not claim immunity and other situations in which it could not always know beforehand whether or not it could claim immunity. In practice, such situations might very well arise in connection with the draft articles under consideration, in which that sentence should be taken into account.

42. Mr. SUCHARITKUL (Special Rapporteur) said that a number of pertinent points had been made concerning Sir Francis Vallat's suggestion that articles 8 to 11 should be approached from the point of view that the subject-matter under discussion was that of consent. Mr. Reuter had pinpointed the problem by saying that paragraphs 1 and 2 of article 8 contained a clear statement of principle, while paragraph 3 dealt with different ways of expressing consent. He himself had gone on from article 8, subparagraph 3 (c), to give in article 9 another example of a way of expressing consent. It was because voluntary submission was well-known that he had singled it out in a separate provision. Nevertheless, voluntary submission was only one of several ways of expressing consent by conduct, and it might be better described by using the words "participation in the proceedings".

43. Any overlapping between articles 8 and 9 could certainly be eliminated—for example, by deleting article 9, subparagraph 1 (c). Those two draft articles might also be merged under the heading "*expressis verbis*", as suggested by Mr. Ushakov. Moreover, article 9, paragraph 2, might be worded positively and placed somewhere in article 6, article 7 or article 8 to make it clear that failure to appear in proceedings before a court could not be construed as consent. He would also take account of the parallel between article 9, paragraph 3, and article 11, paragraph 4, to which Mr. Quentin-Baxter had drawn attention.

*The meeting rose at 1 p.m.*

## 1665th MEETING

*Wednesday, 3 June 1981, at 10.10 a.m.*

*Chairman:* Mr. Doudou THIAM

*Present:* Mr. Aldrich, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

### **Jurisdictional immunities of States and their property (concluded) (A/CN.4/331 and Add.1,<sup>1</sup> A/CN.4/340 and Add.1, A/CN.4/343 and Add.1—4)**

[Item 7 of the agenda]

#### **DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (concluded)**

ARTICLE 8 (Consent of State),  
ARTICLE 9 (Voluntary submission),  
ARTICLE 10 (Counter-claims), and  
ARTICLE 11 (Waiver)<sup>2</sup> (concluded)

1. Mr. SUCHARITKUL (Special Rapporteur), summing up the discussion of draft article 9, said that he appreciated the comments made by Mr. Calle y Calle, which had provided further clarifications of the line of thinking he (the Special Rapporteur) had pursued in his third report (A/CN.4/340 and Add.1). He would make every effort to incorporate the drafting suggestions made by Mr. Evensen, Mr. Jagota, Mr. Ushakov and Mr. Quentin-Baxter in the redraft which he would prepare. He was grateful to Mr. Reuter and Mr. Ushakov for raising an interesting point concerning the stage in legal proceedings when active participation by a State or one of its authorized representatives was considered as consent to submit to jurisdiction.

2. He could accept Mr. Reuter's suggestion that the ways of expressing consent should be rearranged in chronological order: before the dispute arose, when a certain stage had been reached in the legal proceedings, or after the dispute arose. In that connection, he said that Mr. Reuter's understanding of paragraph 61 of the third report had been correct: the paragraph had been intended to refer to the form of consent and to the requirement of the expression of consent that had to be satisfied in accordance with the test established by the court concerned. It had nothing to do with the interpretation of consent given in a treaty, an international agreement or a contract; that matter had been dealt with in other paragraphs of the report.

<sup>1</sup> *Yearbook . . . 1980*, vol. II (Part One).

<sup>2</sup> For texts, see 1657th meeting, para. 1.

3. He was of the opinion that draft article 9 could now be referred to the Drafting Committee, for consideration in the light of the Commission's discussion.

4. The CHAIRMAN suggested that draft article 9 should be referred to the Drafting Committee.

*It was so decided.*

5. Mr. SUCHARITKUL (Special Rapporteur) said that draft article 10, on counter-claims, followed on logically from draft article 9, on voluntary submission, since there could be no counter-claim against a State unless and until that State had submitted to the exercise of jurisdiction by instituting proceedings before the court concerned. The question to be decided in respect of counter-claims was the extent to which they could operate. He had indicated in the report that State practice was changing and that there was now a tendency to equate the effects of counter-claims against a State and the effects of counter-claims by a State. The effect of a counter-claim by a State was, of course, the same as if the State had intervened in proceedings on the merits.

6. Referring to draft article 11, he said that in the practice of many countries waiver was almost identical to other forms of consent, except that it was perhaps more dignified. A waiver of immunity thus had the same effect as submission to the exercise of jurisdiction. In the past, formalities in the courts of territorial States had sometimes been quite rigid, and waiver had had to be effected by a State expressly *in facie curiae*. At present, however, the trend was to consider that a State was bound by an undertaking given in advance in an express provision of a treaty, an international agreement or a contract. Since there was some overlapping between an expression of consent by waiver and an expression of consent given in a treaty or a contract, counter-claims and waiver might be treated simply as different, but equally important, forms of the expression of consent.

7. Mr. USHAKOV, referring to the Commission's discussion of the recent evolution of practice regarding the jurisdictional immunities of States, said that while there were divergent trends, all were based on the principle of State immunity. Even the 1972 European Convention on State Immunity<sup>3</sup> mentioned in its preamble "a tendency to restrict the cases in which a State may claim immunity before foreign courts", and therefore recognized implicitly the principle of immunity as the basis of its provisions.

8. In his opinion, that convention reflected a tendency which, while real, was none the less peculiar to western countries, or, at least, to some of them. In one of his statements on the topic, Mr. Jagota (1656th meeting) had rightly noted that there were also contrary tendencies, followed especially by developing

countries and socialist countries. Perhaps the Commission should seek to determine which was the dominant tendency. At all events, the tendency which characterized the position of the western countries stemmed from their reaction to the attitude of developing countries, which, to defend their interests, now invoked for their own benefit the concept of absolute State sovereignty, particularly in cases of the nationalization of enterprises.

9. Article 10 was acceptable in principle, since a State which had initiated a legal proceeding before the courts of another State must allow for the possibility of a counter-claim. In the other cases of submission, the situation was, however, less clear. In particular, the expression "in which a State intervenes" (in paragraph 1) should be made more explicit, since the notion of counter-claim referred solely to the case in which a State had brought an action and in which another party made a claim in return.

10. With regard to article 11, he had some doubts concerning the possibility of making any express statement of rules on waiver as such, and thought that it would be preferable to make a distinction between waiver, which was general in scope, and the lifting of immunity, which was limited in scope and did not affect the absolute immunity of the State. Thus, the 1961 Vienna Convention<sup>4</sup> provided, in its article 32, that the immunity from jurisdiction of diplomatic agents enjoying immunity might be waived by the sending State. That immunity was attributed to the State as a subject of international law, and the State could waive it, not for itself, but for one of its organs or agents. It was more accurate to say that the State lifted the immunity enjoyed by the agent in question but did not waive it for itself in general. It would be preferable, therefore, to refer to lifting of immunity, since the draft articles concerned only the cases in which a State caused immunity to cease solely with respect to a precisely defined matter or action.

11. In sum, he agreed in principle with the two draft articles, although he had some general reservations in their regard.

12. Mr. RIPHAGEN said that it might be necessary to insert a saving clause in draft article 10 to take account of the fact that, in many cases, the procedural rules of national courts, some of which were more restrictive than others, placed limitations on the admissibility of counter-claims.

13. The relationship between the four paragraphs of draft article 10 would, in his view, have to be made clearer. Paragraph 1 laid down a number of conditions for the admissibility of a counter-claim from the point of view of immunity. The "facts" referred to in subparagraph 1 (b) might, however, be relevant to various legal relationships and the use of the words "the same legal relationship or facts" was, therefore, a

<sup>3</sup> See 1663rd meeting, footnote 5.

<sup>4</sup> See 1654th meeting, footnote 4.

potential source of confusion. When read in the light of subparagraph 1 (c), paragraph 2 seemed to indicate that a counter-claim would be admissible only if the relief in question was a matter of amount, not a matter of difference of kind—which would, moreover, not necessarily have the effect of set-off. The wording of those two paragraphs should therefore be tidied up.

14. The Drafting Committee would probably also be able to tidy up the wording of paragraph 3, which was the same as that of subparagraph 1 (c) and gave rise to the same difficulty in respect of paragraph 2. Did paragraph 3 mean that paragraph 2 was also applicable in the case of voluntary submission? Was subparagraph 1 (a) also applicable in the case of voluntary submission? It seemed to him that the answer to that second question should be yes, because subparagraph 1 (a) referred to counter-claims that would be admissible if jurisdiction could be exercised if separate proceedings had been instituted. That should be indicated somewhere in the text of article 10. It should also be made clear whether paragraph 2 would apply if a counter-claim operated as a set-off with respect to amount.

15. Mr. FRANCIS said that Mr. Ushakov had rightly pointed out that the practice of the socialist and developing countries with regard to jurisdictional immunities differed from that of the developed countries. The developing countries, which regarded privileges and immunities as a means of protecting their sovereignty, were faced with a problem because there was now a growing tendency in the developed countries to restrict the scope of such immunities. He was not entirely sure that the reciprocal basis of State immunity would provide a complete answer to that problem. The only other alternative was thus the elaboration by the Commission of draft articles on jurisdictional immunities that would take account of the realities of the present-day world and be acceptable to all countries.

16. In his view, the reference in draft article 10, paragraph 1, to the intervention of a State in legal proceedings in a court of another State might usefully be qualified by a reference to “merits” and to cases where immunity was not claimed. He hoped that the Special Rapporteur still held the view he had expressed at an earlier meeting, namely, that “a rider should perhaps be incorporated in paragraph 4 of draft article 10 to the effect that there was an implied condition that the principal claim arose out of the same transaction or legal relationship as the counter-claim” (1657th meeting, para. 8). Such a rider would bring that paragraph into line with paragraphs 78 and 79 of the Special Rapporteur’s report.

17. He agreed with the distinction that had been drawn by Sir Francis Vallat (1664th meeting) between express consent and implied consent and said that, in his opinion, article 11, on waiver, could be included in article 8, because an express waiver would amount to a direct expression of consent.

18. Mr. JAGOTA said that all members of the Commission were well aware of the reasons why the Commission had been requested to prepare draft articles on the question of the jurisdictional immunities of States and their property and how sensitive that question could be in practice. In that connection, he referred to the statement he had made at the 1656th meeting, when he had said that the world now had two separate legal regimes, one operating mainly in the United States of America, the United Kingdom and most of Europe, and the other operating in the socialist and the developing countries.

19. The regime of the socialist and developing countries was the traditional one that had prevailed in international law until the 1970s. However, a new trend had emerged in recent years, primarily as a result of increased trading activities which were carried on not only by developed countries *inter se*, but also by the socialist countries and developing countries, in pursuit of rapid economic growth. Indeed, the current trend in the socialist States seemed to be not to claim immunity in respect of the commercial activities of States or State trading organizations. Such trading organizations thus had the legal capacity both to sue and to be sued, even in foreign courts.

20. While the distinction between sovereign and non-sovereign or commercial acts of State had not yet been recognized by the developing countries, it might eventually be so recognized, because those countries’ trading organizations and supply agencies were being subjected to the exercise of the jurisdiction of foreign courts, both in developed countries and in other developing countries. For the time being, however, the developing countries were particularly anxious to ensure that their policies should not be subject to review by other countries and that their property, particularly funds deposited in banks in other countries, should not be subject to seizure.

21. In view of those trends and of the expectations of the international community, the Commission had been right to decide not to follow the model of the European Convention on State Immunity, which proceeded from the exceptions to immunity (arts. 1 to 14) to the general principle of immunity (art. 15), and to move instead from the general principle to the exceptions. That would help to make the draft articles acceptable to as many members of the international community as possible.

22. It made no real difference to him whether draft articles 10 and 11 were combined or left as separate provisions. That was a matter for the Drafting Committee to decide.

23. Since he had not been convinced by the argument contained in paragraph 80 of the Special Rapporteur’s report, he was not sure that the distinction which the Special Rapporteur had drawn between counter-claims against the State and counter-claims by the State would serve any useful purpose in article 10. He would

therefore appreciate it if the Special Rapporteur would explain the basis for that distinction, which seemed to imply that a counter-claim against the State was restricted to the amount of the State's claim, while a counter-claim by the State could exceed the amount of the principal claim. That distinction did not appear in article 1, paragraph 2, of the European Convention on State Immunity. Should there be some basis for the distinction, it might well serve as a useful tool for legal advisers to Governments in cases where counter-claims were possible.

24. It seemed to him that the only specific points that were being made in draft article 11 were that waiver must either be effected expressly *in facie curiae* or in advance in a treaty, an international agreement or a contract. Paragraphs 3 and 4 of that draft article were general provisions that could also apply to draft articles 8 and 9. He therefore suggested that article 11 should be examined by the Drafting Committee in relation to other ways of expressing consent.

25. Mr. CALLE Y CALLE considered that draft articles 10 and 11 were complete and required only a few drafting improvements. He thought it logical that the State which renounced its immunity by instituting an action before a foreign court should also accept the jurisdiction of that other State with regard to a possible counter-claim. Similarly, the State which brought a counter-claim before a court of another State recognized the jurisdiction of the latter in respect of the principal claim.

26. In article 10, paragraph 1, however, the expression "in which a State intervenes" was ambiguous, since it was so general that it could also refer to intervention of the State before the court in order to invoke its immunity and so avoid its jurisdiction. It would therefore be desirable to eliminate the notion of intervention or to state its meaning in more precise terms.

27. Article 10, subparagraph 1 (a), referred to the nature of the claim and permitted the exercise of the jurisdiction of the court seized if, by its nature, the matter of the counter-claim fell within that jurisdiction as defined by the relevant draft articles. He noted that the European Convention on State Immunity laid down, in article 1, a different point of departure to achieve the same result. If the Commission's draft articles were to reflect the tendency towards the reduction of immunities on which the European Convention was already based, the "present" articles mentioned in article 10, subparagraph 1 (a), would have to contain a list of instances in which immunity would not apply.

28. He observed that paragraph 2 referred to defensive counter-claims brought against a State, and that paragraph 4 defined the scope of submission in terms corresponding to those of article 1 of the European Convention.

29. Article 11, devoted to waiver, distinguished between two types of express waiver: waiver *in facie curiae* or waiver by prior assent, in a treaty, an international agreement or a contract in writing. Paragraph 3 was concerned with the implicit waiver deriving from the conduct of the State (a notion also used in the 1972 European Convention), with, however, a restriction concerning which he would like the Special Rapporteur to indicate to what specific situation it referred.

30. Mr. DÍAZ GONZÁLEZ said that he wished to comment on a phenomenon noted by several members of the Commission, namely the existence of several trends of opinion within the Commission. The explanation of that situation lay in the fact that contemporary international law could not be codified and developed according to the same principles as classical international law. That meant that the Commission's draft articles must be a reflection of present-day trends and take account of the various legal systems represented in the Commission.

31. At the beginning of the century, the new States of Latin America had been victims of acts of aggression on the part of various Powers, which had cited the principle of jurisdictional immunity of States as the main reason for their action. Those Powers had feigned complete ignorance of domestic law to concern themselves with matters relating not to acts performed in the exercise of public authority, but to private or semi-private acts. However, the jurisdictional immunity of States could exist only when there was respect for sovereignty, which was itself based on the principle of the legal equality of States. That was why one of the current tendencies, which was quite widespread, was to distinguish between acts performed in the exercise of public authority and acts which a State performed *jure gestionis*, or as an individual. French jurisprudence, which made such a distinction, recognized jurisdictional immunity only with regard to acts of the former category.

32. The Commission had been led to consider that consent was a fundamental element of the draft articles submitted by the Special Rapporteur. Whatever its form, such consent was, and must be, voluntary. It was for each State to decide, of its own will whether or not to submit to the jurisdiction of another State. However, will did not create law; it recognized it. Will could only have legal effects if it was manifested in the forms provided for by positive law, which in the case in question meant domestic law. Once the principle that consent of the State was essential was accepted, it was necessary to specify the means whereby such consent should be expressed as a manifestation of will, as well as the exceptions to that principle. It was essential to elaborate general rules which took account of current trends in the practice of States. The Special Rapporteur's draft articles contained the necessary elements for the elaboration of such rules. That task could be entrusted to the Drafting Committee.

33. A rule of international law could not be drafted on the basis of one trend alone; for that reason, the information provided by members of the Commission concerning the procedures to be observed in particular legal systems for a manifestation of will to be regarded as implying reliance on, or waiver of jurisdictional immunity would be very useful.

34. Sir Francis VALLAT, referring to observations made by a number of speakers, said that nationalization could be as much a tool or weapon of the developed countries as of the developing countries. The consequences of nationalization, combined with extensive application of State immunity, in the developed countries could be very serious. For example, in a developed country, a very large oil corporation which, while not nationalized, had very close links with the State, could easily be made an entity of that State. Such a measure would have serious consequences for many developing countries if an unduly extensive application of State immunity was allowed. The nationalization of banks could also have serious consequences, particularly when the banks in question were those dealing with large private accounts, which inevitably had contractual relations having effect in the territory of other States. If such banks became part of a State entity and were accorded immunity from suit in other States in respect of all contractual interests, the consequences for the financial world would be very serious.

35. Consequently, nationalization should not be regarded as a phenomenon occurring solely in the developing countries, but as one which could also occur in the developed countries, with serious effects on the interests of developing countries.

36. Mr. SUCHARITKUL (Special Rapporteur), summing up the Commission's consideration of draft articles 10 and 11, said that a general consensus appeared to have emerged concerning the principle of consent to the exercise of jurisdiction by the court of another State and the various methods of expressing such consent. He hoped to be able to take full account of all the points raised in redrafting the articles for consideration by the Drafting Committee.

37. Referring to observations made by Mr. Jagota, he said that the division of counter-claims into those made by a State and those made against a State was quite useful from the analytical point of view. A counter-claim by a State was an act whereby a State submitted to the jurisdiction of the court of another State, whereas a counter-claim against a State was a direct consequence of an earlier submission to jurisdiction by the State itself. However, as Mr. Aldrich had pointed out, a discrepancy existed between the effects of those two types of counter-claim as far as the question of immunity was concerned. That discrepancy should be eliminated—although section 1607 of the *Foreign Sovereign Immunities Act of 1976*<sup>5</sup>

<sup>5</sup> See 1656th meeting, footnote 5.

indicated a trend away from that direction in United States legislation.

38. With regard to comments made by Mr. Calle y Calle, he said that the European Convention on State Immunity provided States with the possibility of raising a plea of immunity after they had taken steps in proceedings. Moreover, under some national legislations such a claim could be entered at any point up to the time of judgement.

39. With regard to the question of State intervention, he said that while some terminological amendment might be required, the provision in question was useful, particularly in cases where proceedings were instituted not against a State directly, but against an agency of the State. It would be too simple to infer consent on the part of a State which was far removed from the venue of the proceedings if no provision were made for the possibility of justified State intervention.

40. In the light of the debate in the Commission, he was prepared to regroup draft articles 8, 9, 10 and 11 into one or two draft articles for consideration by the Drafting Committee.

41. The CHAIRMAN suggested that draft articles 10 and 11 should be referred to the Drafting Committee.

*It was so decided.*

*The meeting rose at 12.40 p.m.*

## 1666th MEETING

*Thursday, 4 June 1981, at 10.10 a.m.*

*Chairman:* Mr. Doudou THIAM

*Present:* Mr. Calle y Calle, Mr. Dadzie, Mr. Diaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

### Visit by a Member of the International Court of Justice

1. The CHAIRMAN welcomed Mr. Ago, Member of the International Court of Justice and former member of the International Law Commission, whose presence confirmed the longstanding relationship of respect and friendship between the Court and the Commission. He requested Mr. Ago to convey to all the Members of the Court and to its Registrar the best wishes of the Commission.

2. The Commission had the honour of counting among its former members a number of Judges of the

Court, which had served to draw closer not only personal ties of friendship and affection but also professional ties within the international legal fraternity. The work of the Commission in codifying and progressively developing international law and the work of the Court as the highest judicial organ at the international level were part and parcel of the same aspiration: to promote harmonious and friendly relations between the members of the international community on the basis of international law and justice.

3. Mr. Ago's monumental and untiring service to the Commission through, *inter alia*, his work on the topic of State responsibility had been recognized in a resolution adopted by the Commission the previous year. His visit coincided with the Commission's resumption of its consideration of the topic of State responsibility and, more particularly, that of the second report by Mr. Riphagen on the content, forms and degrees of international responsibility.

4. Mr. AGO said that he was happy to be present when the Commission was about to take up once again Part 2 of the draft concerning State responsibility and to hear Mr. Riphagen, the Special Rapporteur, introduce his second report. He was pleased to note that the topic of State responsibility continued to be a main concern of the Commission and that, through Mr. Riphagen's devoted industry, the work undertaken by the Commission on that fundamental chapter of international law was still highly topical. He also welcomed the fact that Governments were beginning to submit observations on the draft articles relating to Part 1 of the topic of State responsibility.

5. The visit to the Commission of the President or Members of the International Court of Justice had often provided an opportunity to bring up the question of co-operation between those bodies, each of which had as its purpose the subject of international law, its definition, development and application. What had in the past seemed sometimes a formula of mutual courtesy had come to have an extremely real significance. The work of the Commission, particularly its achievements with respect to the law of the sea and the law of treaties, had long been reflected in the judgments of the Court, and it might be thought that it would be so reflected in future judgments. Other achievements of the Commission had been mentioned in the Court's hearings and even in its judgments. In a recent case, many references had been made in the parties' expositions to principles set forth by the Commission with respect to diplomatic law and State responsibility, and the Court had itself referred to those principles in the arguments put forward to support its conclusions. In their turn, the positions adopted by the Court could undoubtedly have an influence on the future work of the Commission.

6. However, there were additional contemporary reasons why co-operation between the Court and the

Commission should become even more intense and active. It was essential that the Court and the Commission should co-operate in actually defending the law in the field of international relations. It was by no means unheard of, in current circumstances, for superficial observers to advocate making a kind of distinction between "classical" international law—allegedly old, if not indeed obsolete—and a "new" international law covering new areas and more closely attuned to the recent aspirations and needs of the international community. Those views were unacceptable to anyone with a substantial knowledge of the realities of the life of the international community and its law. International legal rules should certainly be gradually extended to new areas with which the law had not so far been concerned, or had been involved to a limited extent only. Those rules should, however, be carefully thought out and should genuinely meet the acknowledged needs of the whole community. It was essential, in particular, that new rules thus developed should be grafted on to the solid trunk of existing international law. In any event, the Commission had been well advised when, in drawing up its programme, it had given priority to the task of first codifying all the essential branches of international law. That was, moreover, its institutional mandate.

7. The Commission had also had the merit of demonstrating that the codification and progressive development of international law, which it was its object to promote, were not tasks to be pursued separately, but tasks to be carried on together in the definition of all the topics under consideration. Whatever the matter proposed, codification should be both the reaffirmation of the still topical rules of existing law and the affirmation, in the form of gradual development, of the modifications necessitated by the changes in the international community and its way of life. In that approach, there could be no codification without gradual development. It would, in particular, be very dangerous to lose sight of the fact that, following the profound changes that had occurred in the composition of the community of States, it had become both essential and urgent to define anew, and with the participation of all concerned, the old customary law, to redefine it, to supplement it, and to invest it with the clarity characteristic of written, conventional law. On the basis of the fulfilment of that primordial task, it would then be possible to turn attention to the consideration of new matters and to add an organic supplement to the rules inherited from past centuries.

8. He was thus convinced that the Court and the Commission were called upon to co-operate even more closely, not limiting themselves to mere reciprocal borrowing of each other's work, to safeguard international law and the essential function it fulfilled in the life of the international community.

## State responsibility (A/CN.4/344)

[Item 4 of the agenda]

### *The content, forms and degrees of international responsibility (Part 2 of the draft articles)*

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

9. The CHAIRMAN invited the Special Rapporteur to introduce the draft articles submitted in his second report (A/CN.4/344, para. 164), which read:

##### *Article 1*

A breach of an international obligation by a State does not, as such and for that State, affect [the force of ] that obligation.

##### *Article 2*

A rule of international law, whether of customary, conventional or other origin, imposing an obligation on a State, may explicitly or implicitly determine also the legal consequences of the breach of such obligation.

##### *Article 3*

A breach of an international obligation by a State does not, in itself, deprive that State of its rights under international law.

##### *Article 4*

Without prejudice to the provisions of article 5:

1. A State which has committed an internationally wrongful act shall:

(a) discontinue the act, release and return the persons and objects held through such act, and prevent continuing effects of such act; and

(b) subject to article 22 of Part 1 of the present articles, apply such remedies as are provided for in, or admitted under, its internal law; and

(c) re-establish the situation as it existed before the breach.

2. To the extent that it is materially impossible for the State to act in conformity with the provisions of paragraph 1 of the present article, it shall pay a sum of money to the injured State, corresponding to the value which a fulfilment of those obligations would bear.

3. In the case mentioned in paragraph 2 of the present article, the State shall, in addition, provide satisfaction to the injured State in the form of an apology and of appropriate guarantees against repetition of the breach.

##### *Article 5*

1. If the internationally wrongful act is a breach of an international obligation concerning the treatment to be accorded by a State [within its jurisdiction] to aliens, whether natural or juridical persons, the State which has committed the breach has the option either to fulfil the obligation mentioned in article 4, paragraph 1, under (c), or to act in accordance with article 4, paragraph 2.

2. However, if, in the case mentioned in paragraph 1 of the present article,

(a) the wrongful act was committed with the intent to cause direct damage to the injured State, or

(b) the remedies referred to in article 4, paragraph 1, under (b) are not in conformity with an international obligation of the State

to provide effective remedies, and the State concerned exercises the option to act in conformity with article 4, paragraph 2, paragraph 3 of that article shall apply.

10. Mr. RIPHAGEN (Special Rapporteur), introducing the draft articles, said that State responsibility constituted only one link in the chain of the process of international law, which extended from its formulation to its enforcement. In theoretical terms, wrongful acts could be regarded as creating a new situation to which new rules would have to be applied, or else they could be seen as acts to be wiped out as far as possible, with measures being taken to prevent their recurrence. In practice, however, the approach adopted fell somewhere between those two possibilities, since in the event of a breach of an international obligation, an attempt was made to find a substitute for the performance of that obligation. In determining the legal consequences of the wrongful act, account must be taken of the concept of proportionality between the act and the response to it. However, such proportionality could only be approximate, given the infinite variety of possible factual situations, of which the wrongful act constituted only a single element.

11. In his report, he had attempted first to define the fundamental structural difference between international law and internal law. Because of the peculiar character of the international community, international law was subject to constraints which did not exist within the framework of internal law. For example, no central authority existed to establish a situation which was in complete conformity with the rules of international law. In that connection, the link between primary rules, rules of State responsibility, and the implementation of State responsibility should be borne in mind.

12. In preparing rules for possible inclusion in a future convention, the Commission was attempting to state the rights and responsibilities of States and to provide guidelines for international courts and tribunals. In that regard, it should be remembered that the legislator was not in the same position as a judge, who dealt with specific situations and acted as a central authority above the interests of the parties concerned. Judges might also be empowered to go beyond what could be provided in a general rule of international law in determining the rights and obligations of the States that were parties to a dispute. Examples of such special powers were those accorded to the tribunal in the *Trail Smelter* case (see A/CN.4/344, para. 42) and those envisaged in article 290 of the Draft Convention on the Law of the Sea.<sup>1</sup> On the other hand, there were many examples of arbitration tribunals lacking the power to award punitive damages in cases in which they were deemed to be warranted. Consequently, care must be taken not to translate into a general rule of international law a

<sup>1</sup> "Draft Convention on the Law of the Sea (informal text)" (A/CONF.62/WP.10/Rev.3 and Corr.1 and 3).

pronouncement made by an international court or tribunal in the exercise of such special powers.

13. Referring to chapter II, section B, of his report, he said that one obvious difference between earlier plans of work and his preliminary report was the emphasis placed in the report on the rule of proportionality. That expression should not be interpreted as meaning a rule which would ensure complete proportionality between a wrongful act and the response to it; such a provision would not be conceivable in international law. It might be preferable to think of such a rule as being intended to prevent disproportionality, by precluding particular responses to particular breaches.

14. In view of the foregoing considerations, he had concluded that it might be useful to begin the draft articles by stating a number of very general principles.

15. The general principle stated in draft article 1, while it might appear self-evident, was nevertheless worth restating, given the different approaches to international law which existed.

16. The principle contained in draft article 3 was the counterpart of that in draft article 1, in that it stated that a breach of an international obligation did not, in itself, deprive the author State of its rights under international law. That principle was of particular importance in modern international law, in which account was taken of the interests of entities other than States, while the rules of international law were still addressed to States. Consequently, it was more necessary than ever to protect the interests of entities other than States if a wrongful act was committed by a State.

17. The principle stated in draft article 2 contained no new element and was in conformity with a statement made by the Commission in its commentary on article 17, contained in Part 1.<sup>2</sup> It would seem useful to state the rule in the body of the draft articles, rather than simply in a commentary, since such special regimes did exist in specific treaties, and since it underlined the residual character of the rules to be proposed in the draft articles. Such special regimes might also exist in customary international law, as had been pointed out in the Judgment of the International Court of Justice in the case *United States Diplomatic and Consular Staff in Teheran* (see A/CN.4/344, para. 59).

18. In chapter II, section D, 1, he had considered the first parameter from the theoretical point of view, and had described the three steps which resulted from the fact that a wrongful act had been committed. Thus, the first step to be taken by the author State was to stop the breach of its international obligation; the second was to make reparation as a substitute for performance of the primary obligation; the third was to restore the situation which the primary obligation had

sought to ensure or, in other words, to provide *restitutio in integrum, stricto sensu*, including, in principle, retroactive measures. It was, of course, obvious that those three steps depended upon the factual possibilities existing after the breach had occurred. The author State could clearly not undo what had been done and could not reconstitute the past. It had therefore to find a substitute performance.

19. The three steps associated with the new obligations of the author State placed a burden on it, and the question therefore arose whether it had an obligation in all cases to take the three steps discussed in the report, regardless of the nature of the obligation breached. It should also be borne in mind that many rules of international law drew a distinction between the direct rights of a foreign State and the rights the foreign State had in the person of its nationals. From a theoretical point of view, it might be wondered whether the same distinction should be made in respect of the content of the new obligations of the author State arising out of a wrongful act. No doubt because of the many factors involved, it was not easy to find such a distinction in the decisions and awards of international tribunals.

20. Account must also be taken of the qualitative difference between various breaches and of quantitative factors such as the attitude of the author State and the seriousness of its breach. Such factors could influence the decisions to be taken concerning the obligations of the author State and the amount of damages to be paid in particular cases. From the theoretical point of view, the peculiarities of the factual situation and the character of the breach were clearly relevant, as was pointed out in the summary of the analysis of the steps associated with the new obligations of the author State contained in paragraphs 99 to 104 of the report.

21. In chapter II, section D, 3, he had attempted to test those theoretical considerations in the light of judicial and arbitral decisions, State practice and doctrine, on which a great deal of research had already been carried out in connection with the first part of the draft articles.

22. The decisions of international courts and arbitral tribunals were necessarily taken within the special framework of their particular mandate and powers. Such decisions were usually taken long after the alleged breach had been committed, and more often than not they dealt with both the determination of the existence of the breach and its legal consequences. It was, moreover, not always easy to see how international courts and arbitral tribunals arrived at their final decisions, particularly as concerns the amount of damages awarded. In addition, the position of a judge in a specific case was quite different from the attitude which the Commission must adopt in trying to determine *in abstracto* what were the new obligations of the author State.

<sup>2</sup> See *Yearbook . . . 1976*, vol. II (Part Two), pp. 80 *et seq.*

23. Accordingly, the Commission might do well to take a closer look at the sometimes sweeping statements made in judicial decisions. It was interesting to note that courts very seldom found *restitutio in integrum, stricto sensu*, including retroactive measures, to be a consequence of a wrongful act. In practice, there were many cases in which an alleged wrongful act by a State gave rise to protests and diplomatic claims by another State and resulted in the adoption by the author State of measures to stop the breach—for example, by releasing persons who had been wrongfully imprisoned or giving back money or goods that had been wrongfully taken—but such measures did not amount, in his view, to *restitutio in integrum*. Indeed, in most cases, courts ordered *restitutio in integrum* only when they were themselves ordered to do so by their statutes or by the powers entrusted to them, as, for example, in the cases decided by the Conciliation Commissions set up under the Peace Treaty with Italy (see A/CN.4/344, paras. 118–119). Thus, if a treaty provided for the restitution of property, rights and interest, the court concerned would, of course, order such restitution, but that was not, in his opinion, the normal case.

24. One recent decision that had gone into the matter was the arbitral award of 19 January 1977 in the case *Texaco Overseas Petroleum Company/California Asiatic Oil Company v. Government of the Libyan Arab Republic* (*ibid.*, paras. 120–122). In that case, on the basis of “international case law and practice” and “writings of scholars in international law”, the Arbitrator had concluded that he should order *restitutio in integrum, stricto sensu*, which was “the normal sanction for non-performance of contractual obligations” and “inapplicable only to the extent that restoration of the *status quo ante*” was impossible. The principal point made in that award was that *restitutio in integrum, stricto sensu*, including retroactive measures within the territory of the author State, was the normal sanction under international law. Indeed, the Arbitrator in the case had cited Mr. Reuter as having said that *restitutio in integrum* was, in principle, “the most perfect performance possible of the original obligation”. That was no doubt true but, for his own part, he was not sure that it was the normal consequence of the breach of a primary rule of international law.

25. In that connection, he was of the opinion that there might be room for another opinion, particularly in view of the primary rule stipulating the domestic jurisdiction of States, which meant that a State, within its own territory, had to decide on the consequences of certain facts. Obviously, however, that rule of domestic jurisdiction could be qualified by an international obligation. The rule of domestic jurisdiction did not prevent a State from accepting an international obligation, but once the obligation had been breached he wondered whether the normal consequence was that there should be *restitutio in integrum, stricto sensu*. That was a matter for the

Commission to decide, but, in his view, *restitutio in integrum, stricto sensu* was not a normal consequence of the breach of an international obligation.

26. In paragraph 131 of the second report, he had referred to the power of some courts to order interim measures of protection, which might be of interest to the Commission since, in deciding whether or not to exercise such power, a court might come to the conclusion that an obligation that had been breached might be repaired by pecuniary compensation. In that connection, he drew attention to the Judgment of the International Court of Justice in the *Aegean Sea Continental Shelf* case (*ibid.*, para. 134). In his view, that case involved something akin to *restitutio in integrum, stricto sensu*, because if something could be made good in another way there was no place for interim measures of protection. The few cases in which interim measures of protection had been discussed might provide guidance for the Commission on the question of the new obligations of the State whose act was internationally wrongful.

27. The new obligation of the author State to stop the breach of its international obligation could also be regarded as involving an obligation to take the steps provided for in its internal law in cases of wrongful acts and, in particular, in cases concerning the treatment of aliens. Many possible steps that could be taken under internal law might be applicable in international law, subject, of course, to the rule of the exhaustion of local remedies, which provided that the initiative must be taken by the alien concerned, not by the State which had allegedly breached an international obligation. In general, the rule of the exhaustion of local remedies was, in his view, applicable in respect of the obligations arising for the author State after a wrongful act had occurred.

28. Those considerations had led him to propose draft articles 4 and 5, which should certainly not be considered as final provisions. He would point out that, since the idea of an author State being obliged to inflict a penalty on itself seemed alien to the structure of international law, there was no point in the Commission's discussing the distinction between reparations and penalties. There was also no need for it to deal with the wrongful acts which article 19 of Part 1 of the draft articles<sup>3</sup> had defined as “international crimes” and which had no bearing on the new obligations arising from the breach of an international obligation.

29. Lastly, the matters to which he had referred in paragraphs 160 to 162 of his second report would be dealt with in a later report.

30. Mr. ŠAHOVIĆ, having emphasized the quality of the report and expressed his hope that the Commission would be able to examine the analysis and

<sup>3</sup> For the text of the articles in Part 1 of the draft adopted by the Commission on first reading, see *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

conclusions of the Special Rapporteur in some depth, said that he would like to know what method the Special Rapporteur proposed should be used for the consideration of his report. It might be useful to decide from the outset whether the Commission should first hold a general discussion or whether it would be more efficient and appropriate to examine in turn the various articles proposed, discussing general problems as they arose.

31. Mr. REUTER said that the question of international responsibility was a highly complex one and observed that the topic chosen by the Special Rapporteur, of the consequences of the breach of one of its obligations by a State and the nature of the obligations arising from such a breach, was particularly difficult. However, the topic was not wholly new to the Commission, which had already evaluated its scope in connection with its work on the text of the 1969 Vienna Convention on the Law of Treaties,<sup>4</sup> as was clear from article 60 of that instrument, concerning the termination or suspension of the operation of a treaty as a consequence of its breach. Moreover, even in the field of the theory of the shortcomings of consent, the text of the above-mentioned convention had qualified the consequences of those shortcomings to take account of the requirements of responsibility.

32. At the conclusion of his work on Part 1 of the draft articles, Mr. Ago himself had not hidden the fact that the question of the consequences of responsibility would raise immense difficulties, since those consequences could not be uniform because they depended, first of all, on the number of States affected by the breach. The most recent jurisprudence of the International Court of Justice showed clearly that the importance and number of interests involved modified the consequences of the breach.

33. Moreover, the dignity of the rule itself also modified the consequences of the breach, as could be seen, in positive law, from article 60, paragraph 5, of the Vienna Convention. While it was undeniable that *jus cogens* existed, it should nevertheless be asked whether there were degrees of *jus cogens*. Thus, for example, some obligations might concern the human person (through his family situation, for example), and the question of the effectiveness of *restitutio in integrum* could validly be raised. Lastly, the problem of consequences could have a different aspect according to the matter in which it arose.

34. Like Mr. Šahović, he thought that the Commission should select a method. It stood seized of two preliminary articles and two specific articles, and the Special Rapporteur rightly considered that certain fundamental general rules should be laid down. He himself approved the principle and substance of the

three general articles that had been proposed, but noted that it would be necessary to resolve some drafting problems, in particular that of deciding on the wording of the general principles. The Commission should nevertheless decide from the outset of the discussion whether it would first examine the three principles or articles 4 and 5, which were specific in nature.

35. Lastly, he regretted having to recall that, however agreeable it might be, when studying international law, to refer to actual practice by invoking jurisprudence, it should not be forgotten that there was in fact no compulsory international justice, since international justice existed only by consent, that was, on an exceptional basis. It was thus legitimate to wonder whether the Commission should deal in its draft articles with a problem such as that of constraints and obligations at a time when an unduly large number of States reserved their position with regard to international justice. By adopting such an approach, the Commission ran the risk of restricting the general scope of its work, and he was not certain that such a choice would be a fruitful one in the over-all framework of the draft articles.

36. Mr. VEROSTA said he agreed with Mr. Reuter that the Commission should base its discussion of the topic under consideration on the first three draft articles proposed by the Special Rapporteur.

37. Mr. RIPHAGEN (Special Rapporteur) said he, too, thought that the Commission should begin by considering the draft articles which he had proposed. During the discussion the Commission might decide whether the general principles embodied in draft articles 1 to 3 were really necessary and, if so, where they should be placed in the draft articles as a whole.

38. Sir Francis VALLAT said he was of the opinion that the Commission should first discuss the general principles embodied in draft articles 1 to 3 and then go on to consider articles 4 and 5. Such a course of action would enable the members of the Commission to express their general views as might prove necessary.

39. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to begin by considering the first three draft articles proposed by the Special Rapporteur.

*It was so decided.*

*The meeting rose at 1 p.m.*

## 1667th MEETING

*Friday, 5 June 1981, at 10.15 a.m.*

*Chairman:* Mr. Robert Q. QUENTIN-BAXTER

*Present:* Mr. Aldrich, Mr. Calle y Calle, Mr. Francis, Mr. Jagota, Mr. Reuter, Mr. Riphagen, Mr.

<sup>4</sup> 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.

Šahović, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

**State responsibility (continued) (A/CN.4/344)**

[Item 4 of the agenda]

***The content, forms and degrees of international responsibility (Part 2 of the draft articles) (continued)***

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

**ARTICLES 1, 2 AND 3<sup>1</sup>**

1. Mr. RIPHAGEN (Special Rapporteur) said that articles 1, 2 and 3 were intended simply as a frame for the picture that would eventually emerge in the draft articles that were to follow. There was a close relationship between articles 1 and 3, which dealt with what might be called the “non-consequences” of a wrongful act, while article 2 indicated the residual nature of the rules that would apply as a result of a wrongful act.

2. The rules contained in articles 1 and 3 might be considered self-evident, but it was useful to state them because there were many lawyers who were inclined to say that a wrongful act was of such a nature that it caused the law to cease to apply, as was apparent when it was maintained that treaties were invalid because they were not in conformity with the rules that gave effect to them. Invalidity thus reflected the idea that, through wrongfulness, something disappeared.

3. Articles 1, 2 and 3 also laid the foundations for a number of more detailed rules that would be set forth in the rest of Part 2 of the draft. Thus, article 1 laid the foundation for the first duty of any State which had committed a wrongful act, namely, the duty of stopping the breach of its obligation, while article 3 laid the foundation for the rule of proportionality between the wrongful act and the response to that act. Article 2 provided that a rule of international law could, in addition to imposing an obligation on a State, determine the legal consequences of a breach of the obligation. It therefore applied to treaty rules and rules of customary law, such as those of diplomatic law, which constituted self-contained regimes that had their own regulations concerning the consequences of wrongful acts. Article 2 had been placed in its present position because it referred to both articles 1 and 3, and also to the existence of a self-contained regime concerning the relationship between rights and obligations and the relationship between the breach of an international obligation and the rights and obligations that followed from such a breach.

4. Mr. CALLE Y CALLE said it was gratifying that the Commission had decided to refrain from engaging in a general discussion and to proceed forthwith to consider the draft articles submitted by the Special Rapporteur, articles which, indeed, did not seem to require any changes.

5. Articles 1 to 3 set forth the general rules that should apply to the whole of Part 2 of the draft. Article 1 provided that an international obligation in force breached by a State, and made it clear that the new relationships created by the breach did not replace the previous relationships. For his own part, he unreservedly endorsed that analysis. Again, as stated in article 2, a rule of international law could determine the consequences of a breach of the rule in question. At the same time, he fully shared the view reflected in article 3 that the State committing a breach of an international obligation was not deprived of its rights vis-à-vis the State that was affected by the breach.

6. Accordingly, he considered that the three draft articles under discussion had a place at the beginning of Part 2 of the draft.

7. Mr. JAGOTA noted that the Special Rapporteur had explained that article 3 was the counterpart of article 1 and that, when a breach of an international obligation occurred, the obligation itself did not disappear and the author State was not deprived of its rights. Those were sound propositions and would serve as a useful basis for the elaboration of other articles to be included in Part 2.

8. However, the Special Rapporteur had then gone on to explain that a rule of proportionality was built into article 3. Personally, he failed to see how such a rule could be said to exist if article 3 was intended to apply only to the breach of an “original” obligation, and not to the breach of an obligation by means of a countermeasure—in other words, by means of a response which must of necessity be in proportion to the wrongful act if it was not itself to constitute another wrongful act. He would therefore like the Special Rapporteur to explain how the rule of proportionality related to the breach of an “original” international obligation.

9. Mr. RIPHAGEN (Special Rapporteur), replying to the question raised by Mr. Jagota, said that in his opinion the rule of proportionality—or rather the “rule against disproportionality”—was, in a broad sense, an existing rule of international law which played a part in respect of the new obligations of the State that had committed a wrongful act. Article 3 laid the groundwork for the limitations to those new obligations, in other words, for the proposition that the author State was not, in every instance, obliged to re-establish the situation which the original obligation had sought to ensure and that the breach did not deprive the author State of its rights under international law. For example, in humanitarian law, a State which committed a breach

<sup>1</sup> For texts, see 1666th meeting, para. 9.

of an international obligation relating to prisoners of war still had the right to claim that other States should treat its prisoners of war according to the rules, which prohibited retaliation.

10. Sir Francis VALLAT said he could agree that the ideas expressed in articles 1, 2 and 3 should be reflected somewhere in the draft, but he would not go quite as far as had Mr. Calle y Calle. Rather, he was inclined to think that the Commission should examine the wording of the articles both carefully and critically.

11. It seemed to him that the principle of the non-effect of a breach on the force of an obligation, which was enunciated in article 1, was directly related to the principle stated in article 3, that the author of a wrongful act was not deprived of its rights under international law, and that the application of those general principles was qualified by the principle set forth in article 2. Thus, if it was incorrect that a State which committed an act of aggression was, by virtue of that breach of international law, deprived of its right to self-defence, then the provisions of the Charter of the United Nations relating to the maintenance of international peace and security would be a nonsense; on the other hand, if it was indeed correct, what appeared to be an absolute statement in article 3 had to be subject to qualification by the principle embodied in article 2.

12. He hoped that those comments would bring out the importance of the relationship between articles 1, 2 and 3 and of the order in which they were arranged. It might be better to start with articles 1 and 3 and deal with article 2 somewhere else in the draft. The rule stated in article 2 read more like a textbook rule than a rule to be included in a future convention. It should therefore be worded more along the lines of articles 1 and 3. He also experienced some difficulty with the word "may" in article 2, which suggested permissiveness, but the fact was that treaties frequently laid down specific requirements. The words "explicitly or implicitly determine" should also be examined with care, for if something was true under international law it would be explicitly provided for in a rule. Hence, the word "determine" might be replaced by the words "provide for".

13. Again, some caution should be exercised with regard to the use of the words that had been placed in brackets in article 1. Although it was quite evident that a breach of an international obligation would affect that obligation, it was not as obvious that such a breach would affect the force of that obligation. He would also be grateful if the Special Rapporteur would explain the meaning of the words "deprive that State of its rights", which were used in draft article 3 and, because they were very general, seemed to imply that the State might become a kind of outlaw. It might be preferable to say "some rights" rather than speak simply of "rights", which could be taken to signify all rights.

14. Mr. VEROSTA noted that the Special Rapporteur had not provided titles for the proposed draft articles. Admittedly, it would not be difficult to find a title for article 1, but he was at a loss to see how article 2 could be labelled, for as Sir Francis Vallat had pointed out, it did not contain a normative provision. Perhaps the Special Rapporteur could provide further clarifications concerning that article, and the title that it might be given, at a later stage in the Commission's work.

15. He agreed with Sir Francis Vallat that the rule stated in article 3 was too absolute and seemed to imply that a State which committed a wrongful act might be regarded as an outlaw. It was, however, hardly likely that a State which committed an "international crime" under article 19 of Part 1 of the draft<sup>2</sup> would be deprived of all its rights.

16. Mr. RIPHAGEN (Special Rapporteur), replying to the questions raised by Sir Francis Vallat and Mr. Verosta, said that it had been difficult to draft the actual wording of articles 1, 2 and 3, let alone find titles for them. Moreover, the articles should be clear enough without titles.

17. In preparing article 3, he had at one point used the words "all its rights under international law", but, as a lawyer, he had found those words too strong. Clearly, article 3 still required further discussion, and it might even have to be redrafted. The idea he had wanted to express was merely that under the rule of proportionality a breach did not extinguish the rights of the author State. In that connection, he did not fully understand how Sir Francis Vallat's example of an act of aggression would apply as between the aggressor State and the State which was the victim of the aggression, because the aggressor State obviously had no right to self-defence vis-à-vis the victim State. The Commission might give further consideration to that example.

18. Sir Francis's suggestions concerning the wording of article 2 might be taken into account by the Drafting Committee. The article was meant to act as a kind of escape clause, in the sense that any self-contained regime established either by a treaty or by customary law could apply instead of the articles that the Commission was preparing. He had placed article 2 between articles 1 and 3 to make it clear that there was always a possibility of applying a different regime of State responsibility, for such regimes were many, as the Commission had had occasion to note in earlier discussions of the topic.

*The meeting rose at 11.05 a.m.*

<sup>2</sup> See 1666th meeting, footnote 3.

## 1668th MEETING

Tuesday, 9 June 1981, at 3.05 p.m.

Chairman: Mr. Doudou THIAM

*Present:* Mr. Aldrich, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

### State responsibility (*continued*) (A/CN.4/344)

[Item 4 of the agenda]

#### *The content, forms and degrees of international responsibility (Part 2 of the draft articles) (continued)*

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

#### ARTICLES 1, 2 AND 3<sup>1</sup> (*continued*)

1. Mr. FRANCIS commended the Special Rapporteur on his excellent report. He agreed with the view expressed by the Special Rapporteur that Part 2 of the draft articles should begin with a statement of general principles (Chapter 1).

2. With regard to the three parameters for the possible new legal relationship arising from an internationally wrongful act of a State, (see A/CN.4/344, para. 7), he said that the third parameter, which concerned the position of third States, could relate to two possible situations: first, a wrongful act directed against a State and constituting a breach of an obligation in respect of that State, while at the same time unintentionally causing injury to a third State; and second, a wrongful act affecting a State directly and, at the same time, giving other States rights under international law, thus making them third States. While the second possibility was dealt with to some extent in draft article 3, the draft general principles did not seem to encompass a situation in which a third State injured by a wrongful act of another State was eligible for compensation. The draft articles should cover the general situations which were likely to arise and should state general principles as a basis for the more detailed rules to follow. Another aspect which was dealt with in the report, but not in Chapter 1 of the draft articles, was the question of non-recognition, in appropriate circumstances. The general principles should be expanded to cover both those aspects.

3. Referring to draft article 1, he agreed with the view expressed by Sir Francis Vallat (1667th meeting) that, contrary to what seemed to be stated in the draft

article, a wrongful act did affect the obligation of a State in that it represented a breach of that obligation. Accordingly, the words "the force of", which the Special Rapporteur had placed in brackets, were an essential part of the article and should be included in it. On the other hand, the words "as such and for that State" should be deleted, since it was well known that the breach of an obligation by one State did not affect the obligations of other States, and since it was clear from the report that what the Special Rapporteur had in mind was that the breach of an obligation should not affect the legal force of that obligation. It is preferable, however, to qualify the word "force" by either the word "legal" or the word "binding".

4. Draft article 2 seemed to touch only marginally on the essence of what the Special Rapporteur wished to say. As it stood, the article appeared to be a statement of the existence of a rule of international law rather than of the principle formulated in consequence of the existence of that rule. Consequently, the text might be reworded to state that a breach of an international obligation established by a rule of customary, conventional or other origin which imposed specific consequences for its breach would attract such consequences. The draft article might also indicate in general terms that breaches not falling within those categories would attract the consequences established in the draft articles.

5. If, as the Special Rapporteur had stated, draft article 3 was intended to be a statement of the rule of proportionality, it should be redrafted to indicate the extent to which the rule of proportionality related to the action of the injured State, and to that of third States in so far as they were entitled to respond to a wrongful act under international law.

6. Mr. TABIBI congratulated the Special Rapporteur on his excellent report.

7. Whether the Commission was to base its deliberations on the premise that internationally wrongful acts should be sanctioned or on the premise that they should be remedied, the principle of proportionality underlay all the provisions of Part 2 of the draft articles. Moreover, the determination of proportionality was, in itself, a very complex question.

8. In dealing with the topic of State responsibility, the Special Rapporteur and the Commission as a whole must take account of the primary rules of international law and of the new principles of international law developed following the entry into force of the Covenant of the League of Nations, the Charter of the United Nations and the various conventions, declarations and other instruments adopted by the United Nations, in the light of article 19 of Part 1 of the draft articles on State responsibility.<sup>2</sup> Those principles included the maintenance of international peace and security, the self-determination of peoples, the inviol-

<sup>1</sup> For texts, see 1666th meeting, para. 9.

<sup>2</sup> See 1666th meeting, footnote 3.

ability of national frontiers and respect for human rights. The overwhelming majority of States Members of the United Nations were small States, and it was for their protection that those principles existed. Unless, in considering Part 2 of the draft articles, the Commission took careful account of all the basic new developments of international law, it would not only risk damaging the valuable articles contained in Part 1, but would preclude any possibility of completing consideration of Part 3.

9. The general worldwide trend seemed to be towards the swift punishment of offenders, whether they were individuals or States. A reflection of that trend had been the efforts made to establish an international criminal court, which unfortunately had been frustrated by the major Powers. In paragraph 99 of his report, the Special Rapporteur appeared to favour that approach.

10. Turning to the draft articles themselves, he said that articles 1 and 3 as they stood appeared to place more emphasis on measures for the protection of the State committing an internationally wrongful act than on ways of remedying breaches of international obligations.

11. With regard to article 2, he said that if it was intended to be the statement of a rule, it should be made more explicit. The use of the word "may" gave rise to doubts in that regard. If the draft article was not intended to be the statement of a rule, it should be deleted entirely.

12. Mr. ŠAHOVIĆ noted that chapter I (General Principles) was presented by the Special Rapporteur as covering the entire topic of Part 2 of the draft articles on State responsibility. However, a reading of the three articles which formed that chapter created the impression that it did not cover the topic as a whole, and that the principles set forth in it were concerned primarily with the situation of a State which committed a breach of an international obligation. To ensure that chapter I really covered the entire question of the content, forms and degrees of State responsibility it would be necessary for it to enunciate some further general principles relating to the new inter-State relationships resulting from a breach of an international obligation. To that end, account would have to be taken in particular of the second and third parameters mentioned by the Special Rapporteur, namely, the new right of the "injured" State, and the position of the "third" State in respect of the situation created by the internationally wrongful act. In the event that chapter I was not supplemented, articles 1 to 3 might be included in chapter II, which specifically concerned the State author of an internationally wrongful act.

13. In the report under consideration (A/CN.4/344), the Special Rapporteur came to the conclusion that it was not necessary to formulate definitions. He agreed with that view, although the previous year he had

thought it preferable that definitions be given of the new expressions and concepts which the Special Rapporteur would need to use.<sup>3</sup> He stressed, however, the necessity of treating chapter I from a more general standpoint.

14. While article 1 reflected in fact the situation of a State which committed a breach of an international obligation with regard to that obligation, the provision was perhaps not entirely adequate. It might be necessary for it to refer to the new obligations of the State in question: the legal consequences of the breach of the obligation. That question was dealt with in article 2, but the Special Rapporteur had himself indicated that article 2 served to explain both article 1 and article 3. However, article 2 contained several elements which could be developed in other provisions. In particular, article 1 might be enlarged and no longer deal with only one aspect of the new relationships between States arising from an internationally wrongful act.

15. As for article 3, it called for a similar comment. As Mr. Tabibi had stressed, the provision seemed to be a clause designed to safeguard the rights of the State that had committed an internationally wrongful act. It would be necessary to indicate, in article 3, that the breach of an international obligation by a State, while not depriving that State of its rights under international law, imposed other obligations upon it.

16. Mr. SUCHARITKUL congratulated the Special Rapporteur on his excellent report, in which he had managed to introduce clarity and simplicity into a difficult topic.

17. He agreed with the Special Rapporteur's proposition concerning the concept of proportionality. To be complete and comprehensive, the draft articles should take account not only of the obligation on the part of the author State to cease its wrongful act but also of the consequences arising out of that wrongful act. Although the obligation of the author State would clearly be to make restitution, as far as possible, for its act, it should be remembered that some damages were irreparable, and therefore called for various types of compensation. As the Special Rapporteur had said, the author State was also under an obligation to apologize for its conduct and to undertake not to repeat the breach in the future.

18. Referring to draft article 1, he said that, while it was true that an obligation, although breached, remained an obligation, it was difficult to state that principle adequately. Some obligations were of a continuing nature, while others were not. Consequently emphasis should be placed on the new obligation of the State to continue to respect the obligation it had breached, whether that obligation was a new one or a continuation of the existing obligation.

<sup>3</sup> See *Yearbook ... 1980*, vol. I, p. 83, 1599th meeting, para. 19.

19. Referring to draft article 2, he said that some strengthening of the wording might perhaps be called for. Moreover, the provisions of the article might not be consistent with those of article 3, since the legal consequences determined by a rule of international law might include a curtailment of the rights of the State that had committed the breach, whereas article 3 stated that those rights would continue to be protected. Moreover, as far as the question of outlawing States was concerned, it should be remembered that States could be suspended or even expelled from the international community for having committed serious breaches of their international obligations. Consequently, it might be advisable to qualify the provisions of draft article 3.

20. Mr. VEROSTA asked whether the Special Rapporteur could give the tentative titles of chapters III and IV of the draft articles, which were to deal with the second and third parameters referred to in paragraph 7 of his report.

21. If chapter I was to deal also with the second and third parameters, he wondered whether it might not be necessary to add to the general principles stated therein. Like other speakers, he felt that the general principles stated thus far were too favourable to the State that had committed the internationally wrongful act, and that additional principles might give greater emphasis to the new obligations of that State, the new rights of the injured State and the attitude of third States.

22. Mr. RIPHAGEN (Special Rapporteur) said that it had been his intention that chapter III of the draft articles should deal with the second parameter concerning the new rights of the injured State, which might not entail more than a suspension of its obligations. Chapter IV would deal with the position of third States, and might necessitate a subdivision between the new rights and the new obligations of third States.

23. Referring to the second question asked by Mr. Verosta, he said that the general principles contained in chapter I were intended to apply to the whole of Part 2 of the draft articles. In fact, articles 2 and 3 were probably more relevant to the second and third parameters than to the first. Of course, the possibility could not be excluded that in the course of its deliberations the Commission might discover other general principles.

24. Mr. USHAKOV said he doubted whether, in legal terms, one could speak of a rule of proportionality, since such a principle in fact existed only with respect to the philosophy of law, as a general idea proceeding from the natural, social and political logic upon which the law was based.

25. In order to justify such a rule, it was assumed that wrongful acts caused a more or less serious danger to human society, which, through its internal law, defended itself in proportion to the danger by providing a scale of punishments in the area of

penalties, with the legal consequences of the offence being more or less heavy according to the danger presented by the wrongful act. The same would hold true in international law, where the community of States provided the heaviest sanctions for the most serious offences. Such a concept was not, however, a characteristic of law, but proceeded from metalegal logic. It should not be forgotten that another concept was applied in law, based upon the intentional nature of the offender's behaviour, with an offence committed through negligence entailing less heavy consequences than a premeditated act.

26. The Commission should therefore bear in mind that the so-called "rule of proportionality" did not exist as a rule of international law, the role of which was, on the contrary, to establish the consequences of every wrongful act precisely. The principle of proportionality, which governed internal law as well as international law, was not a rule characteristic of law itself from which universally applicable legal consequences could be drawn.

27. Furthermore, he was afraid that the Special Rapporteur might be construing the concept of *restitutio in integrum* in a general sense, valid for all forms of State responsibility. Such a position would be indefensible. *Restitutio in integrum* was only really possible in the area of material responsibility and, more particularly, in the case of damage to things or property. It seemed inapplicable, however, in the area of political responsibility, since it was difficult to see how it could work, for example, in the case of an act of aggression by one State against another. It was even quite impossible in the event that the State that had been the victim of the act of aggression had lost some human lives which could obviously not be compensated for by *restitutio in integrum*. The concept was thus inappropriate outside the field of material responsibility and even, more precisely, outside the limited case in which property could be fully restored, namely, provided that it had been neither destroyed nor even, as quite often happened, damaged.

28. In that connection, he agreed with Mr. Reuter's comment (1666th meeting) that jurisprudence was of limited value only as a source of inspiration in the matter of State responsibility. International jurisprudence was never called upon to make judgements on the most serious wrongful international acts, those which justified armed intervention, for example. Its sphere in the matter of State responsibility was limited to that of material responsibility, and it would certainly be neither satisfactory nor sufficient to base Part 2 of the draft articles on ideas drawn from international jurisprudence.

29. Furthermore, he had been surprised to read, in paragraph 40 of the second report (A/CN.4/344) that the Commission had "a double task: stating the rights and obligations of States *and* providing guidance to international courts and tribunals for the performance of their task." He did not believe that the Commission

had ever thought of providing guidance to international courts and tribunals. It limited itself to preparing drafts to help the General Assembly in its task of codifying and developing international law, and had at no time claimed to provide guidance to international courts and tribunals, which gave rulings in accordance with existing international law.

30. Similarly, he was unable to accept the idea that international courts and tribunals could sometimes be seized of requests for them to establish rules of law, since it was never within their power to determine the rules applicable to the facts submitted to them, but only to interpret the content of the law and to define the facts which entered into the framework of the pertinent rules. He had some reservations, therefore, regarding the wording of paragraphs 41 and 42 of the report. He noted that, according to the Special Rapporteur, the internal law of a State could prevent it from fulfilling its obligations arising from the rules of responsibility in cases where the courts were not under the authority of the Executive but were independent. Such reasoning could lead to the conclusion that, since the courts were independent, their acts contrary to the law would not engage the responsibility of the State. In fact, the State itself created its own internal organization, and it was for the State to change its system if the one it had established prevented it from respecting certain of its obligations.

31. On the specific question of the three draft articles proposed by the Special Rapporteur, he considered that those three provisions were actually alien to the draft articles of the Commission in that they established no real rules of State responsibility, and were even individually indefensible.

32. Chapter I of Part 2 of the draft articles concerned the general principles applicable to the content, forms and degrees of State responsibility, but they were not dealt with at all in articles 1, 2 and 3, which contained principles irrelevant to the subject.

33. Moreover, the provisions taken separately did not stand up to criticism. Thus, article 1 provided that the breach of an obligation did not affect that obligation. Such an approach was an unsatisfactory one; in internal law, it could not be said that if a person were killed, the obligation not to kill remained. On the contrary, it would be appropriate to say that the obligation remained violated. In the same way, in international law, if a State were the victim of an act of aggression, it could not be said that the obligation not to commit an act of aggression remained, since in fact the obligation remained violated, in that case also. The obligation that had been breached suffered the effects of the internationally wrongful act contrary to the rule, and it was precisely because the obligation was affected in that way that the internationally wrongful act, the source of international responsibility, was created.

34. As for draft article 2, it provided that a rule might itself determine the consequences of an inter-

nationally wrongful act. It was necessary to decide, however, whether those consequences should be stated in the rule, in a treaty, or in another way. Since international law had some of the characteristics of law in general, every legal obligation was necessarily accompanied by sanctions, wherever they were set out. Without such sanctions, a rule was not a legal one but of another kind—a moral rule, for example. Thus there was no point in saying that a rule could itself determine the consequences of its breach, since those consequences could in fact be provided for by any type of document or even by customary law.

35. Finally, article 3, according to the Special Rapporteur, responded to the concern not to place the State responsible for an internationally wrongful act outside the law. However, if the law provided for certain specific consequences, such as international responsibility, those consequences were of a legal nature and the State was obviously not outside the law because of its wrongful act. On the other hand, in describing that situation it would be erroneous to say that the responsible State retained its rights under international law. An aggressor State, for example, lost its right to non-intervention provided for under Article 2, paragraph 7, of the Charter of the United Nations. A provision along the lines of draft article 3 would be in open contradiction to that established principle of international legal life. In the same way, it could not be maintained that a State which was in breach of the provisions of a treaty retained all its rights under that treaty. If the purpose of article 3 were simply to say that a State was not placed outside international law by the mere fact of being in breach of one of its obligations, it would certainly be more accurate to say that the State responsible for an internationally wrongful act would be deprived of some of its rights. Even outside the framework of the general principles of responsibility, article 3 could not be defended.

36. He also urged the Commission to consider the question whether reparation represented a sanction or the consequence of an internationally wrongful act. He doubted whether the act of restoring lost property and that of restoring stolen property were identical. In the case of theft, the perpetrator was legally bound to restore the item and was also punished by a sanction; the theft created the victim's right to claim restitution and also a sanction having a social purpose. Similarly, in international law, a State's breach of one of its obligations created the right for the victim State or States to claim reparation and impose it.

37. Generally, chapter I of Part 2 of the draft articles should be based not on the obligations of the State responsible but on the rights of the injured States, and even of the entire international community in some cases, arising from the internationally wrongful act. He reserved the right to propose at a later date draft principles that might be included in that chapter.

*The meeting rose at 6.05 p.m.*

## 1669th MEETING

Wednesday, 10 June 1981, at 10.10 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Aldrich, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitul, Mr. Tabibi, Mr. Ushakov, Mr. Verosta.

### State responsibility (*continued*) (A/CN.4/344)

[Item 4 of the agenda]

#### The content, forms and degrees of international responsibility (Part 2 of the draft articles) (*continued*)

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

##### ARTICLES 1, 2 and 3<sup>1</sup> (*continued*)

1. Mr. USHAKOV pointed out, in connection with his statement at the previous meeting, that, to his mind, the concept of *restitutio in integrum* meant simply the return of the physical object seized by the person who had taken it. In his comments, it had not been his intention to maintain that the *statu quo ante* could not be re-established, since, in particular, the original legal situation which had ceased to exist as a result of the breach could be restored and, for example, a treaty that had been suspended because of certain circumstances could enter into force again.

2. Mr. ALDRICH said that, since the topic under consideration was a new one for him in the present context, he had carefully studied Part 1 of the draft,<sup>2</sup> which did not deal with primary rules but nevertheless gave a clear idea of the scope of the primary rules that would be covered by the remedies to be provided for in Part 2. The task now before the Commission was to formulate draft articles that would, if they came into force in the form of a convention, guide States and judicial and arbitral tribunals in deciding which remedies should apply in cases of breaches of international obligations.

3. The scope of such obligations was, in his view, staggering. Indeed, the Commission would face enormous difficulties if it tried to prescribe remedies for breaches of obligations such as aggression, questionable self-defence, injuries to aliens, expropriations of property, cancellations of concessions, violations of human rights, and even international crimes. It would face still greater difficulties if it tried to articulate the general principles that would apply to such remedies.

<sup>1</sup> For texts, see 1666th meeting, para. 9.

<sup>2</sup> See 1666th meeting, footnote 3.

Since he had a common-law background, he would be quite at ease with the case-by-case approach adopted by courts which fashioned remedies on the basis of precedent and practice, but he was somewhat sceptical about the possibility of formulating normative rules embodying remedies that might or might not be appropriate in every instance. He was therefore inclined to think that, if the Commission was to succeed in its task, it would have to devise remedies relating to particular types of obligations.

4. He agreed with the Special Rapporteur that, although articles 1 to 3 appeared to state the obvious, it was useful to enunciate them at the beginning of Part 2, if only as a means of identifying the problems to which they gave rise. He was not sure, however, that those provisions would have a useful role to play in the final draft, for the specific rules to be included in the future chapters II to IV would presumably make it clear how the rights and obligations of the author State, the injured State and third States would be affected.

5. Articles 1 and 3 would none the less serve a useful purpose in setting forth as concisely as possible the scope and effects of the provisions of Part 2. Articles 1 and 3 might therefore be combined and reformulated to read:

“A breach of an international obligation by a State affects the international rights and obligations of that State, of the injured State and of third States only as provided in this Part.”

6. Clearly, article 2 was intended to say something that should definitely be stated at some point in Part 2, and it merely had to be reformulated more in conventional terms than in textbook terms. It might, for example, read:

“The provisions of Part 2 apply to every breach by a State of an obligation, except where the rule of international law establishing the obligation itself prescribes the legal consequences of such a breach.”

7. Lastly, the Commission might wish to decide whether, instead of general principles applicable to all types of remedies covered by Part 2, it should not formulate provisions dealing with the scope and effect of Part 2, which would not apply to breaches of obligations which themselves prescribed special remedies.

8. Perhaps the Special Rapporteur could indicate whether the proposed amendments would fit into the general structure that he had in mind for the draft articles as a whole.

9. Mr. JAGOTA said that one of the prime concerns of the General Assembly, of States and of judicial and arbitral tribunals would be to determine whether Parts 1, 2 and 3 of the draft on State responsibility formed a coherent whole or whether they constituted separate bodies of rules. In accordance with the General Assembly's instructions, the Special Rapporteur had

proceeded on the assumption that Parts 1 and 2 should be interrelated, and had therefore begun Part 2 with a number of general principles similar to those contained in chapter I of Part 1. However, in view of the fact that general principles had been included in Part 1, his own opinion was that the Commission should take a decision on the matter of including general principles in Part 2 only after it had completed its consideration of Part 2 in its entirety. It would then be clear whether or not the general principles contained in Part 1 were comprehensive enough to cover the rules embodied in Part 2.

10. The provision in article 2 which, as the Special Rapporteur had explained, provided for the application of a special legal regime to the consequence of a breach of an international obligation, seemed to be a general provision that would apply to all three parts of the draft. It might therefore be placed elsewhere in the draft as a whole. The draft articles should, moreover, bring into sharper focus the relationship between the general principles enunciated in Part 2 and the topic of State responsibility, as well as the new legal relationships that emerged as a result of a breach of an international obligation. Accordingly, the wording of article 1 might be amended along the following lines:

“A breach of an international obligation by a State does not, as such and for that State, affect the force of that obligation or the international responsibility of that State. Such a breach establishes new legal relationships between that State and the State affected.”

11. Similarly, article 2 might be amended to read:

“A rule of international law, whether of customary, conventional or other origin, imposing an obligation on a State, may determine also the legal consequences of the breach of such obligation by that State and establish its international responsibility.”

12. In effect, article 3 provided that when a State committed a breach of an international obligation it did not thereby become an outlaw. It was still a subject of international law and still had sovereign rights, which nevertheless depended on the nature and quality of the obligation and the seriousness of the breach. Those two factors had been mentioned in the Special Rapporteur's report (A/CN.4/344) and would have to be examined carefully. Indeed, in the Commission's 1975 report, it had been stated that the quality of the obligation and the seriousness of the breach might make it necessary to divide possible remedies into “reparation” and “penalties”.<sup>3</sup> However, the Special Rapporteur had indicated in paragraph 67 of his report that, because of the lack of clarity about what constituted “reparation” and what constituted a “penalty”, “it would be more appropriate to start with a description of the various possible contents of the

new obligations of the author State arising from its breach of an international obligation”.

13. In articles 4 and 5, however, the Special Rapporteur had made a qualitative distinction on the basis of the seriousness of the breach and the intent of the wrongdoer, and had included the need for an apology and a guarantee against repetition of the wrongful act. Obviously, some reference to the quality of the obligation and the seriousness of the breach also had to be made in the general principles; otherwise, article 3 would imply that the author State was being afforded some kind of protection. The rights of the wrongdoer must therefore be placed in their proper perspective and seen as the rights which existed prior to the commission of the wrongful act, rights which would vary according to the quality of the obligation breached and the seriousness of the breach. In his view, Part 2 of the draft articles would be more acceptable to the General Assembly and to States if the Commission abandoned its descriptive approach and amended article 3 to take account of those qualitative factors.

14. Mr. PINTO said that, in describing the possible contents of the new obligations arising from the breach of an international obligation, the Special Rapporteur had indicated four possible types of new obligations: an obligation to stop the continuing effects of the breach *stricto sensu*, for example, by releasing persons or objects wrongfully held; an obligation to stop the breach *lato sensu*, by means of a substitute performance, such as the payment of money for loss suffered; an obligation to restore the situation which the original obligation had sought to ensure, in other words, *restitutio in integrum stricto sensu*; and an obligation to provide satisfaction of some kind through an apology or a guarantee of future conduct.

15. Those could be regarded as the main gradations in the scale of the author State's obligations, and the question of which obligation was to apply would depend on a number of factors, including the possibility or impossibility of fulfilling the original obligation. He agreed with the Special Rapporteur that it was the nature and seriousness of the breach and the character of the conduct of the State, rather than the nature of the obligation or the right infringed, which determined the content, forms and degrees of State responsibility.

16. The Special Rapporteur had indicated that, in essence, a breach of an international obligation was considered to create a new situation that was separate from the primary rule that had created the original obligation. That view seemed to form the foundation for the general principles enunciated in articles 1 to 3. Since article 1 provided that the original obligation continued to exist and was unaffected by the breach, that continuing obligation was presumably the basis for the author State's future obligation to make reparation or provide satisfaction. In article 2, the Special Rapporteur had contemplated the possibility

<sup>3</sup> *Yearbook* . . . 1975, vol. II, p. 56, document A/10010/Rev.1, para. 43.

that a rule of international law itself might determine the legal consequences of the breach of an obligation, thus preparing the ground for articles which would specify legal consequences that were not, so to speak, predetermined. Article 3 appeared to be simply a somewhat oblique reflection of the rule of proportionality.

17. He had no objection to the statement of general principles in articles 1 to 3, but, like other members of the Commission, he experienced difficulties regarding the wording, particularly that of article 3, which was, at the very least, too concise. As he understood it, article 3 could be taken to mean either that, since the breach did not affect the legal force of the obligation or the legal rules which supported it, those rules continued to regulate the consequences of the breach and to protect or condemn the author State, or that the State which committed a wrongful act did not *ipso facto* lose all its legal rights and did not place itself outside the general protection of international law. If his understanding was correct, article 3 was bound to give rise to misinterpretations, and the wording should therefore be expanded.

18. He also had some difficulty with the Special Rapporteur's repeated use in his report of the term "quantitative" to convey the idea of seriousness or gravity. In his own view, the term "quantitative" introduced the idea of an accumulation, of an increasing number of things, whereas seriousness was qualitative. Similarly, the term "response" was rather confusing when used in connection with the arising of obligations under international law; so far as he was concerned, a "response" was an animate reaction.

19. In paragraphs 55 and 56 of the report, the Special Rapporteur referred to the "specific character" of a "true" legal obligation and indicated that such an obligation was not created by certain types of instruments or statements. The Commission might give some thought to the meaning and content of a "true" legal obligation and try to decide if it mattered whether such obligations were contained in statements of various kinds, in treaties or in other instruments. "True" legal obligations should also be considered in the context of the four types of obligations discussed in the report, so as to determine whether those obligations were comprehensive enough.

20. What he had in mind in that connection was the obligation to co-operate and the way in which it might fit into the categories of new legal obligations described by the Special Rapporteur. Obligations to co-operate were not necessarily confined to statements that were not formal agreements. For example, the draft Convention on the Law of the Sea contained a provision to the effect that States should seek to promote, through the competent international organizations, the establishment of general criteria to assist in ascertaining the nature and implications of marine scientific

research.<sup>4</sup> He would hesitate to say that a statement of that kind was not a statement of a "true" legal obligation and that a breach of such an obligation did not entail some form of responsibility, but he was not quite sure where it would fit into the Special Rapporteur's classification. It might be useful for the Commission to consider that example in the context of the content of State responsibility.

21. Mr. REUTER pointed out that, in the topic assigned to him, any special rapporteur was inevitably bound by earlier decisions of the Commission. In the case in point, the Commission had embarked on a course that had fostered some extraordinary illusions.

22. Among the first three articles proposed, the most important one was certainly article 2. Mr. Ushakov (1668th meeting) had rightly pointed out that it was not the rule alone that had to be considered. In fact, article 2 called into question everything that had been done before, and led one to ask whether there was indeed a general rule of responsibility or whether there were simply special regimes.

23. Some systems of law yielded quite easily to the illusion that a general system of responsibility did exist, but not all legal systems adopted such an approach. For example, Roman law had begun with a number of special rules, and similarly, the construction of common law seemed to be based on a series of special norms. International law as taught some years before had, perhaps wrongly, envisaged the existence of general rules on responsibility. The Commission had yielded to that illusion and prepared Part 1 of the draft by laying down general rules on the origin of international responsibility.

24. In dealing with Part 2 of the draft, relating to the consequences of responsibility, the Commission was compelled to examine whether there really were any general rules in that matter. It realized that it might well have been somewhat hasty in Part 1, and was now experiencing some difficulty in clarifying the meaning of draft article 19,<sup>5</sup> which had nevertheless been adopted enthusiastically at the time.

25. In point of fact, it seemed extraordinary to assert that the State had a penal responsibility when not a single rule had been laid down in that regard, and when it was difficult to assume that a uniform system of responsibility existed in such diverse matters as air pollution and the protection of diplomatic personnel, for example. He had bowed before the logic of the Commission, which had taken a very serious step in stating that injury was not an element of responsibility. The traditional construction of international responsibility related essentially to cases of injury suffered by an alien in which equivalent reparation was possible and accepted. Yet the Commission had

<sup>4</sup> "Draft Convention on the Law of the Sea (Informal text)" (A/CONF.62/WP/10/Rev.3 (and Corr.1 and 3).

<sup>5</sup> See 1666th meeting, footnote 3.

deprived itself of recourse to that possibility by deleting the reference to injury and placing responsibility at its highest level—a choice that prompted some uneasiness and concern regarding the consequences of responsibility. The members of the Commission had strong doubts in view of the many types of responsibility that could be envisaged.

26. There were two possible solutions. The Commission could simply enunciate a few very general rules or principles of classification so as to draw up a list of the various types of responsibility possible. It could also take its analysis further and choose a “special case”. On that point he agreed with Mr. Ushakov and did not see how it would be possible to lay down general rules that would apply to cases of aggression. Aggression was certainly a monstrous act, but it did occur in practice. If it could not be fitted into a general regime, it would have to be expressly excluded, something which could also lead to the exclusion of genocide, for example, which would likewise fall within the scope of special rules.

27. The Commission would therefore deal with the classic and most straightforward case, namely, the case in which reparation in pecuniary terms was possible, and it would have to decide whether that method was the right one. In actual fact, he feared that the Commission would be faced with a host of special cases that would require it to distinguish between a wide range of eventualities.

28. Some members of the Commission had made reference to the seriousness of the rule breached. Hitherto, the Commission had spoken of *jus cogens* with a great deal of faith, but it now found itself in a corner when it had to define the consequence of a breach of the rules of *jus cogens*. If, for example, a State decided to cut off the hands of its prisoners of war and it were acknowledged that the enemy State had the right to act in the same way, the assertion could certainly be made that there was no *jus cogens*. The Commission would have to make decisions on many extremely difficult problems of that kind.

29. Furthermore, some rules were extremely serious but did necessarily form part of *jus cogens*. For instance, the rules concerning diplomatic personnel fell within that category. If a State deprived a foreign ambassador of his freedom, could the injured State act the same way in reprisal? Such a possibility also brought to mind certain rules which, although they did not belong to *jus cogens*, could not be suspended in order to respond to a breach of a rule of another kind. Cases of that type occurred very often. In that respect, a decision had to be made as to whether certain rules formed a system and whether a breach of one of them produced effects first of all within that system—an idea that could be illustrated by the position adopted by the Permanent Court of International Justice in the case *Diversion of Water from the Meuse*.<sup>6</sup> Some rules

were considered to form a whole within which the effects of the breach of a primary rule must be felt.

30. The position taken by the Commission in Part 1 of the draft articles also called for consideration of cases in which the effects of a breach of an obligation involved only one State. Jurisprudence recognized that a breach of a private individual’s right of ownership concerned only the country of which the individual was a national. It acknowledged, however, that other breaches could involve consequences for a group of States. In the case of the breach of a customary rule, for example, there was no formal arrangement determining which States might be concerned; in actual fact, it was the international community as a whole that was affected.

31. Generally speaking, he wondered whether the Commission should, following the Special Rapporteur, agree that an attempt must be made to make a broad distinction, without going into detail, and then choose the most developed aspects of the subject-matter at the present time and proceed to more specific definitions, or whether it would be better to keep to a more general level.

32. With respect to draft articles 1 and 3, he reminded members that he had given his agreement to those provisions and wished to make it clear that he was not withdrawing it. Nevertheless, the wording was open to discussion.

33. Article 3 was both correct and incorrect, because it was too broad in scope. It could be admitted, although not without some hesitation, that the most heinous crime was aggression—and the mass destruction of an entire innocent civilian population was perhaps even more heinous—yet it was not possible to maintain that, because of such an act, the State was no longer a subject of international law; such a consequence would purely and simply eliminate the problem of responsibility, for lack of a responsible subject of law. Nevertheless, the State’s wrongful act certainly deprived it of many rights, and even of the benefit of observance of certain rules of *jus cogens*. He could accept an article such as article 3, but felt that the wording should be clearer.

34. Again, article 1 was both correct and incorrect, and could be made completely correct if the expression “for that State” was replaced by the expression “at the initiative of that State”. A State could not rid itself of its obligations by breaching its commitments, but the injured State could decide to deprive it of the benefit of a particular obligation contracted towards it.

35. Lastly, he noted that the three draft articles described the situation of the guilty State, and not the rights of the other States. In his opinion, it was also necessary to consider in the general principles the change in the legal situation of the injured States. The Commission should take account of the dispersal of the effects of responsibility under various systems, according to the nature of the obligations breached.

<sup>6</sup> Judgment, 1937: *P.C.I.J.*, Series A/B, No. 70, p. 4.

36. Mr. QUENTIN-BAXTER said that the formulation of a rule of great generality and universal truth within the confines of a particular subject, wherever possible, could not fail to be enormously helpful. However, the Special Rapporteur himself had drawn attention to the distinction between judicial dicta or general statements by a political organ and a rule which might stand up under the most perverse tests. For example, the maxim *sic utere tuo ut alienum non laedas*, while of great value as a general guideline, did not constitute a rule that could be confined within the scope of a specific article.

37. By the same token, it could be argued that the ideas contained in articles 1 to 3, though valid within given limits, did not exactly express rules as such, and they could not be refined in order to do so. If the propositions that a State was not released from its obligations by breaking them and that even a State which breached its obligations did not cease to be a subject of international law were relevant to the draft articles, then an attempt should be made to express those principles in the form of rules. He, for his part, was not absolutely convinced that those principles were closely related to the subject-matter of the draft articles. Moreover, in concentrating on general principles at the beginning of Part 2, the Commission might find itself adopting new postulates and abandoning earlier ones.

38. It was possible that those responsible for planning the work on the topic of State responsibility might have underestimated the problems which would remain after the completion of Part 1 of the draft. Because of those difficulties, it might be necessary in the first instance to limit the Commission's consideration to a modest area of obligations. Part 1 had involved setting forth secondary rules that were sufficiently broad in scope to accommodate such aspects of primary rules as might develop in the future. That was the essence of the difficulty now confronting the Special Rapporteur. The development of primary and secondary aspects of rules was in itself an abstraction which had been necessary for the completion of Part 1. However, the necessity of envisaging the kind of primary rules which were to be accommodated in secondary rules impinged to some extent on the primary rules themselves. In this first report,<sup>7</sup> the Special Rapporteur had shown that he was aware of that problem and of the fact that the distinction between primary and secondary rules was not absolute.

39. No matter how the Commission decided to approach Part 2, it should not disparage what had been accomplished in Part 1, which was of enormous significance as a first attempt to present universal international law in a form that would attract the support of those who had good reason to be sceptical of the value of international law.

40. The Commission should not try too hard to equip itself with new general principles at the current stage of its work. It would be preferable to reduce such principles to statements of the kind suggested by Mr. Aldrich. The Commission could then go on to consider any range of obligations which the Special Rapporteur felt was manageable in the first instance.

41. Mr. ŠAHOVIĆ said he wished to complete his remarks at the previous meeting by commenting on the general problems raised in the course of the discussion.

42. He endorsed the views expressed by Mr. Reuter on the need to bear certain factors in mind throughout the consideration of the topic and also supported several of Mr. Reuter's suggestions regarding articles 1 to 3. However, Mr. Reuter seemed far too pessimistic in his approach. The point was not that the Special Rapporteur was in thrall to the Commission or the Commission in thrall to the set of articles in Part 1 of the draft, but simply that the Commission and the international community were dependent upon international law as it had developed in recent years. It was precisely that development that had caused the Commission to take certain positions when it had prepared the articles in Part 1, which were the outcome of an analysis of State responsibility as it had taken shape since the Second World War. Hence, those articles must serve as the basis for elaborating the provisions that were to supplement them.

43. In short, the difficulties being encountered by the Commission were the difficulties inherent in getting any ambitious and difficult project under way. It has to be recognized that in preparing Part 1 of the draft the Commission had overturned the traditional theory of State responsibility, by taking account both of the Charter of the United Nations and of the changes in the attitude of the States as a whole towards the establishment of an objective international legal regime of responsibility. Admittedly the sovereignty of States must be safeguarded, but it was no less true that States, as subjects of international law, were being brought under a much more general regime which, more and more, was determining their rights and duties independently of their will. Thus the Commission could not devise a universal regime of State responsibility without considering the relevant trends in international crimes and international delicts. It had been Commission had drafted article 19, relating to international crimes and international delicts. It had been well aware that such an article might raise many difficulties when the provisions for the content, forms and degrees of State responsibility came to be prepared.

44. Mr. Reuter had rightly wondered whether it was better to establish a universal regime of State responsibility or simply be satisfied with several regimes. For his own part, he thought there was undeniably a tendency to favour a single regime, which did not mean that the various rules applicable to injury and the consequences thereof should be scorned when that

<sup>7</sup> *Yearbook ... 1980*, vol. II (Part One), document A/CN.4/330.

regime was being built up. The Commission must therefore engage in major work of research, adaptation of the traditional rules, and progressive development of the law. It must move ahead and try to develop the general principles that would govern Part 2 of the draft. Various opinions had been expressed in that regard. Mr. Aldrich had thought that it might be possible to forgo general principles, whereas Mr. Jagota had suggested that the Commission should wait a little before formulating them. Personally, he considered that the Commission should first of all study the existing rules and their practical application. As he had indicated at the previous meeting, articles 1 to 3 could be broadened in scope so that they genuinely covered all of Part 2 of the draft. If the Commission agreed with that point of view, the work could be undertaken by the Drafting Committee in keeping with the Special Rapporteur's directions.

45. Finally, it was highly desirable that the discussion of the articles under consideration should be properly reflected in the Commission's report on the current session, as it would be very instructive for the international community and, in particular, for the Sixth Committee of the General Assembly.

*The meeting rose at 1 p.m.*

## 1670th MEETING

*Thursday, 11 June 1981, at 10.10 a.m.*

*Chairman:* Mr. Doudou THIAM

*Present:* Mr. Aldrich, Mr. Boutros Ghali, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

### **State responsibility (continued) (A/CN.4/344)**

[Item 4 of the agenda]

### **The content, forms and degrees of international responsibility (Part 2 of the draft articles) (continued)**

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

#### **ARTICLES 1, 2 and 3<sup>1</sup> (concluded)**

1. Mr. USHAKOV said he disagreed with the assertions by some members of the Commission that

it was not possible to lay down general rules of international law on the regime of State responsibility.

2. Admittedly, while special rules applicable to internationally wrongful acts did exist, they were not detailed rules like those of domestic law but more general rules, applicable to specific categories of internationally wrongful acts. In addition to those rules, there were some truly general rules, which included special rules. Indeed, the special rules gave rise to the general rules, which were based on them, whereas the general rules were developed and clarified in the special rules. The principles on which international law was based constituted a category of particularly general rules. Such principles were stated, for example, in Article 2 of the Charter of the United Nations.

3. Mr. Reuter (1669th meeting) held the view that the study of the consequences of internationally wrongful acts led to the statement of special rules, but such rules necessarily implied general rules, under which they were grouped. The special rules contained in Article 11 of the Charter, for example, had no meaning except in relation to the general rule in Article 10, which defined in general terms the functions and powers of the General Assembly. Conversely, the special rules in Article 11 were essential in order to clarify the conditions of the application of the general rule contained in Article 10. Similarly, the general principles stated in articles 1 to 4 of chapter I of Part 1<sup>2</sup> of the draft embraced all the rules in the succeeding chapters.

4. As Mr. Jagota (*ibid.*) had suggested, the general rules to be formulated by the Commission with respect to Part 2 of the draft might possibly be inserted in chapter I of Part 1. In addition to those very general principles, there were general principles relating to each chapter of the draft articles. For example, article 5 of Part 1 of the draft articles, which marked the beginning of chapter II, stated the general rule of the attribution to the State of the conduct of its organs, a rule which was clarified in the other articles of that chapter. The three draft articles under consideration did not, as they stood, express general rules universally applicable to the effects of internationally wrongful acts. Even if special rules on the subject existed, it was important to begin by enunciating general principles. He had no doubt that the Commission would be able to derive such principles from the practice of States, from judicial decisions and from the doctrine.

5. Several members of the Commission had wondered whether the draft articles in Part 1 constituted the adequate basis needed for the formulation of the draft articles in Part 2. For his own part, he believed that, with a few minor exceptions, the draft articles already adopted provided a good working basis for the future work of the Commission. Mr. Reuter had

<sup>1</sup> For texts, see 1666th meeting, para. 9.

<sup>2</sup> See 1666th meeting, footnote 3.

referred to the fact that, in Part 1 of the draft articles, injury did not appear as a basis for a responsibility. The reason why it did not appear therein as such was that the Commission shared the view that the breach of an international obligation always entailed injury, or at least prejudice, if indeed an "injury" necessarily entailed physical damage. It was unnecessary, therefore, to refer to prejudice as a basis for responsibility. Having accepted that prejudice existed in all cases, the Commission was currently at liberty to evaluate the prejudice which could be caused and to seek means of reparation.

6. Admittedly, the breach of some international obligations might give rise to responsibility without the existence of any prejudice. If a State party to the International Convention on the Elimination of All Forms of Racial Discrimination did not introduce into its legislation measures prohibiting racial discrimination, despite the obligation to do so imposed on it by the instrument in question, its responsibility was entailed, since its obligation had not been performed. However, if there was no racial discrimination of any kind in that State, there was no prejudice to individuals, to States or to the international community. Such cases were rare, however. Consequently, while prejudice had not been mentioned as a basis for responsibility in Part 1 of the draft articles and while the breach of an international obligation could, in exceptional circumstances, not entail prejudice, there was nothing to prevent the Commission from formulating rules on the consequences of internationally wrongful acts.

7. Referring to article 19 of Part 1 of the draft articles, concerning international crimes and delicts, he said that the drafting of that provision had been an act of codification as much as of the progressive development of international law on the part of the Commission. The Commission should certainly take that article as a basis when preparing the draft articles in Part 2. Under article 19, paragraph 2, an international crime resulted from the breach by a State of an international obligation *erga omnes*. What emerged from that article was that the States authorized to take countermeasures were not only the States directly affected, but all States, authorized as they were to "respond" to the breach of an international obligation essential for the protection of fundamental interests of the international community. Far from impeding the preparation of Part 2 of the draft articles, article 19 should facilitate the Commission's task. Obviously, the countermeasures which could be taken against the State which was the author of an international crime must be those allowed under international law. To take the example given at the previous meeting by Mr. Reuter, a State clearly could not, by way of countermeasures, have the hands of prisoners of war cut off. It was for the Commission to indicate the countermeasures authorized by international law.

8. Referring to the English text of draft article 1, under which a breach of an international obligation by a State did not, as such and for that State, affect the "force" of that obligation, he pointed out that the question whether an obligation was in force or not was a matter to be determined not by the draft articles but by primary rules. For all treaty obligations, reference should be made to the law of treaties, as codified in the Vienna Convention.<sup>3</sup> Under article 60 of that instrument, a party to a treaty could terminate it, under certain conditions, in the event of a material breach of that treaty by another party. It was therefore not possible to declare that an international obligation remained in force once it had been breached. What counted, under article 18, paragraph 1, of Part 1 of the draft articles, was that the wrongful act should have been committed at a time when the obligation was in force. For the purposes of the draft articles, therefore, it was sufficient that the obligation should have been in force in respect of the State in question, in accordance with the applicable primary rules. In that respect, the wording of draft article 1 was not satisfactory.

9. Mr. FRANCIS said that while Mr. Ushakov's observations concerning the status of draft article 1 must of course be taken into account by the Special Rapporteur, it was his view that, since Part 2 was concerned, *inter alia*, with the consequences of a wrongful act, the inclusion of draft article 1 was warranted. Furthermore, a situation in which an obligation did not continue to be in force could obviously not result from the wrongful act of a State. To consider it as such would be to disregard the whole concept of *pacta sunt servanda*. The termination of the existence of an obligation must be the result of the operation of some other law or of the attitude of the affected State. He hoped that the Special Rapporteur would be able to find a neutral wording that would satisfy all the concerns expressed.

10. He recalled that, in his own earlier observations (1668th meeting), he had said that since article 3 was intended to deal with the notion of proportionality it should include a direct reference to that notion. The article should be drafted from the point of view of the rights of the injured States, rather than emphasizing the rights of the author State. That approach had been adopted in draft articles 30 and 34 of Part 1.

11. Mr. REUTER said that, although Mr. Ushakov did not appear to agree with him, he nevertheless agreed with Mr. Ushakov. In respect of draft article 1, for example, the intentions of the Special Rapporteur were clear. He had stated only that a breach of an international obligation did not, in itself, cause that obligation to disappear without making any reference to conventional or customary law. Obviously, the obligation existed before its breach and continued to exist immediately afterwards, at least for a certain time.

<sup>3</sup> *Ibid.*, footnote 4.

12. Referring to article 19 of Part 1 of the draft articles, he emphasized the difficulties created by that provision, which necessitated different regimes of responsibility depending on whether the responsibility in question conferred the universal right to impose sanctions or constituted responsibility for acts resulting in physical injury. In the first case, it would be necessary to draft both detailed and general rules, while in the second case provision would have to be made for reparation measures, independent of the consequential right to impose sanctions.

13. Mr. RIPHAGEN (Special Rapporteur), summing up the Commission's debate on draft articles 1 to 3, said that his initial reaction on rereading the comments made on his preliminary report,<sup>4</sup> both in the Commission and in the Sixth Committee of the General Assembly, had been that the task of reducing them to the form of draft articles was a virtually impossible one. However, he had been encouraged by the thought that, since it had been possible to draft very general rules covering all types of treaty, as in the case of the Vienna Convention, it should also be possible to do so in respect of internationally wrongful acts.

14. That conclusion had led him to draft some very abstract rules, which had been subjected to various degrees of criticism by a number of members of the Commission. While many members had expressed the view that an attempt should be made to draft such preliminary rules, all speakers had expressed doubts as to the wording to be used. He noted that many speakers had referred to the phenomenon of aggression and its legal consequences as a test of the validity of the provisions proposed. In that connection, he wished to point out that the articles would cover many other types of wrongful acts, and that the regime of State responsibility applicable in cases of aggression was a special regime, which draft article 2 was intended to safeguard. Although the Commission had always envisaged the existence of several different regimes of State responsibility, that did not exclude the possibility that some rules would be applicable to all of them.

15. Draft articles 1 to 3 had been criticized as stating nothing and as stating too much. Those articles should be read as applicable, unless otherwise provided for either in subsequent articles or in the rules referred to in article 2. In that regard, Mr. Aldrich had suggested that articles 1 and 3 should be reworked by combining them in one provision stating that a breach of an obligation affected existing rights and obligations only as provided in Part 2 of the draft articles (1669th meeting, para. 5). He had also suggested that article 2 should be reworded to cover other exceptions (*ibid.*, para. 6). That approach might meet, at least partially, the concerns expressed by Mr. Quentin-Baxter (1669th meeting) and others.

16. Referring to the observations made by Mr. Tabibi and Mr. Sucharitkul (1668th meeting), he said that he failed to see how article 1 could be read as protecting the author State or as precluding new observations from arising on the part of the author State.

17. He was inclined to agree with Mr. Francis (*ibid.*) that the words "the force of" should be included in article 1. He had placed them in brackets simply because they had not been used before. At the same time, he noted Mr. Ushakov's objection to the use of the term "force".

18. The underlying idea of draft article 1 was that the fact of a breach did not simply create a new situation to which the old obligation was irrelevant—a rule to which there were practically no exceptions. That concept was, however, not as self-evident as it might appear, and in fact, under the old Civil Code of the Netherlands, in the event of the non-performance of a contractual obligation, that obligation was replaced by the obligation to pay damages.

19. Draft articles 1 to 3 had also been criticized by some members, including Mr. Francis, Mr. Jagota (1669th meeting) and Mr. Šahović (1668th meeting), as stating too little. In that connection, he agreed that the title of Chapter I—"General Principles"—might be misleading, since the draft articles were simply meant to provide a general framework which was essentially negative in character. The title "Introduction", along the lines of a suggestion by Mr. Aldrich, might be a better and more neutral term. Given the essentially negative character of Chapter I, he doubted whether positive elements should be added to it, as had been suggested by a number of members. However, that question could be taken up after the consideration of the special articles relating to the three basic parameters listed by the Special Rapporteur (A/CN.4/344, para. 7).

20. He agreed with Mr. Reuter (1669th meeting) and Mr. Ushakov (1668th meeting) that consideration of the topic could not be based simply on existing jurisprudence. He had, in fact, stated as much in paragraph 106 of his report.

21. With regard to the suggestion by Mr. Francis (*ibid.*) that Chapter I should include a reference to indirect injury to a third State and to the principle of proportionality, he doubted whether such positive elements should be included in that chapter, for the reasons he had already given. In any event, the question of injury to one or more third States would be dealt with in subsequent chapters.

22. Mr. Tabibi (*ibid.*) had quite rightly referred to new tendencies in international law, particularly the tendency to take account of extra-State interests. That point would be dealt with in the chapters relating to the second and third parameters.

<sup>4</sup> *Yearbook ... 1980*, vol. II (Part One), document A/CN.4/330.

23. Referring to observations made by Mr. Sucharitkul (*ibid.*), he said that, while it was possible to expel a State from an international organization, the rights and duties of that State under international law remained in force. That question was, in fact, dealt with in paragraphs 77 and 78 of his preliminary report. Moreover, it had been his impression that most members of the Commission had not wished to include that question within the scope of the draft articles. In any event, it would certainly be dealt with in connection with the response of international organizations to internationally wrongful acts.

24. In his earlier remarks, Mr. Ushakov (*ibid.*) had adopted a somewhat limited approach in which he had stressed the danger which internationally wrongful acts presented to the international community. While that aspect was an important one, the draft articles had to take account of many other obligations which did not affect the interests of the international community as a whole. He agreed with Mr. Ushakov's remark that, in national systems of law, the judge, in determining sanctions, frequently applied the principle of proportionality without being forced to do so by law.

25. As for Mr. Ushakov's observation concerning paragraph 40 of the report, and in particular the expression therein "*fournir des directives*", the problem was essentially one of translation, since the word "guidance" had been used in the original English text. He did not think that many jurists would share the view expressed by Mr. Ushakov that judges only applied the law and did not make it.

26. In commenting on article 3, Mr. Ushakov had also observed that the rights of States could be infringed under Article 2 of the Charter of the United Nations. In that connection, he wished to point out that that Article dealt specifically with enforcement measures, and not with the other legal consequences of wrongful acts.

27. Finally, referring to the later statement made by Mr. Ushakov, he emphasized that article 1 dealt with wrongful acts *as such*.

28. With regard to Mr. Pinto's reference at the previous meeting to the obligations of co-operation and their legal consequences, he said that article 1 would apply to such obligations, which would also be covered by the second parameter, particularly in so far as it concerned countermeasures. The question of obligations of that type and the limits placed on possible countermeasures was dealt with in paragraph 93 of his preliminary report.

29. He felt that articles 1 to 3 could be referred to the Drafting Committee.

30. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer draft articles 1 to 3 to the Drafting Committee.

*It was so decided.*

*The meeting rose at 11.35 a.m.*

## 1671st MEETING

*Monday, 15 June 1981, at 3.05 p.m.*

*Chairman:* Mr. Robert Q. QUENTIN-BAXTER

*Present:* Mr. Aldrich, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

### Succession of States in respect of matters other than treaties (*continued*)\* (A/CN.4/338 and Add.1-4, A/CN.4/345 and Add.1 and 2)

[Item 2 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:  
SECOND READING (*continued*)

ARTICLE 15 (Scope of the articles in the present Part)  
*and*  
ARTICLE 16 (State debt)

1. The CHAIRMAN invited the Commission to consider Part III of the draft articles (State debts), and particularly section 1, entitled "General Provisions". The first two articles of this section are articles 15 and 16, which read:

#### *Article 15. Scope of the articles in the present Part*

The articles in the present Part apply to the effects of a succession of States in respect of State debts.

#### *Article 16. State debt*

For the purposes of the articles in the present Part, "State debt" means:

(a) any financial obligation of a State towards another State, an international organization or any other subject of international law;

(b) any other financial obligation chargeable to a State.

2. Mr. BEDJAOUÏ (Special Rapporteur) said that articles 15 and 16 were applicable to all types of State succession in which a problem of State debts arose.

3. Article 15 had not elicited any particular comments, either in the Sixth Committee or in the written replies of Governments. In the context of Part III of

\* Resumed from the 1662nd meeting.

the draft, it was the counterpart of article 4, in Part II.<sup>1</sup>

4. On the other hand, article 16, in which the Commission had sought to define State debt, gave rise to difficulties. In view of the structure of the text adopted on first reading, the Commission had selected two criteria for the definition, namely, the international personality of the creditor and the fact that financial obligation was chargeable to the predecessor State. Its choice immediately and inevitably raised the question of whether those conditions were cumulative and had to be met in order for a State debt to exist, or whether one condition alone sufficed.

5. The extensive discussion in the Sixth Committee of subparagraph (b) had led to much criticism of the Commission, relayed at length by chancelleries. The comments made were analysed in detail in paragraphs 120 to 151 of his report (A/CN.4/4/345 and Add.1 and 2). The arguments put forward were of differing value, and the Commission must first of all decide whether it was advisable to reopen a debate on the issue on second reading, since the individual positions were known, as were the arguments involved.

6. The Commission might resolve the problems in a procedural manner, without raising the substantive issue. Since article 2, subparagraph 1 (a),<sup>2</sup> which defined "succession of States", unequivocally placed it in the sphere of inter-State relationships, the Commission could avoid a belated discussion by deciding to delete article 16, subparagraph (b)—a course which would not mean that it was disregarding the problem of debts, but would show its concern to seek the minimum bases for an agreement, the lowest common denominator within the Commission, by limiting the content of article 16 to the text of subparagraph (a).

7. Such a solution had been suggested to him by the written comments of some Governments, including the Government of Italy (A/CN.4/338/Add.1). The arguments adduced in its favour were not without cogency. Whereas the definition of succession of States set the draft articles within the legal framework of inter-State relationships, subparagraph (b) of article 16 could be applied to relationships between States and private persons. However, the overall structure of the draft up to that subparagraph had by and large respected the definition of State succession as an inter-State international legal relationship. The Commission might be compelled to revise that position if it made provision, in matters of debts, for the situation of private creditors or private individuals affected by a succession of States. Moreover, if the wording of subparagraph (b) was to be left unchanged, the text might impose on the successor State to which part of the debt would pass a number of international obligations towards its own nationals. However, a State's relations with its nationals could be based only

on internal law. Similarly, by relinquishing subparagraph (b), the Commission would not be sacrificing the interests of private creditors in a sphere which in fact lay outside State succession and could be studied and regulated in another context. The Government of Italy had commented that article 16, subparagraph (b), would make for a draft that was very broad in scope, yet other provisions, especially articles 19 and 23,<sup>3</sup> were limited to inter-State relationships. In short, retention of subparagraph (b) might be a source of endless difficulties, and it was better to seek a minimum basis for agreement, even though a conference of plenipotentiaries might decide to enlarge the scope of the future instrument in that respect.

8. He stressed that, should the Commission choose to relinquish subparagraph (b), it might indicate the reasons for its decision in the commentary, in the interests of clarity.

9. Again, article 16, subparagraph (a), might itself give rise to difficulties because of the expression "any other subject of international law", whose meaning could be interpreted in different ways. Clearly, the reference to international organizations had been imperative in conjunction with the reference to States, in view of the very close relations that now existed between States and international organizations, especially financial organizations. However, the expression "subject of international law" might, for instance, cover a national liberation movement, transnational corporations or even an individual. In that regard, subparagraph (a) created difficulties comparable to those stemming from subparagraph (b).

10. Accordingly, he proposed that the expression "or any other subject of international law" should be deleted from paragraph (a). He was concerned at the tendency which could be observed among writers to make multinational companies subjects of international law. Some writers had contended that a State which entered into a contract with a transnational corporation indirectly conferred on the latter part of its international personality. Consequently, he feared that the wording of subparagraph (a) might open the way to a broad interpretation of the concept of subject of international law.

11. Lastly, he pointed out that the Commission had agreed not to deal with the question of "odious debts" in its draft articles. However, he was entirely at the Commission's disposal in the matter of attempting to formulate a satisfactory text, should it reconsider its decision in that regard.

12. Mr. USHAKOV noted that, while draft article 15 did not give rise to difficulties, such was not the case with article 16.

13. The definition of State debt in article 16 was formulated in general terms, but in fact it related solely to the debts of the predecessor State. Subparagraph (a)

<sup>1</sup> See 1660th meeting, para. 17.

<sup>2</sup> See 1659th meeting, para. 25.

<sup>3</sup> See 1658th meeting, footnote 3.

was directed towards obligations under international law, and might lead to problems only if an excessively broad interpretation were placed on the concept of the subject of international law. Some representatives in the Sixth Committee had, none the less, taken the view that the Commission had adopted too theoretical an approach to the subparagraph. To his mind, it was the expression "other subject of international law", rather than the substantive aspect, that was open to criticism. He believed that it would not be enough to mention States and international organizations alone without mentioning the other subjects of international law, since they actually existed in modern international legal life, as the example of the EEC, in particular, showed. One solution might be to speak of persons in international law defined as entities which, in the exercise of their supranational functions, could enter into an obligation under international law. For instance, when the EEC incurred a commitment under international law, it validly bound its members, and therefore constituted another "subject of international law". History also offered the example of the free cities. In modern life, Berlin [West] was recognized as an international person whose international relations were regulated by international law.

14. Thus, apart from States and international organizations, there were persons regulated by international law who could be creditors in international law. Consequently, the form of words adopted in subparagraph (a) reflected one aspect of the situation, and certain doctrinal exaggerations should not prevent the Commission from acknowledging the existence of those other subjects of international law. The expression was by no means a new one, since it appeared in article 3 of the 1969 Vienna Convention<sup>4</sup> and in various other codification treaties. Hence there was no reason why the Commission should not use it in the draft.

15. With respect to subparagraph (b), the members of the Commission who had urged that the text should contain such a provision had done so with the obvious intention of seeking to protect private persons, and more particularly foreign private persons, in cases of succession of States. In the context of the Commission's draft, it was indeed desirable and possible to endeavour to protect the legitimate interests of natural and juridical persons in private law. Among its nationals, the USSR had juridical persons in civil law who were not State organs and, for instance, concluded loan agreements. It was right that a State should wish to protect the interests of such persons in matters of State succession.

16. However, although subparagraph (b) was acceptable from that angle, it did not seem effective enough to protect all the interests of all persons in private law, since it concerned only private persons who were nationals of a third State, and not those who were

nationals of the predecessor State. Furthermore, it protected only persons to whom financial obligations were owed, and not persons who had other kinds of claims. Its scope was therefore extremely limited, and the original goal had not been attained. Furthermore, the private persons concerned would not be able to address their claims directly to the predecessor State or to the successor State. They would be required to assert their rights before the competent authority under the applicable law, in other words, the law of contract, either in the internal law of a State or in an arbitral tribunal. Hence, considerable difficulties of principle would be involved, since international law had no bearing on relationships with private persons and contracts were always concluded under the internal law of a State or the law of contract itself. Lastly, if subparagraph (b) was retained, subparagraph (a) would become superfluous.

17. Consequently, the need to protect the legitimate rights of private persons in cases of State succession was an argument in favour of drafting a different provision, in the form of a safeguard clause which would specify that the articles in the draft did not affect the rights and obligations of private natural and juridical persons. He noted in that regard that article 18, paragraph 1, took the form of a safeguard clause. In principle, he was in favour of that provision, and had agreed to it on first reading, although he had been opposed to subparagraph (b) of article 16.

18. However, he now doubted whether an article such as article 18 was enough to protect all the rights and obligations of private persons, for, over and above creditors in respect of financial obligations, persons with other kinds of claims also had to be protected. The safeguard clause should therefore be cast in broader terms and appear in the section on general provisions, so as to apply to all claims related not only to debts but also to State property and archives. The Drafting Committee should work along those lines.

19. In conclusion, if "odious debts" (see A/CN.4/345 and Add.1 and 2, paras. 135, 136, 146, 160) did exist, the question of their definition had implications that went beyond the scope of State succession. If such debts had no legal force in international law, that was necessarily true at all times, and not simply when a succession of States occurred. The problem therefore lay outside the scope of the draft articles and could not be regulated in the limited confines thereof. Moreover, if such debts existed, they related not to succession of States but to succession of governments, and chiefly involved cases in which the previous government had itself been odious and the new regime had been set up in response to the will of the people. In short, he believed that odious debts had no place in a draft which was concerned expressly and exclusively with succession of States. However, caution was required, and a definition of that kind of debt could be based only on specific criteria.

<sup>4</sup> See 1659th meeting, footnote 7.

20. Mr. REUTER said that he shared the misgivings expressed by the Special Rapporteur, whose views he supported.
21. He considered that the Commission might prepare the text of a provision on odious debts, but deferred to the view of the Special Rapporteur, particularly in view of the time available. However, the Commission should at least broach the topic in its commentary.
22. The comments by Mr. Ushakov on that and other aspects raised a problem which left him in some doubt as to the meaning of the words “financial obligation” in article 16. It should be made clear whether the Commission had in mind exclusively obligations whose origin was initially financial—namely, debts arising from loan contracts—or whether it also included all operations which resulted in financial obligations at some time or another. For example, an aggressor State might be responsible for delictual obligations as the result of an act of aggression on its part and it was desirable that the successor State should continue to be responsible for them. However, if a State had contracted a loan prior to an act of aggression in order to finance the military preparations for that purpose, the fact that the debt thus contracted was considered to have an absolute unlawful cause would remove the validity of the loan *ab initio*, and therefore render the debt non-existent.
23. Consequently, the concept of financial obligations should be clarified; Mr. Ushakov had taken the view that it should have a very broad meaning and cover any commitment which could be resolved by a financial obligation, particularly in the event of non-performance.
24. He endorsed Mr. Ushakov’s comments on the expression “other subject of international law” in subparagraph (a). In fact, the Commission had ultimately decided to use that very expression in the topic of the law of treaties; but he was able to accept Mr. Ushakov’s position and agree to deletion of the expression, although such a course might make subparagraphs (a) and (b) contradictory.
25. For all that, retention of the expression “any other subject of international law” would open the door for controversial views which held that certain entities in private law also had the status of subjects of international law. In his opinion, the Commission should not take up a position in such doctrinal controversies, and should indicate its choice of that attitude in its commentary.
26. He both agreed and disagreed with Mr. Ushakov on subparagraph (b), since he too was by no means sure that such a provision was superfluous, yet thought it could well be drafted differently. For example, some international labour conventions might provide for protection which resulted in financial obligations by a State towards private persons, even aliens. Consequently, if a State committed a breach of such an instrument to the detriment of foreign nationals on its own soil, any successor States might be bound by the obligations thus chargeable to the predecessor State. Admittedly, the victims would not have the possibility of taking direct action against the debtor State and would have to go through the State of their nationality. However, it was possible that a remedy would be available to them in the form of a complaint to an international organization. There were instances in modern practice in which individuals were able to avail themselves of some protection through the resources of international law. Viewed from that angle, subparagraph (b) was not entirely superfluous.
27. A compromise solution might be to retain subparagraph (b), redrafted, for instance, to read:  
 “any other financial obligation recognized by a rule of international law as chargeable to a State”.
- By selecting such a formula, the Commission would not be taking up a position on the issue of what might be a State’s international obligations in respect of an individual, but it would regulate the situation in cases in which such obligations existed. A solution of that kind might be useful as a compromise, so that as the Special Rapporteur wished, a substantive debate on the matter could be avoided.
28. Mr. ALDRICH said he considered it important to retain the essence of subparagraph (b) of article 16.
29. There was little doubt that in international law a succession of States did not have the legal effect of relieving the successor State of the obligations for the debts of the predecessor State, but it appeared that in the course of drafting the articles, the Commission had come close to the point where it seemed almost wrong to deal with the obligations of States towards private persons. The purpose of the draft articles, as he understood it, was to set forth the law on succession of States in respect of property, archives and debts, and the articles dealt mainly with the rights and obligations of the successor and predecessor States and, in certain cases, of third States. In the case of State debts, however, there was no reason, in his view, for confining the draft articles to debts owed to States or to international organizations, and every reason for extending them to deal with the legal consequences of State succession in matters of all debts owed by the State, regardless of the creditor.
30. The draft articles were to be very narrowly construed in terms of time, since they dealt with the rights and duties of the predecessor State and the successor State at the moment of State succession. Consequently, he considered that the draft articles on State debts dealt not with the rights of either the predecessor State or the successor State to modify, repudiate or opt out of a debt, but simply with the legal consequences of the mere fact of succession, and one of those consequences was that, as a result of the succession, the successor State was not relieved of the debts of the predecessor State. That was what article 16 said, and should say.

31. In political terms, it could be said that the draft articles drew upon the history of the past thirty years, which was rich in examples of State succession. It was to be hoped that the draft would set the framework for dealing with future instances of State succession, which would probably be far fewer than in the past. Perhaps that was why some people considered that the type of convention in question was of more academic than practical interest, although he thought that it would be of considerable value to the world of the future and trusted that it would be adopted.

32. At the same time, it had to be admitted that there was little in the draft to attract the enthusiastic support of a sizeable number of countries, and certain aspects were positively repugnant to some countries, particularly some of the former colonial powers. The real question was what useful purpose the convention would serve. Were it not for article 16 and the protection afforded for the rights of creditors, including private creditors, he was not sure that it would be of much value, and deletion of that article in order to maintain a State-to-State obligation throughout the text would have the unfortunate effect of divesting it of any force.

33. He agreed of course with Mr. Ushakov that debts were only one of the issues with which the Commission had been faced in the development of the draft and that, ideally, the draft articles should deal with other obligations. He suspected, however, that the scope of the text had been limited to State property, archives and debts for very valid reasons; the fact that it had not been possible to include other kinds of obligations of the State did not mean that the one obligation that had actually been included should be limited to debts owed to other States or international organizations. If the Commission produced a text that purported to deal with the illegal effects of State succession and failed to deal with the legal effects which were of considerable potential importance to a great many investors, it would lay itself open to the charge of having produced a useless convention. That would be very unfortunate, given the work done by the Special Rapporteur and the years of effort on the part of the Commission. Therefore, it was important to display discernment so as to ensure that the Commission's work would not be prejudiced.

34. He experienced no particular difficulty regarding subparagraph (a) of article 16, and would be prepared to let the future resolve the question of who were subjects of international law. He agreed, however, with one of the comments in the Sixth Committee to the effect that subparagraph (a) was unnecessary because subparagraph (b) sufficed: the problem of subjects of international law could perhaps be dispensed with in that way.

35. He also thought it necessary to be cautious about the use of the consensus rule as suggested by the Special Rapporteur in the context of State debts. If such a rule were adopted, it would have to be applied

uniformly, which would mean deleting not only subparagraph (b) of article 16 but also article 9, and would also raise questions, so far as he was concerned, regarding article 20, paragraph 2.

36. The draft articles would be of greater value to the international community if they were not confined to obligations among States alone. There was every practical reason for retaining a clear statement to the effect that a succession of States did not relieve the successor State of the debts of the predecessor State.

37. Mr. RIPHAGEN said that his approach differed somewhat from that of other members of the Commission.

38. The draft articles started by dealing with the legal aspects of the passing of territory from one State to another and then went on to deal with the incidental passing of State property, archives and debts. Viewed in that context, it seemed to him that the question of debts must be examined from the economic standpoint: in other words, the benefits of the passing of State property, rights and interests might well be accompanied by a corresponding financial burden. It would not be very helpful to limit the draft articles to the relatively few financial burdens that derived from the obligations owed by a State to a third State, an international organization, or another subject of international law, if any. Consequently, while he understood why the draft articles should be confined to the consequences of State succession as between the predecessor and successor States, he considered that article 16 had been rightly conceived and, in that connection, would remind members that subparagraph (b) had been included precisely because of the significance of the financial burdens for the successor State.

39. Mr. ŠAHOVIĆ said that he would prefer to retain article 16, subparagraph (b).

40. That provision had elicited many comments on the part of Governments, but they focused on matters which the Commission had duly taken into consideration before adopting its draft on first reading, and it would be pointless to reopen the discussion on second reading. Moreover, article 16 fitted well into the pattern of the draft. Articles 1, 4 and 15 were provisions which stated in a general way that the articles in the draft applied to the effects of succession of States in respect of matters other than treaties, and in particular to State property and State debts. It did not follow from those articles that the draft applied only to the effects of succession of States in the relations between the predecessor State and the successor State. Consequently, the Commission had attempted to settle all the questions to which a succession of States might give rise in respect of State debts, taking into consideration the various situations in which the States in question might find themselves. After defining the concepts of State property and State debt, it had found that it could not limit itself simply to

international relations in respect of financial obligations chargeable to a State and that it would have to take into account the repercussions that a succession could have on the situation of other foreign creditors.

41. Accordingly, he preferred the first solution mentioned by the Special Rapporteur (A/CN.4/345 and Add.1 and 2, para. 154), namely, to retain subparagraph (b) of article 16, since deletion of that provision was not likely to resolve the problems that could arise in the process of succession in respect of State debts. Another solution would be to attempt to alter the wording of subparagraph (b), but without going back on the position taken by the Commission.

42. Lastly, not only the general articles he had mentioned argued in favour of retention of subparagraph (b), but so did a number of special articles, such as article 18, paragraph 1 of which referred explicitly to "the rights and obligations of creditors", to be interpreted in the broadest sense of the term.

43. Mr. USHAKOV said that he did not deny the possible importance of the financial obligations of the predecessor State towards foreign private persons, and he recognized that such obligations were chargeable to the successor State following the succession of States. The only problem was that of the law that was applicable to those obligations. In the case of the obligations referred to in article 16, subparagraph (a), it was obviously public international law, and in the case of the obligations referred to in subparagraph (b) it was internal law or private international law. The Commission had drafted articles applicable to State property. In addition to the property of the State, there was property belonging to private persons that the Commission had deemed appropriate to take into consideration in subparagraph (b). If that private property was involved in a succession of States, its fate depended not on international law but on internal law. Hence, the rights of private, natural and juridical persons could not be protected by means of international law.

44. Mr. CALLE Y CALLE said that all States were, of course, heavily indebted. Article 16, however, did not deal, nor should it deal, with all the debts incurred by States. Rather, it defined a special type of debt, namely, a debt incurred by a State towards another party with which it had a relationship recognized under international law. In subparagraph (a) of the article, the word "international" could have been added before the words "financial obligation", and taken to mean "between States". On the other hand, subparagraph (b) was couched in extremely broad terms and covered types of relations other than those recognized under international law. To avoid confusion, therefore, it would be preferable to delete subparagraph (b) of article 16.

45. A provision should be included elsewhere in the draft, however, to safeguard the rights of private persons.

46. Mr. ALDRICH, referring to the comments by Mr. Ushakov, explained that he had indeed been talking about international law. The draft articles determined the legal consequences in international law of a succession of States, and subparagraph (b) of article 16 provided that one of those consequences was that the successor State would succeed to the debts of the predecessor State, including the debts owed to private persons. That was a matter of international law, and he wished to see it stated clearly in the text. If immediately following the succession of States a State expropriated property or repudiated a debt, the matter fell within the scope of international law. Mr. Ushakov and he might not agree about the State's right to take such action in regard to foreign nationals, but he thought that, for the moment, they should be able to agree that, under international law, State succession involved succession to debts, both public and private, of the predecessor State.

47. Mr. FRANCIS asked the Special Rapporteur whether the definition of State property covered only the entitlement of the predecessor State to its rights in relation to another State or whether it extended to interests vested in a party other than another State.

*The meeting rose at 6 p.m.*

## 1672nd MEETING

*Tuesday, 16 June 1981, at 10 a.m.*

*Chairman:* Mr. Robert Q. QUENTIN-BAXTER

*Present:* Mr. Aldrich, Mr. Barboza, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Ushakov, Mr. Verosta.

**Succession of States in respect of matters other than treaties (continued)** (A/CN.4/338 and Add.1-4, A/CN.4/345 and Add.1 and 2)

[Item 2 of the agenda]

**DRAFT ARTICLES ADOPTED BY THE COMMISSION:**  
**SECOND READING (continued)**

**ARTICLE 15** (Scope of the articles in the present Part)  
*and*

**ARTICLE 16** (State debt)<sup>1</sup> (*concluded*)

1. Mr. BEDJAOUI (Special Rapporteur) reminded members that at the end of the previous meeting Mr. Francis had drawn a parallel between the concepts of State debt and of interests, and had wondered whether

<sup>1</sup> For texts, see 1671st meeting, para. 1.

State debt was not covered by the words "property, rights and interests" in the definition of the term "State property" contained in article 5 of the draft.<sup>2</sup>

2. In that respect, it should be emphasized that the Commission had taken the expression "property, rights and interests" from important international treaties, including the Treaty of Versailles. The expression was to be understood in its broadest sense; the concept of interests covered any legal interest, such as a right of pre-emption, a right of option to buy, an interest in taking legal action, regardless of whether an existing or potential right or interest was involved. *A fortiori*, it could be understood in the narrow meaning and apply to a sum of money collected on an investment. If such interest, which was State property, was owned by the predecessor State, it formed part of its assets and could, in accordance with the draft articles, pass to the successor State in the same way as "property, rights and interests". The successor State was entitled to both the principal and the interest.

3. Mr. FRANCIS thanked the Special Rapporteur for his explanation and said that his position on article 16 was basically similar to that of Mr. Šahović (1671st meeting), as qualified, however, by the remarks made by Mr. Reuter (*ibid.*). Initially, he could have accepted the Special Rapporteur's suggestion to delete the phrase "or any other subject of international law" in subparagraph (a) of the article (A/CN.4/345 and Add.1 and 2, para. 159), but, having heard Mr. Reuter and Mr. Ushakov (1671st meeting), he would join in the general consensus emerging in favour of retention of the phrase.

4. With regard to subparagraph (b), he wished to state his position on behalf of the Caribbean region. He believed that it was no longer possible to deal with the question on the theoretical plane. It was necessary to get down to realities and to deal with the issues as seen in a national context. In view of the Special Rapporteur's remarks on the definition of State property contained in article 5, he would cite the hypothetical case of his own country having to sell its mission to the United Nations to one of the major New York banks. If, following an internal revolution, the country were divided into two successor States, the question would arise of how any debt outstanding in that respect would be treated so far as the new States were concerned.

5. During the current economic crisis, many developing countries, including the island States in the Caribbean region, had experienced great difficulties. When their lines of credit from the developed countries and from institutions such as the World Bank had dried up, they had managed to survive, in the first place, on direct loans from such friendly Arab countries as Algeria, Iraq, Kuwait and the Libyan Arab Jamahiriya; latterly Mexico and Venezuela had also arranged especially generous terms for the

Caribbean countries in regard to their oil debts. Yet many Caribbean countries had also had to resort to private borrowing, both internal and external. It was extremely important, in his view, not to create the impression that the value of private external loan facilities, at times when all other avenues had failed, was being minimized. As a matter of principle, it would be wrong to provide for a situation whereby a State could benefit from the private loans or credits which fell due to it and totally ignore the other aspect of the matter. It had to be remembered that there were many small countries, and the smaller they were the more they would be affected if the Commission failed to codify the law in that respect.

6. He would find it difficult to endorse the suggestion to add a proviso to the effect that the articles were without prejudice to any obligations owing to private persons, particularly in view of the terms of article 23,<sup>3</sup> which dealt with the complete disappearance of the predecessor State. Not all of the debts payable by a predecessor State were connected with specific projects in a part of that State. A country with balance-of-payment problems might well secure a sizeable loan which would then be used throughout the country as a whole. If the predecessor State disappeared and no provision was made for the passing of the debt, as would occur if subparagraph (b) of article 16 was not retained, which national law would apply to that debt? The Commission should be alive to such problems in an endeavour to ensure that the draft took account of the interests of the developing countries, which had benefited in vital areas from private loans in recent years.

7. During the Commission's discussion, reference had been made to the "new" international law, which presumably meant the content of such law. In his submission, that new international law must take care of the basic needs of the developing countries and their obvious concern to ensure that the confidence of private investors was not undermined.

8. Mr. JAGOTA said that the main reason for the Special Rapporteur's proposal to delete subparagraph (b) of article 16, together with the phrase "or any other subject of international law" in subparagraph (a), was apparently to enable the Commission to take a second look at the definition of State debts and thus at the scope of the definition and the relevance of State debts to State succession. The Special Rapporteur had proposed that private individuals, private corporations and other institutions that were not international legal persons should be excluded from the definition of State debts in order to avoid any unnecessary broadening of the scope of State succession, and considered that the Commission might restrict the definition to debts owed to another State or to an international organization—something which would be consistent with the approach adopted in other parts of the draft and particularly in

<sup>2</sup> See 1660th meeting, para. 17.

<sup>3</sup> See 1658th meeting, footnote 3.

the part relating to State property. In addition, the Special Rapporteur had been mindful of the criticism voiced in the Sixth Committee in 1979 and 1980 regarding the extended scope of the concept of State debt. Lastly, the Special Rapporteur felt that a consensus on the point was lacking in the Commission, that it would be pointless to reopen the debate and that it would be better for the matter to be decided by a conference of plenipotentiaries on the basis of the various arguments advanced by the Commission.

9. It was difficult to recall any other occasion when, on a second reading, a set of draft articles had been the subject of substantive proposals for revision. The question which came to mind, therefore, was whether the Commission had considered the matter with all due reflection, particularly in terms of the consistency of the text and of State practice. A second question concerned the current situation regarding international law and State practice on the point. In that connection, he noted, from paragraph 149 of the Special Rapporteur's report (A/CN.4/345 and Add.1 and 2), that Italy had made some comments.

10. He would like to know whether debts to individuals, corporations or other juridical persons in private law had been treated, in State practice, as a part of State debts for the purposes of State succession. Was there, for instance, any precedent of which the Commission should take note? In that connection, Mr. Ushakov (1671st meeting) took the view that, in current international practice, private debts were not regarded as part of State debts for the purposes of State succession, since they were regulated under other branches of law, both internal and international, depending on who the creditor was.

11. State debts were a part of contemporary life, particularly for the developing countries which lacked the necessary funds for their economic development. If, for example, a State wishing to raise a loan of \$100 million for the execution of a project secured \$50 million from its own consolidated fund, a further \$30 million from the World Bank and \$20 million, for which it had to guarantee security, from private bankers, what would the position be in a case of succession of States? Of course, both the State debt and the debt owing to the World Bank would pass but would the residual \$20 million, guaranteed by the State, be regarded as a private debt, and hence one that did not fall within the scope of article 16, or as a part of a State debt for the purposes of that article?

12. To find the answer, he had examined previous reports on the Commission's work to see whether a decision in the matter had already been reached. It appeared that there had been no direct discussion on the point, although paragraphs (38) and (39) of the commentary to article 16<sup>4</sup> did suggest that the phrase "any other financial obligation", in subpara-

graph (b) of article 16, covered private debts. However, the report was silent on the main question and on the criticism voiced in that respect in the Sixth Committee of the General Assembly, and it therefore seemed that the Commission had not in fact reached a decision advisedly. At the same time, he seemed to recollect a discussion of the matter in 1977 when the Commission had been keenly aware of the need to protect the interests not only of the predecessor and successor States but also of the creditor. The term "creditor" had not been defined, but it was understood to refer both to a State and to an international organization, something that would create problems regarding the application of article 18 to such an organization. His impression therefore was that a State debt could include debts other than those owed to another State or to an international organization: if a debt was owed by a State, for instance to a private bank or a private individual, then it was a State debt.

13. Given the sensitive nature of the problem, there appeared to be three main options. First, article 16 could be retained as drafted, the views of both sides being reflected in the commentary; secondly, article 16 could be amended as recommended by the Special Rapporteur, the reasons being indicated in the commentary; and, thirdly, the part of the article on which there was a difference of opinion could be placed between square brackets, an explanation being included in the commentary.

14. He would be unable to decide on his own preference without some evidence of whether, in State practice, private debts were included among State debts. If they were, he would favour the retention of the article in its existing form; otherwise, the better course would probably be to leave it to a plenipotentiary conference to settle the matter on the basis of the views expressed by members of the Commission.

15. Mr. USHAKOV pointed out that under article 16, subparagraph (a), the State was acting as a subject of international law, whereas under subparagraph (b) it was acting as a subject of private law. In the latter case, it renounced its State immunity in principle and consented to the application of a specific law to the contract to which it was a party; succession could also take place in such a case, but under a national law and not under international law.

16. Mr. PINTO said that the Special Rapporteur's proposals regarding article 16 reflected two alternative approaches. In respect of the first proposal, namely to retain the existing text of the article, the Commission had sought to regulate succession to debts owed by a State to creditors which were not States or inter-governmental organizations, and thereby to offer a measure of confidence to those creditors that the process of succession would not itself constitute an additional risk to their capital. The second proposal was to recast the text so as to cover only debts owed by a State to another State or to an intergovernmental organization. He agreed with the Special Rapporteur

<sup>4</sup> Yearbook . . . 1979, vol. II (Part Two), p. 46.

that, to restrict the scope of the article in that way, it was necessary to delete subparagraph (b) and also the phrase "or any other subject of international law" in subparagraph (a).

17. Those who advocated the broader approach believed that international law, and specifically the draft articles, should be seen to protect private creditors. According to the "Brandt Report",<sup>5</sup> State borrowing on the international private market had risen from 17 per cent of the outstanding debt of developing countries in 1970 to 40 per cent in 1979—a factor of considerable relevance in view of the increasing vulnerability of developing countries to the charge that they were no longer creditworthy.

18. Those who advocated the second, more restrictive, approach had stated they were in no way opposed to the protection of private creditor's rights, but considered that it was essentially a matter for the internal law of the successor State, and not for international law. In their opinion, the draft articles should do no more than acknowledge the existence of those rights, in a saving clause, and place them firmly outside the scope of the articles.

19. His own view was that whether or not a State borrowed from a foreign source was entirely a matter of the policy of that State. If the decision was to borrow, it was necessary from both the moral and the practical point of view for the money to be repaid as agreed, whether the creditor was a State, an inter-governmental organization or a private party. He was convinced that not a single modern State would like to have a choice in law as to whether or not to repay a debt related to its territory on the ground that a State succession had occurred and that it was no longer responsible. That was even more true in the case of debts owed to private creditors, who not only were more vulnerable but were more likely than State creditors to retaliate by withholding further credit. In the circumstances, he considered that there was no need to contemplate any distinction between the two types of debt so far as the effects of succession were concerned.

20. The question remained whether the regulation of debts owed by a State to a foreign private creditor fell within the scope of international law and, in particular, of the draft articles. So far as the obligation of a State to a foreign national was concerned, international law could, in his opinion, have a certain role to play. Such law might or might not govern directly the detailed obligations of performance, although such obligations might well be governed in whole or in part by the proper law applicable to the transaction. The draft articles, however, were not concerned with what law was applicable to the loan, but rather with whether the

debt was affected by the succession and what law was applicable for the purpose of determining the effects of the succession: in other words, to which State a creditor could turn following the succession. In a process as fundamental as that dealt with in article 17, the matter was not one with which private law, or private law alone, was equipped to deal. The nearest concepts in private law involving the automatic passing of property and debts related to decease, and analogies could not be drawn with State succession.

21. It was therefore difficult to escape the conclusion that international law must have some role to play in determining which State was accountable for debts to private creditors following a succession. Under article 16, read in conjunction with article 17 in its existing form, responsibility passed to the successor. Once that passing had occurred, the successor State could rely on the full range of its rights in public and private international law in deciding how to deal with the obligation that had devolved upon it. That latter aspect was not to be covered by the draft articles. International law as reflected in the draft only had to ensure all those concerned that the financial obligation survived the succession. The process of succession was independent of the process of performance of financial obligations, which might be viewed differently.

22. If it was necessary to clarify the scope of the application of private law to the performance of financial obligations owed to private creditors following a succession, that could be done by making an appropriate addition to article 17 or to the commentary.

23. In view of the little time available to the Commission, he would be guided by the Special Rapporteur and the opinion of the majority of the Commission in the matter of excluding from or retaining in the draft articles State debts owed to private creditors.

24. He would have liked to pursue the question of "odious debts", but was prevented from doing so by lack of time. The question was one which raised so many problems of definition that he doubted whether it would be possible to complete the discussion at the present session.

25. Mr. VEROSTA said he was somewhat surprised that it should be necessary, on second reading, to decide whether to continue along the lines set out by the Special Rapporteur or to take a completely different course as a result of criticism by some Governments. In his view, it would be difficult to go back on the Commission's position. Personally, he had always considered that the draft applied to all debts, including those contracted by States with private natural or juridical persons. Not only article 17, which had already been mentioned, but also article 23, concerning the passing of State debt of the predecessor State when the latter was dissolved, referred to a regime of public international law. Consequently, the

<sup>5</sup> *North-South: a Programme for Survival—The Report of the Independent Commission on International Development Issues under the Chairmanship of Willy Brandt* (London, Pan Books, 1980).

current wording of article 16 should remain unchanged.

26. Mr. BEDJAOUI (Special Rapporteur) said he regretted that article 16 had been the subject of a further discussion, which merely served to emphasize the divergence of views among members of the Commission. The Drafting Committee would undoubtedly be concerned by the fact that no consensus was emerging on a solution. It was none the less generally accepted that the definition in article 16 should not have the effect of sacrificing the rights of private parties. The fact that no reference was made to such rights in the article did not mean that they were sacrificed, but that consideration of them did not fall within the purview of the draft. As Mr. Ushakov had pointed out at the previous meeting, protection of the rights of private natural or juridical persons was not governed by public international law but by private international law or internal law.

27. It was in no way absurd, in the context of the draft, to exclude the financial obligations assumed by a State towards an individual. At the outset, the Commission had set aside many public debts that might concern individuals, for example, debts contracted by local authorities with private individuals, and had confined itself to State debts. In that case too, the fact that such debts were not specifically mentioned did not mean that they were sacrificed. The Commission had therefore gradually narrowed the field of application of the draft, first by excluding public debts other than State debts and then by restricting its consideration of State debts to those which gave rise to relationships in public international law, namely, the debts of a State towards another State or an international organization. In doing so, it had simply set aside State debts contracted with private persons, but without thereby sacrificing them.

28. In connection with a comment by Mr. Jagota, he said that there was a State practice with regard to State debts contracted with other States or international organizations and debts contracted with private persons. For debts in the first category, the practice was based on international agreements or conventions such as the articles which the Commission was in the process of drafting, whereas for those in the second category, it was based on contracts, and, generally speaking, referral to the judicial authorities was not required. Public international law could indeed apply later on, if difficulties arose as a result of debts contracted with private persons; however, the matter was not one of succession of States, but of exhaustion of internal remedies and diplomatic protection. Similarly, the growing practice in international law of protecting private investments abroad was not a matter that fell under succession of States either.

29. In its draft articles, the Commission had taken into consideration three matters relating to succession, namely, State property, State debts and State archives, but its definitions were very different in each case. It

referred to the internal law of the predecessor State only in respect of State property and State archives. If it had wished to define the term "State debt" along the same lines, article 16 ought to have been drafted to read:

"For the purposes of the articles in the present Part, 'State debt' means any financial obligations of a State which, at the date of the succession of States, were, according to the internal law of the predecessor State, chargeable to that State."

The Commission had not opted for such a definition because it had wished to pinpoint certain aspects of international law on State debt. It had wished to take account of one relationship in purely public international law, in other words, the relationship between States or between a State and an international organization; thus, in order not to depart from that approach, anything relating to private international law or internal law had to be deleted from the definition.

30. It seemed difficult to reconcile the views of those who were in favour of deleting subparagraph (b) of article 16 and those for whom that provision was so general that it would in fact be more logical to delete subparagraph (a). Admittedly, subparagraph (b) was very general, but Mr. Ushakov had pointed out at the previous meeting that it did not afford the degree of protection for private creditors that the Commission had expected. Mr. Reuter (1671st meeting) had asked whether a financial obligation was an obligation of financial origin, as was the case for a debt resulting directly from a contract for a loan, or whether it was a secondary obligation resulting from another obligation expressed in financial terms. In that respect, it should be noted that subparagraph (b) of article 16, and particularly the words "any other financial obligation", when taken together with subparagraph (a), covered two types of financial obligations: on the one hand, those that were not assumed by a State "towards another State, international organizations or any other subject of international law" and which could therefore be assumed towards an individual, and on the other, those which differed from the obligations covered in subparagraph (a), either in their delictual nature, the way in which they were created or their modalities.

31. Mr. Aldrich (*ibid.*) had considered that the Commission should take care not to reopen the discussion on article 16, that the consensus reached on first reading meant that subparagraph (b) should be retained, and that further debate would ensue precisely if it was deleted. However, it should not be forgotten, as Mr. Jagota had pointed out, that the deletion of the word "international", which had qualified the term "financial obligation" in the original version of the text which became article 16,<sup>6</sup> had led to a new split within the Commission.

<sup>6</sup> See, for example, *Yearbook . . . 1979*, vol. II (Part One), p. 70, document A/CN.4/322 and Add.1 and 2, art. 18.

32. With regard to article 16, subparagraph (a), in its work on the draft articles on treaties concluded between States and international organizations or between international organizations, the Commission had hesitated between the expressions "subject of international law" and "entity in international law".<sup>7</sup> The expression "entity in international law" could be used in subparagraph (a), provided that it was stated in the commentary, as Mr. Francis had stressed, that international personality was not recognized for multinational companies, so that the arbitral award of 1977 concerning the nationalization of Libyan oil<sup>8</sup> did not set a precedent.

33. In view of the diversity of views expressed, the Commission could either maintain the current wording of article 16, which would undoubtedly give rise to reservations, or delete subparagraph (b), although the members of the Commission were extremely divided on that point, or replace the subparagraph with a safeguard clause stating that the definition in the article did not affect the rights and obligations of private natural or juridical persons. That was the solution proposed by Mr. Ushakov. Mr. Reuter proposed that the difficulty caused by the word "international" should be circumvented by referring to "any other financial obligation recognized by a rule of international law as chargeable to a State" (1671st meeting, para. 27).

34. For his own part, he would be prepared to propose a definition for odious debts. In his ninth report, he had proposed two articles, one containing a definition of odious debts and the other referring to their non-transferability.<sup>9</sup> It was not correct to consider, as did Mr. Ushakov, that odious debts were largely a matter of succession of governments and that it was not therefore necessary to refer to them in the draft. In his ninth report, he had in fact given numerous examples of odious debts, such as war debts, subjection debts and regime debts, which did not concern succession of governments alone.

35. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer articles 15 and 16 to the Drafting Committee.

*It was so decided.*<sup>10</sup>

ARTICLE 17 (Obligations of the successor State in respect of State debts passing to it),

ARTICLE 17 bis (Date of the passing of State debts),

<sup>7</sup> See *Yearbook... 1974*, vol. II (Part One), p. 295, document A/9610/Rev.1, chap. IV, sect. B, art. 3, para. (6) of the commentary.

<sup>8</sup> See 1666th meeting, para. 24.

<sup>9</sup> *Yearbook... 1977*, vol. II (Part One), pp. 70 and 74, document A/CN.4/301 and Add.1, paras. 140 and 173.

<sup>10</sup> For consideration of the texts proposed by the Drafting Committee, see 1692nd meeting, paras. 85 and 86-104.

ARTICLE 18 (Effects of the passing of State debts with regard to creditors), *and*

ARTICLE 19 (Transfer of part of the territory of a State)

36. The CHAIRMAN invited the Commission to consider the last articles in section 1 of Part III of the draft articles, namely, articles 17, 17 bis (A/CN.4/345 and Add.1 and 2, para. 164) and 18, and the first article of section 2 (Provisions relating to each type of succession of States): article 19. Those four articles read:

*Article 17. Obligations of the successor State in respect of State debts passing to it*

A succession of States entails the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as pass to the successor State in accordance with the provisions of the articles in the present Part.

*Article 17 bis. Date of the passing of State debts*

Unless otherwise agreed or decided, the date of the passing of State debts is that of the succession of States.

*Article 18. Effects of the passing of State debts with regard to creditors*

1. A succession of States does not as such affect the rights and obligations of creditors.

2. An agreement between the predecessor State and the successor State or, as the case may be, between successor States, concerning the respective part or parts of the State debts of the predecessor State that pass, cannot be invoked by the predecessor State or by the successor State or States, as the case may be, against a third State or an international organization asserting a claim unless:

(a) the consequences of that agreement are in accordance with the other applicable rules of the articles in the present Part; or

(b) the agreement has been accepted by that third State or international organization.

*Article 19. 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 the State debt of the predecessor State to the successor State is to be settled by agreement between the predecessor and successor States.

2. In the absence of an agreement, an equitable proportion of the State debt of the predecessor State shall pass to the successor State, taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt.

37. Mr. BEDJAOUÏ (Special Rapporteur) said that article 17 enunciated a rule for State debts that was equivalent to the one contained in article 6, concerning State property. Article 17 had not given rise to any particular comments, except for that by the German Democratic Republic (A/CN.4/338), which had said that the mechanism of the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State should apply only to debts contracted in accordance with international law.

Article 17 therefore seemed to command tacit general support.

38. Article 17 *bis* sought to establish the date of the passing of State debts in cases where the date had not been settled by agreement between the predecessor State and the successor State or by a decision of an arbitral tribunal or any other international body. He was proposing that the Commission should use the same formula as for State property, and he had drafted article 17 *bis* purely and simply as a counterpart to article 7, concerning the date of the passing of State property.

39. The rule enunciated in article 17 *bis* was only of theoretical value, since it was possible, in practice, to choose a date other than that of the succession of States. Experience showed that there was always a transitional period during which the predecessor State continued, for example, to service the debt and during which the successor State did not directly discharge its obligations to its creditors. The Commission did not have to deal with that matter, but must make it clear that, for all the debts passing to the successor State and the interest that began to accrue as of the date of succession, the real debtor was the successor State.

40. Article 18 had given rise to problems in the Sixth Committee and had elicited written comments from the Governments of Italy and Czechoslovakia, which were summarized in paragraphs 173 to 175 of his thirteenth report (A/CN.4/345 and Add.1 and 2).

41. Paragraph 1 of article 18 was a general safeguard clause. It had been stated that it created more problems than it solved, and that, in particular, it would be a disservice to the creditors which it sought in principle to protect, since such creditors might be deprived of any recourse against the successor State. It had also been pointed out that the word "creditors" was not sufficiently precise, and that it could apply just as well to third States or the successor State as to natural or juridical persons under the jurisdiction of a foreign State or even the successor State. Paragraph 2 also contained an imprecise definition of creditors, which was not properly in keeping with the terms of paragraph 1, for it applied only to third States and international organizations, whereas paragraph 1 related to creditors in general and was primarily aimed at providing guarantees for private creditors.

42. At the previous meeting, Mr. Ushakov had expressed the view that article 18, paragraph 1, afforded inadequate protection and had proposed the elaboration of a general safeguard clause. For his own part, he suggested that article 18, paragraph 1, should be deleted if the wording could not be improved.

43. The purpose of paragraph 2 of article 18 was to determine when an agreement between the predecessor State and the successor State could be invoked against third States or international organizations. Although subparagraph (b) seemed to be generally acceptable, subparagraph (a) gave rise to considerable difficulties.

44. First of all, the meaning of the words "the consequences of that agreement" and the words "in accordance with the other applicable rules" had to be clarified. Subparagraph (a) had elicited comments in the Sixth Committee as well as written comments by the Government of Czechoslovakia (A/CN.4/388/Add.2), which had, for example, pointed out that there were two categories of third States: those which would accede to the future draft convention and would thus be bound by its provisions, which could be invoked against them, and those which would not accede to the future convention and could not possibly be bound by such a rule, which was, moreover, incompatible with article 34 of the 1969 Vienna Convention.<sup>11</sup>

45. He regarded those difficulties as a drafting problem which the Drafting Committee would have to solve. Nevertheless, one problem would subsist as far as relations with international organizations were concerned, for the future convention would most probably not be open to participation by international organizations and it was therefore difficult to see how its provisions could apply to them. Moreover, the inclusion in the draft of an article providing for special treatment for third States that were parties to the convention might also deter States from acceding to the instrument.

46. Article 19 had not given rise to any comments, other than the statement by one representative in the Sixth Committee that the words "taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt" were incompatible with the words "taking into account all relevant circumstances" used in articles 22 and 23. That difference could, however, be explained by the fact that article 19 covered a very specific case, namely, the transfer of part of the territory of a State, which took place freely, by agreement, and involved a small portion of territory (for example, a frontier adjustment), whereas the separation of part or parts of the territory of a State, covered by article 22, and the dissolution of a State, covered by article 23, often involved violence, took place without any agreement and affected large areas of territory, and account should therefore be taken of all the most general circumstances.

47. Mr. PINTO said that article 7, which dealt with the date of the passing of State property, was readily understandable in the context of article 16, but article 17 *bis*, which dealt with the date of the passing of State debts, almost automatically introduced the idea of third-party interests, whether State or private. The use of the words "Unless otherwise agreed or decided" at the beginning of article 17 *bis* made him wonder who could agree or decide on another date. Again, article 18, paragraph 2, did cover some aspects of an agreement, but it did not deal with the question of acceptance of the agreement by third party private

<sup>11</sup> See 1659th meeting, footnote 7.

creditors, to whom the safeguard clause in article 18, paragraph 1, nevertheless applied.

48. He would therefore like the Special Rapporteur to explain whether the phrase "Unless otherwise agreed or decided" in article 17 *bis* was to be interpreted as meaning that all the types of creditors contemplated in the draft could be parties to the agreement or the decision in question.

49. Mr. ŠAHOVIĆ said that, in his opinion, the Commission could refer articles 17, 17 *bis* and 19 to the Drafting Committee. However, article 18 gave rise to serious problems in the context of article 16, which contained a definition of State debt that was not yet sufficiently clear.

50. Mr. USHAKOV said he thought that the four articles under consideration could be referred to the Drafting Committee.

51. Mr. ALDRICH said that, subject to the Special Rapporteur's answer to Mr. Pinto's question, he could agree that articles 17 and 17 *bis* should be referred to the Drafting Committee.

52. Mr. BEDJAOUI (Special Rapporteur), replying to the point raised by Mr. Pinto, said that article 17 *bis* was concerned exclusively with the date of the passing of State debts to the successor State, which it determined was the date of the succession of States. Accordingly, the agreement or decision in question related only to the matter of the date, and its purpose was not to solve the problem of the different types of creditors. The rule enunciated in article 17 *bis* was thus a residual one, since the predecessor State and the successor State could agree on another date.

53. Mr. REUTER said that there was still some doubt in his mind, and that the words "agreed or decided" gave rise to something more than a drafting problem, because the word "decided" obviously covered a unilateral act that could be the result of arbitration. If that was in fact the case, the Commission should say so in the commentary; otherwise, only the word "agreed" should be retained.

54. Mr. JAGOTA said he would like the Special Rapporteur to explain whether, as far as agreement was concerned, there was any relationship between article 17 *bis* and article 18, paragraph 2. In other words, did the agreement referred to in article 17 *bis* relate only to the date of the passing of State debts, and did the agreement referred to in article 18, paragraph 2, relate only to matters other than the date of the passing of State debts or did it also refer to that date? If article 18, paragraph 2, also related to the date of the passing of State debts, the answer to Mr. Pinto's question would be that the words "Unless otherwise agreed or decided" implied that an agreement by the predecessor State and the successor State could fix the date of succession, but if a third party creditor was not a party to that agreement, then article 18, paragraph 2, would apply.

55. In view of the point raised by Mr. Reuter, the word "decided" would have to have the same meaning both in article 7 and in article 17 *bis*.

56. Mr. BEDJAOUI (Special Rapporteur) said that the words "Unless otherwise agreed or decided" used in article 17 *bis* were the formula that the Commission had used previously in the draft to refer both to what could be agreed by the predecessor State and the successor State and to what might be decided by an arbitral tribunal or an international organization, as had already been indicated in the commentary to article 7.<sup>12</sup>

57. With regard to article 17 *bis* and article 18, paragraph 2, Mr. Jagota had established a relationship that did not exist. The former provision indicated, in the absence of any agreement on the matter, the date of the passing of debts; the latter provision related to the agreement that settled the substance of the problem and governed the manner and proportions in which the passing of debts took place. Thus, there did not seem to be any possible confusion.

58. Mr. ALDRICH said the Special Rapporteur had made it clear that the problem involved in the use of the words "Unless otherwise agreed or decided" in article 17 *bis* was of a drafting nature. The Drafting Committee should obviously examine articles 7 and 17 *bis* at the same time, and find a way of showing that what was being dealt with in both articles was an agreement between the predecessor State and the successor State, or a decision taken in accordance with an agreement between those two States.

59. The CHAIRMAN, speaking first as a member of the Commission, said that, unless his recollection was entirely wrong, the Commission had included the words "or decided" in article 7<sup>13</sup> in order to cover the case of newly independent States, a case in which the determining factor might be a decision or resolution of an international organization rather than an agreement between the predecessor State and the successor State.

60. If there were no objections, he would take it that the Commission agreed to refer articles 17 and 17 *bis* to the Drafting Committee.

*It was so decided.*<sup>14</sup>

61. The CHAIRMAN asked whether the members of the Commission were of the view that further substantive discussion was required before article 18 could be referred to the Drafting Committee.

62. Mr. USHAKOV said that article 18 was closely connected with the wording of a possible general safeguard clause. A more thorough discussion of the article might therefore be held in the Drafting Committee, which had already been requested to

<sup>12</sup> See *Yearbook . . . 1979*, vol. II (Part Two), pp. 19–20.

<sup>13</sup> *Ibid.*, art. 7, para. (4) of the commentary.

<sup>14</sup> For consideration of the texts proposed by the Drafting Committee, see 1692nd meeting, paras. 105–106 and 107–108.

consider the possibility of preparing such a clause, and whose work would certainly make it easier for the Commission to adopt a decision later on.

63. Mr. REUTER pointed out that article 16 had been referred to the Drafting Committee even though everyone was aware that it gave rise to problems of substance rather than form. The same was true of article 18, and it could therefore be referred to the Drafting Committee, since experience tended to show that the work of that body was not confined to drafting problems.

64. Mr. JAGOTA said that, if article 18 was referred to the Drafting Committee without first being discussed by the Commission, the Drafting Committee would probably refer it back to the Commission. The article should therefore form the subject of further discussion by the Commission.

65. Mr. ALDRICH said that, as a new member of the Commission, he would certainly profit from a discussion of article 18.

66. Mr. BARBOZA said that, from the methodological point of view, it would obviously be better for the Commission to discuss article 18 and then refer it to the Drafting Committee.

67. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to continue its consideration of article 18 during the second half of its 1675th meeting, on Friday, 19 June.

*It was so decided.*

*The meeting rose at 1.05 p.m.*

## 1673rd MEETING

*Wednesday, 17 June 1981, at 10.05 a.m.*

*Chairman:* Mr. Robert Q. QUENTIN-BAXTER

*Present:* Mr. Aldrich, Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitul, Mr. Tabibi, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

**Question of treaties concluded between States and international organizations or between two or more international organizations (continued)\* (A/CN.4/339 and Add.1-7, A/CN.4/341 and Add.1)**

[Item 3 of the agenda]

\* Resumed from the 1652nd meeting.

### DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

#### ARTICLE 26 (*Pacta sunt servanda*)

1. The CHAIRMAN invited the Special Rapporteur to introduce article 26, in section 1 (Observance of treaties) of Part III of the draft articles, entitled "Observance, application and interpretation of treaties". The article read:

##### *Article 26. Pacta sunt servanda*

**Every treaty in force is binding upon the parties to it and must be performed by them in good faith.**

2. Mr. REUTER (Special Rapporteur) said that article 26, which was identical with article 26 of the Vienna Convention,<sup>1</sup> did not call for any special comment.

3. He proposed that the Commission should refer the title of Part III, that of section 1 and the text of article 26 to the Drafting Committee.

*It was so decided.*<sup>2</sup>

ARTICLE 27 (Internal law of a State, rules of an international organization and observance of treaties)

4. The CHAIRMAN invited the Special Rapporteur to introduce article 27, which read:

##### *Article 27. Internal law of a State, rules of an international organization and observance of treaties*

1. A State party to a treaty between one or more States and one or more international organizations may not invoke the provisions of its internal law as justification for its failure to perform the treaty.

2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty, unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization.

3. The preceding paragraphs are without prejudice to [article 46].

5. Mr. REUTER (Special Rapporteur) recalled that the version of article 27 adopted on first reading was the result of a lengthy exchange of views in the Commission, which, moreover, had expressed its intention of examining the article carefully at the second reading. It had also been the subject of an important debate in the Sixth Committee and of written comments by Governments and international organizations, which on the whole had adopted a fairly favourable attitude towards the text approved on first reading, although some had considered that its provisions called for reconsideration.

<sup>1</sup> See 1644th meeting, footnote 3.

<sup>2</sup> For consideration of the article by the Drafting Committee, see 1692nd meeting, para. 46.

6. The German Democratic Republic, in particular, had considered (A/CN.4/399/Add.6) that the text adopted on first reading, accompanied by the Commission's comments,<sup>3</sup> left room for doubt and confusion. Moreover, the ILO had pointed out (A/CN.4/339) that article 27 might create difficulties not unrelated to those the Commission had been required to solve at its thirty-second session during its examination of draft article 73. He recalled the view adopted by the Commission at the time, that the text of article 73<sup>4</sup> should probably be linked to that of article 27. Apart from drafting matters, the latter provision in fact raised three series of questions.

7. One series of questions had arisen when, at the beginning of the current session, the Commission had considered article 2, paragraph 1, subparagraph (j), concerning the definition of "rules of the organization" (1644th and 1645th meetings). That expression had been specifically included in paragraph 2 of the text of article 27 adopted on first reading, and the Commission had wondered whether it might not be better to state which particular rules of the organization could not justify failure to perform the treaty. In his view, the expression "rules of the organization" meant the rules which the organization might invoke on the precise subject, that is to say, those concerning its competence to conclude a treaty. He recognized, however, that the wording of article 27 was an awkward one, in that paragraph 3 contained a reference to article 46,<sup>5</sup> which expressly reserved the right of an international organization, in the event of a manifest violation of a provision of its rules, to invoke those rules as invalidating its consent.

8. He thought it would be better to express that limitation as soon as possible, for there was no doubt that an international organization could invoke the rules governing its competence to conclude treaties if a treaty was concluded in conditions manifestly contrary to those rules. The Yugoslav Government had approved the use of the expression "rules of the organization" in its written comments and observations (A/CN.4/339/Add.2) and he noted that a more logical wording of article 27 would meet the criticism expressed by the German Democratic Republic, since it was quite understood that nothing in that article deprived an international organization of the possibility of ensuring observance of the rules governing its competence to conclude treaties.

9. The second series of questions had to do with the fact that, on first reading, the Commission had introduced, in the second part of paragraph 2, an exception to the non-applicability of the internal rules of an international organization in respect of refusal to perform a treaty, as expressed by the formula "unless performance of the treaty, according to the intention of

the parties, is subject to the exercise of the functions and powers of the organization".

10. In fact, that expression envisaged an extremely important case, which, moreover, was illustrated in United Nations practice. The Security Council, by a resolution adopted in virtue of its powers of prohibiting aggression and maintaining peaceful relations, could, for example, order a cease-fire along a given front line, entailing the maintenance of certain armed forces in certain places. For the implementation of its resolution, the Council could authorize the Secretary-General of the United Nations to conclude, on behalf of the Organization, an agreement which, on the basis of the cease-fire, introduced certain practical rules to the effect that, at a given time, national armed forces should be maintained on a particular territory.

11. Such an implementing agreement was entirely subject to the functions and powers of the Council. It was inadmissible that the agreement between an international organization and a State should have an autonomous value. Under no circumstances could it deprive the Security Council of its prerogative to exercise its functions and possibly to review its decision. The situation could be compared with that found in the internal law of all countries, in which a legal text of a particular standing, the law, could clearly not provide for everything, and the executive branch was thus inevitably empowered to issue rules, orders or decrees whose purpose was to enable the law to be implemented in a specific set of circumstances. In that context, however, the legislative Power was never paralysed by the fact that the Executive had issued the executing instruments, and if the legislators decided to change the law, those subordinate texts disappeared.

12. Similarly, article 27 provided for the case where instruments concluded by an international organization had merely an implementing function and were therefore of lesser standing. That was by no means a theoretical case, as was shown by the fact that, in practice, the Security Council specified short periods for the performance of executing instruments, as a systematic means of affirming its power to change its decisions.

13. For the rest, paragraph 2 of article 27 had not given rise to any substantive criticism.

14. The last series of problems raised by that provision were the most complex. When the Commission had adopted the article on first reading, it had done so without enthusiasm, but nevertheless, it had not clearly indicated that the exception mentioned in paragraph 2 was not enough and that there were also other exceptions. That problem had cropped up again later, when the Commission had examined article 73, which expressly reserved certain questions the Commission did not intend to examine, having decided to limit its work to the framework provided by article 73 of the Vienna Convention.

<sup>3</sup> See *Yearbook . . . 1977*, vol. II (Part Two), pp. 118 *et seq.*

<sup>4</sup> See 1647th meeting, footnote 1.

<sup>5</sup> *Ibid.*

15. In considering draft article 73 at the first reading, the Commission had noted that cases of the transformation of international organizations might create some definite difficulties. In matters pertaining to the succession of States, international law was, in fact, trying to settle the problem of the continuity and identity of the State. Just like a State, an international organization could cease to exist, and it was important to know what would become of the treaties concluded by it. Moreover, an organization which disappeared generally left some debts behind it, for instance, debts owed to its agents. Another case was that of an organization which lost a number of members. Thus, cases had been known in practice where an international organization had, for example, lost a member State which had played a fundamental role in that organization by reason of its particular importance. It was permissible to wonder whether, in such a case, the organization remained the same. There were also international organizations—set up, in particular, to perform an operational function—which had a very limited number of members but had the capacity to conclude international agreements. There again, the question arose of what would become of such an organization if, for example, it lost two of its three members.

16. The Commission had nevertheless decided not to consider the problem of the changed identity of an international organization and that decision might lead it to extend the scope of the reservations expressed in article 73.

17. The general case envisaged by article 27 was that where an international organization had concluded a treaty valid at the time of its conclusion. The organization could, however, evolve, and its rules could be modified in the course of time. The Commission had to decide whether it would accept that an international organization could legitimately change its rules to the point where, perhaps, it was impossible for it to perform a treaty.

18. Although he considered such problems to be outside the Commission's field of study, it was necessary to distinguish between two types of situation. First, an international organization could conclude a valid treaty and then, by measures in conformity with the rules of the organization and without affecting its constituent instruments, render itself incapable of performing the treaty. The problem was then one of the responsibility of the international organization. In his own view, however, it was inadmissible that States acting collectively could release themselves *ad nutum* from the obligations, presumably valid, contracted by them. The consequences of such conduct raised the question of their responsibility. Furthermore, it would be advisable to recognize, in principle, that no international organization that concluded a treaty did so with the reservation that the treaty was concluded on the basis of a potestative clause unless that fact was expressly mentioned. The adoption of any other solution would

be tantamount to rendering meaningless the rule of *pacta sunt servanda* set forth in article 26.

19. Another situation was that in which the constituent instrument of an international organization was overthrown, thereby creating the problem of continuity between the organization which had concluded the international agreement and the one required to perform it. He did not think that the Commission should consider that problem either, the consequences of which were particularly complex.

20. Finally, he thought that the Commission should take certain precautions in connection with article 27 and, consequently, should reserve the effects of draft articles 46 and 73. He had therefore suggested (A/CN.4/341 and Add.1, para. 88) that article 27 should be supplemented by deleting paragraph 3 from the text adopted at the first reading and inserting the reference to article 46 in both the other two paragraphs, in view of its capital importance. Paragraph 1, concerning the case of a State party, would then read:

“1. Without prejudice to article 46, a State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty.”

Paragraph 2, concerning the case of an international organization, would henceforth include a reference to draft articles 46 and 73 and would read:

“2. Without prejudice to articles 46 and 73, an international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty, unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization.”

21. Mr. USHAKOV noted that paragraph 1 of article 27, concerning States, was in conformity with article 27 of the Vienna Convention, which expressly referred to article 46 of that same instrument and thus clearly removed the case of invalidation of consent from the context of failure to perform the treaty, since the latter was then null and void.

22. Paragraph 2 of article 27, as adopted by the Commission on first reading, proposed a similar solution for international organizations, and it would seem preferable to adhere to that approach and retain the wording of paragraph 3, which was satisfactory. However, he did not exclude the possibility of following the pattern of article 27 of the Vienna Convention by referring to article 46 in each paragraph.

23. On the other hand, to mention article 73 in paragraph 2, as the Special Rapporteur had just proposed, would not serve any useful purpose since, unlike article 46, which proclaimed a rule on the invalidity of treaties, that provision was merely a saving clause invoking other areas of international law. An express reference to article 73 would therefore not

resolve the difficulties pointed out by the Special Rapporteur.

24. The rules of the internal law of a State concerned with its competence to conclude treaties could be modified in exactly the same way as the rules of an organization. Indeed, even the political nature of a State could be modified by certain legislation or by certain expressions of popular suffrage. Accordingly, if it were accepted that such events changed the obligations of States, a similar solution would have to be accepted for international organizations. While he welcomed the fact that those problems had been raised by the Special Rapporteur, he noted that the Vienna Convention had expressly excluded them from its scope, and they should therefore be similarly excluded from the scope of the current draft articles, in view of the fact that they fell outside the framework of the law of treaties.

25. With regard to the difficulties peculiar to international organizations, it should be remembered that a sovereign State was supposed to be master of its internal law and that, if it concluded a treaty which did not fully correspond with that law, it was free to change the content of its internal law, since it possessed inherently both legislative and executive power. The situation of international organizations was entirely different. In principle, such an organization could undoubtedly modify its statutes or its constituent instruments, but it could not assume international commitments which would oblige it to modify its statutes, for such a modification was a matter for its members under the organization's rules. Accordingly, an international organization could not, in principle, act contrary to its constituent instruments and assume commitments inconsistent with them. The draft articles should therefore include a provision to the effect that an organization was entitled not to perform obligations incompatible with its constituent instruments.

26. An apparent contradiction might nevertheless persist, in that draft article 2 contained a general definition of the expression "rules of the organization", to which article 27 then purported to attribute a particular meaning. In his view, the concept of the constituent instrument was not sufficiently precise for the Commission to be able to use it. It would be preferable to determine which rules of the organization were applicable to each specific case, rather than include a general definition of them in the draft. Also, he did not see how the particular meaning to be attributed to that concept could possibly be defined in paragraph 2 of article 27, or how possible exceptions to the rule in question could be indicated in that paragraph. The provision was a legitimate one, but it would have to be interpreted according to the requirements of each specific case.

27. Referring to the necessity of drafting rules as precisely as possible, he noted that the expression "party to a treaty" overlooked the distinction—to his

mind essential—between the two categories of treaties envisaged by the draft articles, which inevitably raised problems of a distinct nature. He hoped that the Special Rapporteur would explore the possibility of dealing with the two cases in paragraph 2.

28. He would also welcome a clarification of the meaning of the words "according to the intention of the parties", for he doubted whether an international organization party to a treaty could have any intention other than that of subjecting the performance of the treaty to the exercise of its functions and powers. Consequently, all that could be meant there was the intention of a State party, and the question arose whether that intention should be expressed in the treaty or deduced from the content of the preparatory work, for example. He feared that a solution of the type adopted on first reading would appear to give an international organization the option of overriding its own constituent instruments, which was out of the question. Moreover, the expression "according to the intention of the parties" would be dangerous in the case of treaties concluded between one or more international organizations and one or more member States of the organization, and seemed absolutely unjustifiable in the case of treaties concluded between international organizations.

29. Mr. CALLE Y CALLE observed that draft article 27 was one of the two draft articles forming Section 1 of Part III of the draft. The other draft article, article 26, laid down the fundamental rule of international law *pacta sunt servanda*, which applied equally to States and international organizations. Article 27, which was the complement to article 26, provided in paragraph 1 that a State could not invoke the provisions of its internal law as justification for its failure to perform a treaty and, in paragraph 2, that in general an international organization could not invoke the rules of the organization for the same purpose.

30. Article 46 provided for a single exception to those two rules, and that exception applied to States and international organizations alike. Under the terms of article 46, a State could invoke a provision of its internal law to invalidate its consent to be bound by a treaty provided that the provision in question related to its competence to conclude treaties, that the provision was one of fundamental importance, and that the violation of the provision was manifest. In the case of international organizations, a provision of the rules of the organization relating to its competence to conclude treaties could not be invoked unless the violation was manifest. In his view, however, such a provision should also be of fundamental importance, since there might well be other rules of lesser importance—for instance, providing for publication of the text of the rules in the official journal of the organization.

31. The commentary to the articles should indicate, therefore, that the rules of an international organization relating to its competence to conclude treaties fell into two categories—rules of fundamental impor-

tance and rules of secondary importance—and that only violation of the former would provide the organization with grounds for invalidating its consent.

32. Article 27 made a very broad reference to the rules of an international organization, which was entirely appropriate in the context. The Special Rapporteur had suggested that it might be possible to use the phrase “rules of an organization other than those concerning the conclusion of treaties” (A/CN.4/341 and Add.1, para. 86). Those rules, however, in so far as they concerned the conclusion of treaties, were already covered by article 46, which was the sole exception allowable to article 27.

33. Another question was what would happen if the rules of the international organization which concluded the treaty were subsequently amended. A comment submitted by the ILO, and referred to in the report of the Special Rapporteur (*ibid.*, para. 87), suggested that, if the rules were amended after the treaty had been concluded, the effect would be to modify the treaty obligations without the consent of the interested parties. His own view was that if, as the consequence of amendment to the rules of an organization, new obligations arose for States, those obligations, being of an organizational character, could not prevail over the obligations laid down in a treaty into which the organization, acting collectively, had entered. In the event of any conflict between the obligations under the treaty and the subsequent obligations that arose for the international organization, the former must prevail. In such a case, the organization would have to find a way of denouncing the treaty and of concluding a new treaty with the same contracting parties which was in keeping with the amendments made to the rules of the organization.

34. Paragraph 2 of article 27 provided for a further special exception in the case of international organizations. Whereas an organization had to act in accordance with its aims and objectives, a different situation arose in the case of a treaty whose aims and objectives were expressly made subject to the functions and powers of the organization. That exception should be formulated in very precise terms. He agreed with Mr. Ushakov that to refer to the intention of the parties might not be sufficient, and might even be dangerous. To use the words “subject to the exercise of the functions and powers of the organization” could imply that the object of the treaty was in fact the exercise of such functions and powers. It would therefore be clearer to say “subject to the powers and functions of the organization”.

35. Lastly, while he agreed that the reservation in article 73 was a saving clause, he considered that article 46 laid down a clear exception to cases where the provisions of the internal law of a State or of the rules of an organization could be invoked to invalidate consent to be bound by a treaty.

36. Mr. JAGOTA said that the substance of article 27 as drafted and approved on first reading and as

proposed by the Special Rapporteur in paragraph 88 of his report was the same. Paragraph 1 simply repeated the parallel provision of the Vienna Convention and presented no difficulty. With regard to paragraph 2, however, which dealt with the position of international organizations, two points had been raised. The first was whether a reference to article 73 as well as to article 46 should be included. In his view, it should not, since article 73 did not protect any particular provision and a reference to it would add nothing. The second point was whether, if a reference to article 46 only was to be included, paragraphs 1 and 2 of article 27 should be redrafted as proposed by the Special Rapporteur or whether the formula adopted in the Vienna Convention should be followed. His view was that the latter would be the neater solution.

37. Speaking on the substance of paragraph 2, Mr. Ushakov had drawn a distinction between two types of treaty: a treaty between a State and an international organization, and a treaty between one international organization and another international organization. For his own part, however, he thought that the question was not so much one of a qualitative distinction between two types of treaties as of interpretation, and specifically of the phrase “the exercise of the functions and powers of the organization”. Once the ambit and implications of that phrase were clear, the Commission would be nearing agreement on the point.

38. The basic rule as laid down in article 26 was that, once a valid treaty had been concluded, it must be performed in good faith. Article 27, which to a certain extent qualified article 26, was couched in negative terms: a treaty, as defined in article 1 of the Vienna Convention and also in draft article 2, subparagraph 1 (a),<sup>6</sup> was governed by international law and, that being so, a party to it could not invoke its internal law to evade its obligations under that treaty. Internal law might have relevance for the purpose of concluding or implementing the treaty, but, so far as its validity was concerned, a party to it could not evade its obligations by changing or invoking internal law. Internal law had to be brought into line with treaty law and, in cases of inconsistency, the latter would prevail. It was an extremely sensitive issue and one that arose frequently in practice. The one exception was if the treaty itself was invalid which, under article 46, it might be if, for instance, it had been concluded by a person who was not competent under internal law to bind the State and if a violation of the internal law was manifest.

39. The “rules of the organization” were defined in draft article 2, subparagraph 1 (j) to include the established practice of the organization, and that could also give rise to problems of interpretation. That was because the effect of article 46, given the terms of draft article 6<sup>7</sup> and of draft article 7, paragraphs 3 and 4,<sup>8</sup> was that a treaty would be invalid if it was signed by

<sup>6</sup> For text, see 1644th meeting, para. 29.

<sup>7</sup> *Idem*, 1646th meeting, para. 36.

<sup>8</sup> *Idem*, para. 47.

anyone who was not competent to do so under the rules of the organization. Moreover, the violation of those rules had to be manifest; in other words, it had to be within the cognizance of both parties: the other party had to know that the party signing was not competent.

40. An international organization could, moreover, invoke its rules to challenge the validity of a treaty only if, at the time when the treaty had been signed, the rules did not empower the organization to conclude such a treaty, in which case the matter would come under article 46. If, on the other hand, the treaty had been validly signed, and the organization had been empowered by its rules to conclude such a treaty, then paragraph 2 of article 27 would apply. The question which then arose was whether the organization could invoke its internal rules in a case where, although it had signed the treaty, it was unable to perform it. Again, the provision was couched in negative terms. The difficulty was that paragraph 2 incorporated an exception and it was the interpretation of that exception that was at issue. In his view, the phrase "subject to the exercise of the function and powers of the organization" did not mean that the organization in question could adopt new rules that were inconsistent with its treaty obligations since, in any event, the latter would prevail. If, however, the phrase was interpreted as referring to methods of implementing treaty obligations, there should be no difficulty.

41. Mr. ALDRICH said that he often failed to understand why a distinction was drawn between international organizations and States. His initial reaction had been that there might be some justification for having two different rules in view of the exception in the case of international organizations incorporated in paragraph 2 of article 27, but the more he listened to the discussion the less certain he was that there really was any difference. If a treaty involving an international organization provided that the organization could modify a requirement under the treaty by a decision of its organs, that might appear as if the organization was citing its own internal rules as an excuse for non-compliance, but in fact there was no question of non-compliance, since that was the intent of the treaty. Such cases could occur not infrequently in practice, since international organizations often provided the forum in which States worked out policy arrangements. It was easy to conceive of a case where the parties to the treaty would in effect permit the treaty to be amended as a consequence of a decision by one party to it, if that party was an international organization whose functions included decisions on issues of that kind. On that basis, therefore, it seemed to him that the provision was an unnecessary one, and he was inclined to revert to his earlier position, namely, that there was no difference between the right of a State to cite internal law and of an international organization to cite internal rules as a justification for non-performance.

42. He would have thought it was hardly necessary to make a cross-reference to article 46, since article 27 dealt with the justification for non-performance and article 46 with questions of invalidity. Consequently the two articles were not inconsistent. It might, however, be desirable for reasons of clarity to have such a cross-reference and, since there was one in the Vienna Convention, he would not object to its inclusion in the draft. He saw no real value, however, in having a cross-reference to article 73: it was a saving clause and therefore no such reference was needed to render it effective.

*The meeting rose at 12.55 p.m.*

## 1674th MEETING

*Thursday, 18 June 1981, at 10.10 a.m.*

*Chairman:* Mr. Milan ŠAHOVIĆ

*Present:* Mr. Aldrich, Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Reuter, Mr. Riphagen, Mr. Sucharitkul, Mr. Tabibi, Mr. Ushakov, Mr. Verosta.

### Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/339 and Add.1-7, A/CN.4/341 and Add.1)

[Item 3 of the agenda]

#### DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

ARTICLE 27 (Internal law of a State, rules of an international organization and observance of treaties<sup>1</sup> (*concluded*))

1. Mr. PINTO said that the basic meaning of paragraph 1 of article 27 seemed to be that a State might not cite its internal law as an excuse for failure to perform a treaty obligation. By contrast, paragraph 2 seemed to say that an international organization might cite its rules, including its charter, relevant decisions and resolutions, and established practice, as an excuse for failure to perform a treaty obligation. It could only do so, however, when all the other parties to the treaty intended, in the sense of understanding and agreeing, that that would be the case. In other words, a plea that the organization's rules would excuse non-performance would succeed only if it had been recognized and agreed at the outset that that was one of the "rules of the game".

<sup>1</sup> For text, see 1673rd meeting, para. 4.

2. What could be cited as justification for failure to perform? Article 27, paragraph 2, spoke first of the rules of the organization, but, further on, it could be read to mean that the organization's rules could be cited as justification for failure to perform if the parties to the treaty had intended that performance would be required only if the exercise of its functions and powers so permitted. Possibly, therefore, some element which went beyond the rules but fell within the range of functions and powers conferred upon the organization, either by statute or by necessary implication, could be cited to justify failure to perform. The doubt that remained in his mind was whether justification for failure to perform, when provided for, was to be based on the rules or on the exercise of the rules. Since the privilege of justifying failure to perform by citing the rules of the organization was clearly made subject to the intention of the parties, that might not matter, even though the limits of the exception were not altogether clear. The introduction of the element of intention itself raised certain problems, however. For instance, should the intention of the parties to the treaty be demonstrated by being "manifest", express, or merely implied? And should the intention have been demonstrated at the time of the conclusion of the treaty or at the time of the failure to perform the obligation.

3. The reason why a special rule was contemplated in the case of international organizations seemed to derive from the dependent nature of such organizations. Organizations were composite persons, and their structure, policies and functions were in the hands of Member States. Such policies and functions were not within the control of the entity that entered into the contract and that could therefore be held responsible for change. Any changes in corporate structure, functions or policies that might affect treaty performance were, therefore, in the nature of supervening events, and treaty partners were on notice to take account of those features when entering into agreements with organizations.

4. In the text proposed by the Special Rapporteur (see 1673rd meeting, para. 20), the exception provided for in paragraph 2 of article 27 was stated to be "without prejudice" to articles 46 and 73.<sup>2</sup> In other words, that exception was precluded from having any effect on articles 46 and 73, although it was difficult to see how paragraph 2 of article 27 could have such an effect since the two articles in question dealt with unrelated matters. He agreed that the reference to article 46 could be retained so as to mirror the corresponding provision in the Vienna Convention.<sup>3</sup> He also agreed, however, that while article 46 was in the nature of a substantive rule and so logically could be the subject of a saving clause, the same did not apply to article 73. It was true that article 73 had a superficial affinity with paragraph 2 of article 27, since paragraph 2 of article 73 also referred to supervening

events to which organizations were prone and States were not—but the burden of the paragraph was simply a disclaimer, and he therefore considered that the cross-reference to article 73 should be deleted.

5. He had wondered whether article 27 should provide for different rules for treaties between organizations and States, on the one hand, and treaties between organizations, on the other. It might, for instance, be necessary to supplement the rights of a State in cases where an organization invoked its rules as justification for non-performance. That could apply in particular where a State which was a member of an organization and a party to a treaty with that organization objected, as a member, to a decision taken within the organization regarding non-performance of a treaty obligation. Since, however, the privilege of pleading rules for non-performance was to be conferred only by agreement of the parties, he would have no objection to the application of paragraph 2 of article 27 to both types of treaties.

6. He also had no objection to the substance of article 27 as a whole, but he considered that its meaning should be clarified by the Drafting Committee.

7. Mr. SUCHARITKUL said that article 27, in the wording proposed by the Special Rapporteur, created no difficulties for him. The only possible stumbling block was the notion of intention. Although the intention of the parties was often difficult to establish, it was an essential element in the article. In that regard, a distinction should be made between treaties concluded between an international organization and one or more States and treaties concluded between international organizations. In the first case, it would be necessary not only to establish the intention of the organization and the State or States parties to the treaty but also to consider whether the State or States were members of the organization or not. In the second case, in which treaties could be either bilateral or multilateral, it would be necessary to establish the intention of the international organizations concerned, and that would not always be easy.

8. Draft article 73, which related to the termination of the existence of an organization and termination of participation by a State in the membership of an organization, should be mentioned in article 27, paragraph 2, as proposed by the Special Rapporteur. In that connection, he referred to the South-East Asia Treaty Organization, from which Pakistan had withdrawn and of which France had ceased to be an active member, and to certain treaties concluded by that organization with one or more member States concerning the establishment of research centres.

9. Lastly, he referred to the very rare phenomenon of successor bodies to international organizations. An example was provided by the circumstances which had led to the creation of the Association of South-East Asian Nations. He noted that situations of that kind were not mentioned in draft article 73.

<sup>2</sup> See 1647th meeting, footnote 1.

<sup>3</sup> See 1644th meeting, footnote 3.

10. Mr. VEROSTA said that he was glad the Special Rapporteur had endeavoured to take account of the comments made in the Sixth Committee, but thought it preferable to revert to the wording of article 27 adopted by the Commission on first reading. It was inelegant to reduce the article to two paragraphs each beginning with a reservation in respect of article 46, and unnecessary to introduce a saving clause regarding article 73 in paragraph 2. He thought also that the words "according to the intention of the parties" in paragraph 2 could be deleted if that was the view of the Drafting Committee, to which article 27 might be referred.

11. Mr. USHAKOV reverted to the question of the retroactive application of new rules of the internal law of a State or of new relevant rules of an international organization. No provision was made in any article of the Vienna Convention or of the draft for retroactive application in that respect. The question was unrelated to the concerns of the Commission.

12. In his view, the intention of the parties had no bearing whatsoever on rules as important as those relating to the functions and powers of an organization. If, for example, the Security Council, having decided to send peace-keeping forces to a particular area, concluded an agreement with a State to place 10,000 troops at the disposal of the United Nations for that purpose, but subsequently decided that a contingent of 8,000 troops was sufficient, the State concerned could not argue that its intention had been to provide 10,000 troops. There was no point in referring to a notion as vague as that of the intention of the parties. Similarly, if the United Nations decided to establish a subsidiary body with a substantial secretariat and concluded a headquarters agreement with a State but subsequently decided to transfer the headquarters, the host State could not plead its intention, which had been to keep the headquarters of the body on its territory. A State could not invoke its intention when the international organization with which it had concluded a treaty took decisions in accordance with its own functions and powers. In that regard, he thought that in the case in respect of which the International Court of Justice had recently given an advisory opinion,<sup>4</sup> the host State should comply with the decision taken by the organization in question and that it could not rely on its intention as an argument. He therefore thought that the words "according to the intention of the parties" should be deleted from paragraph 2.

13. Mr. JAGOTA said that one of the main questions raised during the discussion was whether the intention of the parties was relevant in the context of paragraph 2. In that connection, Mr. Ushakov had cited certain examples of what could be termed the internal legal order of an organization: under that

order, an organization could take certain decisions which, once adopted, would be binding on members even if they had voted against the decision in question. That would apply, for instance, to decisions to move the headquarters of a subsidiary body of the United Nations, to adopt a budget, or to elect the members of certain bodies, and he agreed entirely that such examples of the internal legal order of an organization bore no direct connection to the intention of the parties. If, however, the words "according to the intention of the parties" were omitted from paragraph 2 of article 27, the necessary implication would be that any treaty between a State and an international organization would be subject to the internal legal order of that organization so far as the exercise of its functions and powers was concerned. If that were indeed the implication to be drawn, why was it necessary to refer to the intention of the parties at all? Either their intention had a bearing on the question of performance or it did not. He would be grateful for the Special Rapporteur's response to that point.

14. Again, there was the question of the scope of the phrase "the exercise of the functions and powers of the organization", which was nowhere defined. In his view, that phrase related to the internal legal order of an organization. It did not, however, enable an organization to invoke its rules and so evade its obligations under a treaty. Were it able to do so, then it would not be a treaty governed by international law but some other form of agreement. A treaty could not confer on one party the right to evade its terms by changing its internal rules or law, and that was the context in which article 27 must be read. In the final analysis, therefore, the question to be settled was whether the phrase "the exercise of the functions and powers of the organizations" referred to the internal functioning of the organization, to the modalities for the performance of treaties, or to the powers of the organization to amend its rules and thereby to evade its treaty obligations. Again, he would be grateful for the Special Rapporteur's reaction.

15. Mr. ALDRICH said that he was grateful for the examples given by Mr. Ushakov, since he had felt that there was a lack of a clear understanding of what was being considered in connection with paragraph 2 of article 27.

16. He continued to think that organizations and States were not very different in that respect, except that in practice treaties involving organizations were perhaps more likely to be subject to change as a consequence of the decision-making procedures of such bodies. Under United States of America law, if a commitment was made for the future expenditure of funds that had not been appropriated by the Congress, the official who entered into such a commitment was guilty of a crime. None the less, once such an agreement had been concluded, it was a binding agreement even though it had been made unlawfully under United States internal law unless, of course, the intention of

<sup>4</sup> Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion: *I.C.J. Reports 1980*, p. 73.

the parties, as expressed in the agreement, was to make the obligation subject to the availability of appropriated funds. There were numerous agreements of that kind, mostly in the aid field, which called for the future expenditure of money that had not yet been appropriated by the Congress. In such cases, the clear meaning of the agreement was that the obligation to make aid available was subject to certain internal action by one of the parties.

17. The position seemed to be the same in the case of most of the examples that had been cited regarding international organizations. The main question to determine was what did the agreement mean? For instance, did an agreement by a country to supply troops to a peace-keeping force mean that the organization agreed to use these troops whether or not it changed its original decision? He did not think so. No doubt a careful examination of its terms would reveal quite clearly that it was an agreement by a country to supply forces for so long as they were needed. As he understood it, therefore, the reference in paragraph 2 of article 27 to the intention of the parties was no more than an oblique way of asking what the agreement meant, and he had some doubts whether there was any difference in principle between organizations and States in that regard.

18. There might in practice be a difference of degree in that it was more likely that an organization would make some change that would undo the agreement or bring it to an end, but, in his view, the true meaning and intent, in the cases provided for in paragraph 2 of article 27, was that there would be no treaty violation since the treaty itself included within its own terms a limitation based upon the operation of the organization as an organization. There was therefore no need for an excuse, since it was really a matter of interpreting the treaty. The reference to the intention of the parties seemed to mean something different from the actual scope of the obligations as laid down in the treaty. He doubted whether there was in fact such a difference, and would be grateful for any examples to show that there was.

19. Mr. USHAKOV said that the internal law of a State and the rules of an organization could not be placed on the same footing. The rules of an organization consisted, on the one hand, of procedural rules and, on the other, of rules of international law, such as the rules set forth in Chapter V of the Charter which concerned the functions and powers of the Security Council. On the other hand, all the rules of internal law of a State were rules of pure internal law. The rules which an international organization could not invoke as justification for its failure to perform a treaty, according to article 27, paragraph 2, were obviously not procedural but rules governed by international law, such as those that defined the capacity to conclude treaties. In the final analysis, the internal law of a State could be assimilated only to the procedural rules of an organization.

20. Mr. REUTER (Special Rapporteur), speaking as a member of the Commission, said he thought it preferable not to mention article 73 in article 27. In addition to the reasons mentioned by other members of the Commission, the two paragraphs of article 27 under consideration were not symmetrical, since the first referred only to article 46 while the second referred to articles 46 and 73. The asymmetry was not justified, since article 73 was equally relevant in the case of States. The members of the Commission seemed to be generally in favour of deleting the reference to article 73. The reference had been made as a result of earlier discussions in the Commission and because of the commentary to draft article 73.<sup>5</sup> It should be noted, however, that although the reservation relating to article 73 was only a saving clause, the article had an important—if negative—legal effect in the light of paragraph 3 of article 42. A case which was not covered by article 73 would be subject to the rules of the draft. It would therefore be important to consider article 73 carefully in due course.

21. Like other members of the Commission, he thought that the phrase in paragraph 2 “unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization” was not good because it required interpretation, and considered that it would be better to avoid any reference to the intention of the parties. He noted that the Vienna Convention referred only incidentally to the intention of the parties, for example, in article 31, paragraph 4. Articles 28 and 29 of that convention began with the words “Unless a different intention appears from the treaty or is otherwise established” because there was no way of avoiding that form of words. The only reason for retaining a corresponding formula in paragraph 2 of the article proposed by the Special Rapporteur had been a desire to make as few changes as possible in the text adopted on first reading. He would have no objection to its deletion, but pointed out that in the present wording the concept of intention of the parties was counterbalanced by that of the exercise of the functions and powers of the organization. If the former were deleted, he would not be content with a mere reference to the latter. The formula should be re-considered as a whole.

22. As a member of the Commission, he agreed with Mr. Aldrich that in pure law the question that arose in the case of international organizations also arose in the case of States, although more rarely. That was probably why the Vienna Convention made no reference to it. A State might adopt a law under which foreign residents who would otherwise be subject to military service would be exempted. The exemption would be subject to conditions (such as the performance of military service in the resident's country of origin) and co-operation with other States would be required to ensure they were complied with. Any

<sup>5</sup> See *Yearbook . . . 1980*, vol. II (Part Two), pp. 91 *et seq.*

agreements concluded in that connection would depend on the application of a law which continued to be governed by the sovereignty of the State that adopted it. However, the law was not thereby brought within the sphere of international law. If it was amended, the agreements would cease to be applicable. Normally a State did not conclude agreements of that kind to enforce a unilateral national measure, but the situation was much less uncommon in the case of international organizations. In general, they had no power to ensure the application of their decisions by States and had to conclude agreements with them for that purpose. A degree of asymmetry was therefore to be expected in the two paragraphs of article 27.

23. He had the impression that the Commission tended toward the wording of article 27 adopted on first reading, providing there was a change in the wording of the exception in paragraph 2. The Commission was clearly not required to resolve all the problems that might arise. If an organization concluded a treaty in conformity with its relevant rules and later modified the rules relating to its treaty-making capacity, the modification would not have a retroactive effect. On the other hand, if an organization concluded a treaty with a non-member State and subsequently modified its constituent rules, thereby making performance impossible, the situation would be one that had no parallel in the Vienna Convention. Indeed, if a State concluded a treaty with another State and then concluded a second treaty with a third State and the two treaties, although valid, were in conflict, the problem was not covered by the Vienna Convention but by the rules relating to State responsibility. Nor need the Commission concern itself with a situation in which a treaty might be concluded between an international organization and a State and the organization's constitution—which was a treaty between States—might be modified if that modification was in conflict with the first treaty.

24. Continuing to speak as a member of the Commission, he said that the matter raised by the ILO (see A/CN.4/339) to which Mr. Pinto and Mr. Jagota had referred, might be of interest to organizations of a universal character. If an organization of that type concluded a treaty with one of its member States and at a later stage made changes in its rules that were binding on all its member States, its constitution might be in conflict with the treaty and with a treaty right or a right derived from a treaty. The Commission was not required to resolve problems of that type, since they constituted a special case of conflict, which was covered by the rules of each organization. Mr. Calle y Calle (1673rd meeting) had referred to such a case, a situation which involved rules of international law, but rules of a particular nature. The issue would be settled by the established practices of the organization.

25. Speaking as Special Rapporteur, he suggested that article 27 might be referred to the Drafting Committee.

26. The Commission appeared to be generally in favour of deleting the reference to article 73 and again having an article 27 divided into three paragraphs. Most members of the Commission favoured the deletion of the reference to the intention of the parties. If that was done, another form of words would have to be found to express the underlying idea, which was not irrelevant. In the case, for example, of an assistance treaty concluded in accordance with the relevant rules by one international organization with another international organization or with a State whereby the organization undertook to provide assistance, in the form of a certain sum of money over a period of three years, the organization would be bound by its commitment for a period of three years. If the organization undertook to pay a certain sum in the first year and to pay other amounts the following two years provided that it had the necessary funds, it was setting a condition. In introducing in article 27 the reservation in paragraph 2, the Commission had had in mind a particular condition, i.e. the adoption or maintenance of a decision of the organization. The organization gave an undertaking subject to the adoption of a particular decision or the maintenance of a decision already taken. But it was obvious that all the commitments entered into by an organization were not subject to such a condition. It was difficult to apply a general criterion in order to differentiate between them. The Commission did not seem prepared to adopt the criterion of the intention of the parties. In the final analysis, everything depended on the text of the agreement and on the conditions which it might contain. When an agreement was concluded for the implementation of a decision of the Security Council, it was clearly dependent on the maintenance of that decision. What was needed was a simple wording, which would refer to the rules for the interpretation of the treaty, under which a treaty should be interpreted in good faith, with due regard to its object and purpose and other circumstances establishing whether it was subject to the adoption or maintenance of a decision.

27. The CHAIRMAN suggested that article 27 should be referred to the Drafting Committee.

*It was so decided.*

ARTICLE 28 (Non-retroactivity of treaties),

ARTICLE 29 (Territorial scope of treaties between one or more States and one or more international organizations), *and*

ARTICLE 30 (Application of successive treaties relating to the same subject-matter)

28. The CHAIRMAN invited the Special Rapporteur to introduce articles 28 to 30, which constituted Section 2 (Application of Treaties) of Part III of the draft articles, and which read:

*Article 28. Non-retroactivity of treaties*

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

*Article 29. Territorial scope of treaties between one or more States and one or more international organizations*

Unless a different intention appears from the treaty or is otherwise established, a treaty between one or more States and one or more international organizations is binding upon each State party in respect of its entire territory.

*Article 30. Application of successive treaties relating to the same subject-matter*

1. The rights and obligations of States and international organizations parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated [or suspended in operation under article 59], the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between two States, two international organizations, or one State and one international organization which are parties to both treaties, the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, as between a State party to both treaties and an international organization party to only one of the treaties, as between an international organization party to both treaties and an international organization party to only one of the treaties, and as between an international organization party to both treaties and a State party to only one of the treaties, the treaty which binds the two parties in question governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice [to article 41], [or to any question of the termination or suspension of the operation of a treaty under article 60 or] to any question of responsibility which may arise for a State or for an international organization from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards a State or an international organization not party to that treaty, under another treaty.

6. The preceding paragraphs are without prejudice to Article 103 of the Charter of the United Nations.

29. Mr. REUTER (Special Rapporteur) said that the Sixth Committee had not commented on the three articles given and no written comments had been received from Governments.

30. With regard to article 30, he had two comments. First, the brackets in paragraph 3 of the article, concerning article 59, and those in paragraph 5, concerning articles 41 to 60, should be deleted, since the text had been adopted in first reading.

31. Secondly, noting that the Commission had never been in favour of simplifying the draft texts but that many Governments—in particular the Government of

Romania (see A/CN.4/339/Add.7)—regularly asked in their written comments that the text should be made less involved, he suggested that the Commission should consider the possibility of adopting the simplified wording for paragraph 4 proposed in paragraph 89 of his report (A/CN.4/341 and Add.1).

32. The CHAIRMAN suggested that the Commission should refer the title of Section 2 (Application of treaties) and articles 28 and 29 to the Drafting Committee, and take up article 30.

*It was so decided.*

33. Mr. USHAKOV observed that article 30 was an important provision, since it concerned the application of successive treaties and sought to define the rules establishing the priority of one treaty over another. He noted that the text gave rise to a serious difficulty owing to the different meanings of the word “treaty” in the context, in which it referred both to treaties between States and international organizations and to treaties between international organizations. The example of the Vienna Convention was not entirely satisfactory, since the convention referred to only one category of treaties, those concluded between States. However, where international organizations parties to a treaty between organizations were also parties to a treaty between States and international organizations relating to the same subject-matter, it would be difficult to determine which obligations should prevail.

34. He would not propose a formal amendment, but hoped the Commission would study the problem further and take a position on the issue, at least in the commentary. Another solution might be to draft articles governing the relationship between treaties of the same category. While the resulting text might be much more complicated, it would have the advantage of facilitating the understanding, application and interpretation of the future convention. For his part, he was as a matter of principle always in favour of a more comprehensive wording that would avoid future difficulties of application.

35. In addition, he thought that article 29, on the territorial scope of treaties between one or more States and one or more international organizations, which related solely to the obligations of States parties to a treaty with one or more international organizations, constituted further evidence of the importance of distinguishing between the category of treaties.

36. Mr. ALDRICH said that although there might in some cases be good reasons for drawing a distinction between treaties involving States and treaties involving international organizations, the Commission had, in general, followed the model of the Vienna Convention whenever possible, and the Special Rapporteur’s suggestion concerning the wording of article 30, paragraph 4, was a perfect example of a case in which the Commission could and should follow that model.

37. In his discussions with Government officials and academics in the United States of America concerning

the Commission's work, it had been repeatedly stated that many articles of the draft under consideration seemed unnecessarily complicated, as though the Commission was going out of its way to cast aspersions on the qualifications of international organizations which were, in some ways, treated as second-class citizens compared to States. It had also been considered retrogressive for the Commission to try to place the actions of international organizations—which had, after all, been established by States to serve purposes that States themselves could not serve and thus had an important role to play in the modern-day world—in a category that was different from and somehow inferior to the category of the actions of States.

38. The Commission should therefore be aware of the fact that further criticism of the draft might be forthcoming if it could not clearly explain why it had, in some cases, decided to move away from the wording of the Vienna Convention.

39. Mr. REUTER (Special Rapporteur) said he did not believe that there could be any difference in quality of character between treaties concluded exclusively between international organizations and those concluded between States and international organizations. From the beginning of its work on the draft articles under consideration, the Commission had recognized and accepted the fact that the existence of two major categories of treaties raised problems. Mr. Ushakov's comments seemed to express a regret that was perhaps somewhat belated. As Special Rapporteur, he thought that a different wording of article 30, separating the various possible cases, would necessarily be long and complicated and would involve difficult discussions. In addition, if the Commission decided to lay down as a principle the view that the consent expressed in treaties between international organizations and that expressed in treaties between States and international organizations had a different legal value, it would have to reconsider the entire concept of the draft as a whole. Given a suitable definition, treaties concluded between international organizations could of course be regarded as international instruments of a lesser type, but any such affirmation might meet with a hostile reception in a diplomatic conference and frighten possible parties to the future instrument.

40. Mr. USHAKOV said he did not believe that the value of treaties depended on the character of the parties. All were equal from the legal standpoint, but it was for the Commission to decide, in draft article 30, which obligations prevailed in a case where successive treaties related to the same subject-matter. However, it was possible to envisage the specific case of a treaty concluded between two international organizations one of which subsequently concluded a treaty with a State, dealing with the same subject-matter. It was important to determine which obligations prevailed and for which reasons.

41. Mr. REUTER (Special Rapporteur) took note of Mr. Ushakov's statement of principle and said that the same problem arose with regard to the interpretation of paragraph 2 of article 30 of the Vienna Convention, which he himself took to mean that that provision applied only between the same parties to two successive treaties. However, if transposed to the sphere of the Vienna Convention, the example given by Mr. Ushakov would concern a first treaty concluded between State A and State B, and a second treaty concluded subsequently between State B and State C, a case for which, in his opinion, no provision was made in article 30 of the Vienna Convention.

42. Mr. USHAKOV observed that interpretation of the provisions of the Vienna Convention was relatively easy, since the word "treaty" had only one possible meaning in the Convention.

43. In the case of the draft articles before the Commission, a satisfactory solution might be found by indicating in the commentary to article 30 that the problem mentioned earlier arose in that connection and should be resolved by following the spirit of the Vienna Convention.

44. Mr. REUTER (Special Rapporteur) said he had no objection to stating in the commentary to draft article 30 that article 30 of the Vienna Convention was difficult to interpret, but that as the Convention had entered into force and its interpretation rested with the States parties to it, the Commission had deliberately refrained from interpreting it. The commentary might go on to say that since the text of the Commission's draft was more complex because of the various types of treaties involved, it was bound to raise problems that were similar but even more delicate.

45. In view of the comments which had been made, he thought that article 30 might be referred to the Drafting Committee.

46. Mr. VEROSTA said that he was inclined to support the simplified wording proposed by Mr. Reuter in paragraph 89 of his report. As a compromise, he suggested that, if the Commission opted for that text, the text adopted by the Commission on first reading should be included in the commentary to article 30 in the interests of clarity.

47. The CHAIRMAN pointed out that the Commission could not begin to draft a detailed commentary to article 30 until the Drafting Committee, which would have to give its views on a possible modification of the text, had completed its work.

48. He suggested that the Commission should refer article 30 to the Drafting Committee.

*It was so decided.*

ARTICLE 31 (General rule of interpretation),  
ARTICLE 32 (Supplementary means of interpretation),  
and

ARTICLE 33 (Interpretation of treaties authenticated in two or more languages)

49. The CHAIRMAN invited the Special Rapporteur to introduce articles 31 to 33, which constituted Section 3 (Interpretation of treaties) of Part III of the draft articles, and which read:

*Article 31. General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

*Article 32. Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

*Article 33. Interpretation of treaties authenticated in two or more languages*

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

50. Mr. REUTER (Special Rapporteur) remarked that draft articles 31, 32 and 33 reproduced the

corresponding articles of the Vienna Convention without modification. As the Sixth Committee had made no comments on the articles and no written comments had been received from Governments, he suggested that the title of Section 3 and the three articles should be referred to the Drafting Committee.

51. Mr. CALLE Y CALLE said he agreed that the articles should be referred to the Drafting Committee, although he considered the text should be retained unaltered.

52. Mr. ALDRICH also agreed that articles 31 to 33 should be referred to the Drafting Committee. He noted, however, that in accordance with what he had said (1673rd meeting) in connection with article 27, paragraph, 2, where as he saw it, the problem was one of the interpretation, not the observance, of treaties, he might make some suggestions in the Drafting Committee concerning article 31 in order to deal with the problem to which article 27 gave rise.

53. The CHAIRMAN suggested that the Commission should refer the title of Section 3 (Interpretation of treaties) and articles 31, 32 and 33 to the Drafting Committee.

*It was so decided.*

*The meeting rose at 1 p.m.*

## 1675th MEETING

*Friday, 19 June 1981 at 10.10 a.m.*

*Chairman:* Mr. Robert Q. QUENTIN-BAXTER

*Present:* Mr. Aldrich, Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Ushakov, Mr. Verosta.

**Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/339 and Add.1-7, A/CN.4/341 and Add.1)**

[Item 3 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:  
SECOND READING (*continued*)

ARTICLE 34 (General rule regarding third States and third international organizations),

ARTICLE 35 (Treaties providing for obligations for third States or third international organizations),

ARTICLE 36 (Treaties providing for rights for third States or third international organizations), *and*

ARTICLE 36 *bis* (Effects of a treaty to which an international organization is party with respect to third States members of that organization)

1. The CHAIRMAN invited the Special Rapporteur to introduce Section 4 (Treaties and third States or third international organizations) of Part III of the draft articles, and in particular the first texts of that section, articles 34 to 36 *bis*, which read:

*Article 34. General rule regarding third States and third international organizations*

1. A treaty between international organizations does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

2. A treaty between one or more States and one or more international organizations does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

*Article 35. Treaties providing for obligations for third States or third international organizations*

1. [Subject to article 36 *bis*,] an obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

2. An obligation arises for a third international organization from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation in the sphere of its activities and the third organization expressly accepts that obligation.

3. Acceptance by a third international organization of the obligation referred to in paragraph 2 shall be governed by the relevant rules of that organization and shall be given in writing.

*Article 36. Treaties providing for rights for third States or third international organizations*

1. [Subject to article 36 *bis*,] a right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and if the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A right arises for a third international organization from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third organization, or to a group of organizations to which it belongs, or to all organizations, and if the third organization assents thereto.

3. The assent of the third international organization, as provided for in paragraph 2, shall be governed by the relevant rules of that organization.

4. A State or an international organization exercising a right in accordance with paragraph 1 or 2 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

[Article 36 *bis*. *Effects of a treaty to which an international organization is party with respect to third States members of that organization*

Third States which are members of an international organization shall observe the obligations, and may exercise the rights, which arise for them from the provisions of a treaty to which that organization is a party if:

(a) the relevant rules of the organization applicable at the moment of the conclusion of the treaty provide that the States members of the organization are bound by the treaties concluded by it; or

(b) the States and organizations participating in the negotiation of the treaty as well as the States members of the organization acknowledged that the application of the treaty necessarily entails such effects.]

2. Mr. REUTER (Special Rapporteur) said that articles 34, 35 and 36 had not been the subject of comment in the Sixth Committee or of written observations by Governments or international organizations. Article 36 *bis*, however, had been very fully discussed. It had been the subject of particularly long and difficult debates in the Commission, and the solution adopted was exceptional in that the article had been held in abeyance, between brackets, pending a final decision to be taken at a later stage.

3. The first three articles merely provided, with respect to the treaties covered by the draft, for the solutions adopted under the Vienna Convention,<sup>1</sup> together with a reminder of the obligation incumbent on an international organization to respect the relevant rules of the organization when it accepted a right or an obligation conferred upon it under a treaty to which it was not party.

4. He had only some drafting suggestions to make regarding those three articles. In the first place, he would propose that, to take account of the observations of Governments, article 34 should be recast as a single paragraph, to read (A/CN.4/341 and Add.1, para. 91):

“A treaty does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.”

5. In the case of articles 35 and 36, the Commission would have to decide whether to retain the proviso “Subject to article 36 *bis*,” which was placed in square brackets in both articles.

6. For a number of reasons, article 36 *bis*, unlike those three articles, had been the subject of extensive comment in the Sixth Committee and in the written observations of Governments and international organizations (A/CN.4/339 and Add.1-7). In the first place, there was a general political question to which some members of the Commission had referred and which was based on the view that the article seemed to be directed towards the problems encountered and solutions adopted in the context of one particular entity, the EEC. The Community itself had observations (A/CN.4/339) on that point.

7. That view was open to two interpretations, which followed from the facts themselves and did not involve any value judgements. It was apparent, first, that had the special entity directly in question not concerned

<sup>1</sup> See 1644th meeting, footnote 3.

Europe, some of the matters in dispute would certainly have aroused less interest. If the European Community was considered to have special characteristics that removed it from the category of international organizations and if article 36 *bis* in fact addressed problems peculiar to the Community, there were legitimate grounds for suspecting that an attempt was being made to apply to international organizations generally problems and solutions belonging to a completely different order of organizations and that developments that would totally change the character of the generality of international organizations were thus being instigated and encouraged. Without ruling out any evolution of international organizations, it might be desirable to set limits, to define a threshold beyond which an entity was no longer an international organization. He noted in passing that the European Community had described itself on occasion as a quasi-State, a supranational organization or even an international organization of a special character.

8. He mentioned these matters because they had clearly attracted the attention of the Sixth Committee, as was shown by the number of comments on draft article 36 *bis* in the course of its discussions. The issues were wholly legitimate, but went beyond the strictly technical field to which the Commission's discussions should be restricted.

9. The views expressed on article 36 *bis* fell into three main groups. A first group considered that the provision had no place in the draft. The Byelorussian and Ukrainian Soviet Socialist Republics (A/CN.4/339), the Union of Soviet Socialist Republics (*ibid.*), the Council for Mutual Economic Assistance (*ibid.*), Czechoslovakia (A/CN.4/339/Add.3), Hungary (A/CN.4/339/Add.1), German Democratic Republic (A/CN.4/339/Add.6) and Yugoslavia (A/CN.4/339/Add.2) took that view. Others considered the article useful, even essential, and thought it should be retained. That was the position of the Federal Republic of Germany (A/CN.4/339) and the EEC (*ibid.*), among others. Finally, there was a third, less categorical position, whose supporters had no positive objection to article 36 *bis* but thought the wording was not sufficiently clear and that it was not completely certain that such an article was essential or apposite. That view was taken by Canada (*ibid.*) and perhaps by Romania (A/CN.4/339/Add.7), to which might be added the ILO (A/CN.4/339), which nevertheless indicated that it had no experience that could throw any light on the hypothetical cases envisaged. Some other views were more difficult to interpret and classify, among them that of the FAO (*ibid.*), whose comments gave the impression that it considered that there were practical situations in which problems were solved flexibly without raising difficulties.

10. The Commission would have to take a position on these issues in working on the draft articles and would be obliged to examine article 36 *bis* in order to assess its significance, utility and indeed, advisability.

11. To help the Commission decide, it might be useful to summarize the solutions adopted by the Vienna Convention, which the Commission had accepted and which were accurately reflected in draft articles 34, 35 and 36.

12. The first rule was that in the case of a treaty there were only two possibilities: an entity was either a contracting or a third party (*tertium non datur*). This general rule having been established, article 34 then stated that a treaty created neither rights nor obligations for a State or an international organization without its consent.

13. So far as assent was concerned, the Vienna Convention established an extremely flexible rule with regard to the creation of rights for third States, since it provided that assent was presumed. It would be remembered that the wording of that Convention was such that, in the view of some, the right was created before assent, since the theoretical explanation of a stipulation *pour autrui* was retained as the basis for article 36. The Convention was, on the other hand, very rigid with regard to obligations.

14. In the draft which served as the basis for the Vienna Convention, the Commission simply required express assent, and it was only on second reading that the United Nations Conference on the Law of Treaties modified the wording and provided that assent must be given expressly and in writing. That decision, which was the result of an amendment submitted by the representative of Viet Nam, was adopted by 44 votes to 19 with 31 abstentions,<sup>2</sup> in other words a minority of those voting. The provision was now incorporated in an international convention which was in force, and its interpretation was a matter for the parties alone. However, the parties might maintain on the basis of the statement made by the representative of Viet Nam to the Conference in support of his amendment that the method of acceptance intended was acceptance by means of an instrument. That interpretation would not of course bind the Commission in preparing its draft articles, but it would clearly carry great weight.

15. The Vienna Convention recognized certain limits. The rules it set out did not cover all eventualities. It was not true, for example, that a treaty could not create an obligation for a third State unless the third State expressly accepted it in writing. The Commission had been aware of the exceptions when it examined the draft articles. One of the exceptions was formally embodied in the draft articles the Commission was studying on the succession of States in respect of matters other than treaties; it dealt with the effects for third States of treaties relating to territorial changes.

<sup>2</sup> See *Official Records of the United Nations Conference on the Law of Treaties, Second session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), pp. 59–60, 14th meeting, paras. 5 *et seq.*

16. Another exception related to the flexibility of the rules in respect of assent. It might be illustrated by the purposely absurd example of the charter establishing an international organization; the charter, being the instrument that created the organization, was clearly a treaty to which the organization was not a party. An international organization might conceivably claim that it had not accepted a certain obligation for the benefit of a member State which its constituent instrument imposed on it. He noted, by way of example, that the municipal law of certain countries contained rulings on whether a legal person was a third party in respect of the agreement establishing it. Admittedly, that was putting an extreme case, but nevertheless the difficulty must be recognized.

17. Another example drawn from practice was that of agreements on the privileges and immunities of international organizations in which the rights and obligations of member States—and, when necessary, of non-member States—were established by a treaty between member States only. It was clear in that case that the international organization had not accepted in practice the obligations imposed on it by means of a formal declaration in writing. The few examples cited demonstrated that the Vienna Convention had not envisaged all the cases which could occur in practice.

18. In the light of that analysis, it was easier to appreciate the purpose of article 36 *bis*. The real issue was not whether there was a departure from the unchallenged principle that a treaty could not create rights and obligations for a third party—whether a State or an international organization—without its consent, but whether the rule in article 35 (that acceptance should be given expressly and in writing) was not too rigid. If the members of the Commission unanimously considered there should be no exception to the rule, article 36 *bis* should be deleted. If on the other hand they thought that the answer was not so clear-cut, the Commission would have to analyse the situation envisaged in detail.

19. The Commission would have first to consider the general problem of the nature of an international organization, and decide whether it constituted a reality or a fiction, a simple mechanism or something more. In that connection, thinking oscillated between two answers: an international organization was merely a collective means of action for certain States, a procedure, but it was also a reality, for international organizations must possess legal personality if treaties could be concluded with them, otherwise the draft articles being worked out would be irrelevant.

20. Similar questions arose in municipal law, since the construction of legal entities was a feature of all legal systems although none attributed full existence to them. Thus, French law spoke of the “*transparence de la personne morale*”, and common law of “lifting the veil”. It was well known that there were cases in public international law in which legal personality might disappear. Draft article 73 was concerned with that

possibility.<sup>3</sup> The Commission had reached a stage in its work when it must take a final decision on the fate of article 36 *bis*, which it had conditionally approved in first reading.

21. That article was intended to cover two specific hypothetical cases. The first was that in which the constituent instrument of an international organization provided that its member States were bound by agreements concluded by the organization. That exception to the rule in article 34 was the effect of the provisions of the constituent instrument on the relationship between the organization and its members, a matter which was governed by the relevant rules of the organization and was freely decided by each organization. On that assumption, the cases in which the rule applied in practice would be tolerably rare, since the instruments of association of most international organizations contained a rule requiring member States to co-operate with the organization and the degree of binding force of the rule would directly determine the extent of the effects for member States of treaties concluded by the organization.

22. The solution in that respect depended upon each organization, and no general rule could be established. It was a matter of relations between the parties to the treaty; if a State concluded a treaty with an international organization, it was certainly possible that the treaty would have direct effects on the relationship between that State and the States members of the international organization without express acceptance in writing so far as the rights created by the instrument were concerned.

23. The situation was different with regard to possible obligations created by the treaty, and the Commission must decide whether obligations could be created directly for member States without their express consent in writing. For example, if an international organization which administered a customs union and had the right to conclude tariff agreements under its constituent instrument concluded an agreement with a third State, the customs dues being levied and collected by the national services of the member States of the organization, the question would arise whether, if the national service of one member State claimed that it was not bound by the treaty concluded by the organization, the State with which the treaty had been made would have recourse not only against the organization but also against the member State failing to carry out the obligation. An affirmative answer would mean that the treaty had created direct obligations for a member State without its express consent in writing. The proponents of that solution considered that it must be assumed that the State concluding the agreement was aware of the rules of the organization binding member States. Member States were considered, in that case, to have given their consent *ex ante* and in general terms.

<sup>3</sup> See 1647th meeting, footnote 1.

24. The example was not necessarily theoretical. The State party to the treaty concluded with the international organization might have agreed with the member State not fulfilling the prescribed obligation to have recourse to arbitration and might wish to do so to facilitate the settlement of the dispute. The member State of the international organization could not readily claim to be a third party in respect of a treaty signed by the organization.

25. He believed that that analysis was acceptable and considered that although the provision was a departure from the principle of express consent in writing, it was not an exception to the rule of consent.

26. A second possibility needed to be considered. The subject-matter of an agreement might be such that the international organization's consent to the treaty entailed the assent of member States. In such situations, article 36 *bis* merely recognized that there were cases where the purpose of a treaty was such that its conclusion entailed the acceptance by member States of the obligations undertaken by the international organization.

27. With regard to form, he had proposed a simplified text (A/CN.4/341 and Add.1, para. 104) which might replace the draft adopted in first reading if the Commission decided to retain the provision. It read:

“The assent of States members of an international organization to obligations arising from a treaty concluded by that organization shall derive from:

“(a) the relevant rules of the organization applicable at the moment of the conclusion of the treaty which provide that States members of the organization are bound by such a treaty; or

“(b) the acknowledgement by the States and organizations participating in the negotiation of the treaty as well as the States members of the organizations that the application of the treaty necessarily entails such effects.”

28. In the new version, the introductory phrase was both simplified and modified, and was intended to make clear that article 36 *bis* sought to make the modalities of consent more flexible, not to discard the principle. The Commission's discussions of the first draft had shown there was no need to deal with rights in the article, since the situation with regard to rights was covered by article 36. The new text therefore no longer referred to rights.

29. While proposing subparagraph (b), which introduced the idea of entailed assent, he had put forward a variant, in the case that the Commission, although prepared to consider the possibility of an article 36 *bis*, objected to the idea of entailed assent. The variant (which he considered less satisfactory) read (*ibid.*):

“(b) any unequivocal manifestation of such assent.”

The variant would be sufficient to cover certain practical aspects which would otherwise be left unprovided for.

30. Mr. USHAKOV approved the Special Rapporteur's proposal to shorten article 34.

31. Turning to the basis of the article and its significance, he pointed out that article 2, subparagraph 1 (h)<sup>4</sup> defined the terms “third State” and “third international organization”. The definition was unimpeachable, and it meant that a member State of an international organization, like a non-member State, was a third State in respect of a treaty concluded between an international organization and one or more other States. The question that had to be answered was what the term “international organization” meant. The Commission had not tried to provide a definition that was both theoretical and practical and covered all the possibilities. It was nevertheless clear, he believed, that an international organization was an entity which possessed a legal personality distinct from that of its members. Its legal personality was its own and it possessed its own will, distinct from the will of its members taken separately or collectively. It followed that a treaty concluded by an international organization committed the organization, but did not directly entail obligations for the member States. That was indeed the basis of the draft articles prepared by the Commission.

32. Mr. JAGOTA could see no objection to referring the new text of article 34 to the Drafting Committee. The Committee might wish to replace the words “third organization” by the more commonly used term “third international organization”.

**Succession of States in respect of matters other than treaties (*continued*)\* (A/CN.4/338 and Add.1–4, A/CN.4/345 and Add.1–3)**

[Item 2 of the agenda]

**DRAFT ARTICLES ADOPTED BY THE COMMISSION:  
SECOND READING (*continued*)**

ARTICLE 18 (Effects of the passing of State debts with regard to creditors) *and*

ARTICLE 19 (Transfer of part of the territory of a State)<sup>5</sup> (*concluded*)

33. Mr. USHAKOV said that he approved article 18, paragraph 1, in principle, but thought the safeguard clause it contained should be more general and should apply to the draft articles as a whole. The Drafting Committee might consider the possibility of extending it to all creditors, including private claimants or bodies corporate.

34. It was somewhat surprising that under article 18, paragraph 2, an agreement between the predecessor State and the successor State or between successor States could be invoked only against “a third State or

<sup>4</sup> See 1647th meeting, footnote 1.

\* Resumed from the 1672nd meeting.

<sup>5</sup> For texts, see 1672nd meeting, para. 36.

an international organization asserting a claim" where- as article 16, subparagraph (b)<sup>6</sup> implicitly covered the State's financial obligations vis-à-vis private persons. In fact, private persons were not covered by article 18, paragraph 2, because they were not subjects of international law and an agreement between the predecessor and successor States or between successor States could not be invoked against them. Such an agreement could be invoked against a third State or an international organization, since they were subjects of international law, and they could reject it, as international law authorized them to do, if it was not in conformity with the rules of the draft articles. The apparent contradiction between article 18, paragraph 2, and article 16, subparagraph (b), had been the subject of much discussion, but it could not be eliminated.

35. Mr. JAGOTA said that the Special Rapporteur had proposed the deletion of paragraph 1 of article 18 (see A/CN.4/345 and Add.1-3, para.176) because it could give rise to doubts about the scope of the word "creditors" and also because it was inconsistent with articles 17 and 17 *bis*.<sup>7</sup> That contradiction would persist unless article 18 was related to article 16, a matter that could be resolved only by retaining article 16. The decision on the deletion of article 18, paragraph 1, therefore depended on the decision taken in regard to article 16.

36. The Special Rapporteur had raised the question whether the term "third State", as used in paragraph 2 of article 18, meant a State that was not a party to the instrument resulting from the articles or a State that was a party to the instrument but not to an agreement contemplated under article 18 (*ibid.*, para.179). If the third State was not a party to the instrument resulting from the articles, then obviously the terms of article 18 would not apply. He therefore suggested that, to make it quite clear that the term "third State" referred to States that were not parties to the agreement but were parties to the instrument resulting from the articles, the words "party to the articles" should be added after the words "against a third State" in paragraph 2 of article 18.

37. There was also the question of international organizations. Since an international organization could not become a party to the articles, why should it be bound by an agreement between the predecessor and successor States regarding debts? He was unable to answer that question, and considered that it was a matter to be decided by a plenipotentiary conference. The main point, however, was to ensure that loans granted by institutions such as the World Bank were protected.

38. A third point had been raised by the Special Rapporteur (1672nd meeting) in connection with subparagraph 2 (a), concerning the meaning of the

terms "consequences" and "applicable rules". It had been said that it would give rise to controversy if those terms were not clarified. That seemed to him to be a very valid criticism and he therefore suggested that the subparagraph be redrafted to read:

"(a) that agreement is not inconsistent with the applicable rules of the articles in the present Part;"

39. Mr. ALDRICH said that he was not very satisfied with article 18. He started from the assumption that article 16 would continue to include debts owed to persons as well as to States and international organizations because, if it did not, his interest in the whole draft would be minimal and the prospects for the future of the draft were, in his view, poor indeed. On that assumption, article 18 raised substantive issues.

40. Paragraph 2 of the article could be read to say that, if the rules governing agreements between predecessor and successor States as laid down in the draft were violated by the terms of an agreement the predecessor and successor States or among successor States, then States or international organizations, but not private persons, might assert claims that prevailed, since the rules had not been followed, unless those States and international organizations had, pursuant to subparagraph 2 (b), accepted the agreement which varied from the rules. There were, however, two ambiguities in the paragraph which might conceivably make it acceptable to private claimants and the States concerned about such claimants. One related to the use of the phrase "State or an international organization asserting a claim" which could perhaps be interpreted to mean a State which asserted a claim on behalf of its nationals who were creditors. That was not an altogether satisfactory arrangement for a creditor, who would have to get his State to object to the agreement that deviated from the rules, but at least it afforded some protection.

41. Perhaps a greater ambiguity derived from paragraph 1, since a creditor, reading that his rights and obligations were not affected, might think that he had nothing to worry about. However, paragraph 1 by itself seemed to be inconsistent with article 17 for, as the Special Rapporteur had pointed out, where the obligations of the predecessor State were extinguished and the obligations of the successor State arose, there was a novation. Consequently, while paragraph 1 of article 18 might give some satisfaction to the private creditor, it seemed a little weak owing to the inherent improbability built into its statement. He therefore considered that article 18 required careful consideration by the Drafting Committee.

42. The essence of article 18 could be expressed in a single sentence, built on paragraph 1, to the effect that a succession of States did not as such affect the rights and obligations of creditors except as provided under the articles. A second paragraph might be required to provide that variation from the rules would be permissible in certain cases if all the interested parties so agreed. He had no doubt, however, that the deletion

<sup>6</sup> For text, see 1671st meeting, para. 1.

<sup>7</sup> For texts, see 1672nd meeting, para. 36.

of paragraph 1 as it stood and the retention of paragraph 2 would render the provision unacceptable to those concerned about the rights of private creditors. Yet to leave the article as drafted would oblige creditors to rely on its inherent inconsistencies and ambiguities, and it was highly doubtful that legal advisers to banks would regard that as the best basis of protection. He therefore urged the Commission to stipulate for clarity in the terms of article 18.

43. Mr. ŠAHOVIĆ regretted that the Special Rapporteur was not present, the more so as he was not sure he had correctly understood the Special Rapporteur's comments in paragraph 176 to 182 of his report. The fact that the Special Rapporteur made so few specific proposals suggested that he was basically in favour of deleting the article. Before going further, the Commission should therefore decide whether the provision should be discarded or not.

44. For his part, he had approved the article in the first reading as providing a general safeguard clause intended to protect creditors of all categories in a succession of States. From that point of view, article 18 seemed necessary. The drafting was perhaps unsatisfactory, but it was difficult to see how it could be substantially improved.

45. The Special Rapporteur proposed to delete paragraph 1 on the ground that it served no useful purpose and introduced the concept of novation to show that a succession of State debts affected the rights of creditors. At the same time, he stressed that the patrimonial right of the creditor must remain intact; in his (Mr. Šahović's) view, protecting that right was surely the purpose of paragraph 1. The replacement of one debtor by another was a technical aspect of the problem with which paragraph 1 did not deal. The final wording of the paragraph would depend on what was decided regarding article 16, paragraph (b) and the suggestion, which he considered acceptable, that paragraph 1 should become a general safeguard clause.

46. Article 18, paragraph 2, developed the principle enunciated in paragraph 1 and coupled it with the two conditions in subparagraphs (a) and (b). In that connection, the Special Rapporteur endorsed the position of the Government of Czechoslovakia in its written comments (A/CN.4/338/Add.2): an agreement between a predecessor State and a successor State (or between several successor States) could not be invoked against a creditor third State if the latter had not accepted it and was not a party to the future convention. Subject to that reservation, the Drafting Committee should be careful, in reviewing the text of article 18, not to upset the compromise which had led to its present wording.

47. Mr. USHAKOV said that paragraph 2 of article 18 was of little interest to creditors. Under the paragraph, a creditor third State or creditor international organization could oppose an agreement for

the distribution of debts. However, the important point for a creditor was to get his money back—it hardly mattered from whom. In some cases it might even be preferable for responsibility for the debt to be shared between two States. Under article 18, the only ground on which a creditor third State or international organization could oppose such an agreement was that it was not in accordance with the rules of the draft articles, which essentially provided that the State debts of the predecessor State should pass to the successor State "in an equitable proportion". However, equity did not mean the same to creditors as it did to States participating in the succession.

48. The CHAIRMAN said that, if there was no further comment, he would take it that the Commission wished to refer article 18 to the Drafting Committee.

*It was so decided.*<sup>8</sup>

49. The CHAIRMAN said that, in the absence of any comment, he would take it that the Commission wished to refer article 19 to the Drafting Committee.

*It was so decided.*<sup>9</sup>

*The meeting rose at 1 p.m.*

<sup>8</sup> For consideration of the text proposed by the Drafting Committee, see 1692nd meeting, paras. 109–110.

<sup>9</sup> *Idem*, para. 111.

## 1676th MEETING

*Monday, 22 June 1981, at 3.10 p.m.*

*Chairman:* Mr. Robert Q. QUENTIN-BAXTER

*Present:* Mr. Aldrich, Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Pinto, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitul, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

### Questions of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/339 and Add.1–7, A/CN.4/341 and Add.1)

[Item 3 of the agenda]

#### DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

ARTICLE 34 (General rule regarding third States and third international organizations),

ARTICLE 35 (Treaties providing for obligations for third States or third international organizations),

ARTICLE 36 (Treaties providing for rights for third States or third international organizations), and

ARTICLE 36 *bis* (Effects of a treaty to which an international organization is party with respect to third States members of that organization)<sup>1</sup> (continued), and

ARTICLE 2 (Use of terms), subpara. 1 (*h*) ("third States", "third international organization")

1. Mr. REUTER (Special Rapporteur), summarizing the discussion of article 34, remarked that the only opinion expressed in regard to this article had been favourable.

2. He noted that Mr. Ushakov had suggested that the definition of the terms "third State" and "third international organization" in article 2, subparagraph 1 (*h*), which the Commission had not yet considered in second reading, should have been taken up at the same time as articles 34 to 36.

3. The CHAIRMAN said that if there was no objection he would take it that the Commission decided to refer article 34 and article 2, subparagraph 1 (*h*), to the Drafting Committee.

*It was so decided.*

4. In connection with article 35, Mr. USHAKOV said he would consider only the problems of interpretation that might be raised by that article.

5. It should be noted, in the first place, that under paragraphs 2 and 3 an obligation arose for a third international organization from a provision of a treaty if the organization expressly accepted the obligation in writing. The requirement that acceptance should be given in writing was not essential. As the Special Rapporteur had indicated, examples in which acceptance was not given in writing could be found in practice. The requirement that acceptance should be expressly given was, on the other hand, essential: it was natural that a treaty obligation could not arise for a third State or for a third international organization without its express assent. In principle, a State or an international organization might expressly accept in advance any treaty obligation whatsoever, although it might seem very odd to do so. The member States of the European Economic Community in fact did so, but the Community was, it must be recognized, somewhat different from "normal" international organizations. The assent given in advance was limited to treaties concluded by the Community in a specific area, such as foreign trade. The treaties were concluded by the Community on behalf of and for member States, and were binding on them.

6. Referring to his earlier comments (1674th meeting) on article 30, on the application of successive treaties relating to the same subject-matter, he said that if the members of the EEC were empowered to conclude treaties on the same matters as the Commu-

ity and two treaties entailing different obligations were concluded, the first by the EEC and the second by a member State, under article 30 the later treaty would prevail. The difficulty had been avoided, since the members of the Community had undertaken not to conclude treaties on matters within the Community's competence. The case of the EEC was, however, unique. Treaties concluded by an international organization were normally binding only on the organization, and not on member States, and were performed by the organization. In contrast, treaties concluded by the Community were performed by member States.

7. Although the possibility that States might agree in advance to accept any treaty obligation whatsoever in a specific field was not so far-fetched as might appear, the draft articles should not generalize a situation peculiar to the EEC.

8. Mr. SUCHARITKUL observed that, as the Special Rapporteur had pointed out, the requirement that acceptance should be expressed in writing was not so much a strict formal requirement as a means of establishing that assent had been given. Acceptance of an obligation did not entail a formal communication and might, for example, be established by a declaration made at a conference. In his view it would suffice for an oral acceptance to be recorded or reported in the minutes of the meeting at which it had been expressed.

9. The provisions of article 35 were in fact an exception to the rule *pacta tertiis nec nocent nec prosunt*. It was natural that the exception should require express, or even written, assent, but that requirement could be interpreted flexibly, as not entailing a formal instrument, or strictly, as in the case of novation. The situation of the EEC, to which Mr. Ushakov had referred, seemed to come under article 36 *bis* rather than article 35, because what was involved was the relations between the Community and its members.

10. With respect to acceptance in advance, he referred to an agreement for the return of Vietnamese refugees concluded in the 1960s between the Red Cross of Thailand and the Red Cross of North Viet Nam under the auspices of the International Committee of the Red Cross. The obligations arising from the agreement had been accepted in advance by Hanoi and Bangkok, and then by Saigon.

11. Referring to Mr. Jagota's observations on the acceptance of a right and of attendant obligations during the consideration of the topic of succession of States in respect of matters other than treaties, he noted that paragraph 4 of article 36 was very clear in that connection, because it provided that the State or international organization exercising a treaty right was bound to comply with the conditions provided for in the treaty or established in conformity with the treaty.

12. With regard to the question whether the EEC was an international organization, he observed that the

<sup>1</sup> For texts, see 1675th meeting, para. 1.

Community had been organized under Belgian law and derived its corporate status from Belgian law.

13. Mr. REUTER (Special Rapporteur) said that articles 35 and 36 raised no major problems, and suggested that they should be referred to the Drafting Committee. The Committee could consider the relationship between articles 35 and 30 to which Mr. Ushakov had referred. He pointed out that the two-fold requirement that acceptance should be express and in writing was set out in paragraph 1 of article 35 in the case of third States, whereas the corresponding requirement in the case of third international organizations was divided between paragraphs 2 and 3. The members of the Commission seemed to agree that that difference was of no consequence.

14. Speaking as a member of the Commission, he commented that articles 35 and 36 were closely modelled on the corresponding provisions of the Vienna Convention.<sup>2</sup> With all due deference to the authors of the Convention, it had to be recognized that some of its provisions might require interpretation, although it was doubtful that the Commission was qualified to interpret them, the more so as the Convention had entered into force. He generally endorsed the views expressed by Mr. Ushakov regarding the EEC, but was less certain that the rule that acceptance should be expressly given was essential. When sanctions were taken in response to an international crime, the rule that obligations arising from a treaty were not binding on a third State without its express assent was inapplicable. It was on that basis that peace treaties had been declared valid even before their acceptance by the State regarded as the aggressor.

15. In that connection, he drew a parallel between internal and international law. The Roman law systems rejected the potestative condition: it was possible for one party to accept in advance on the basis of what another party would decide. It might be asked whether the nature of the State was not such that it was inconsistent with a State's sovereignty and its dignity to enter into a commitment the content of which would be wholly determined by an agreement between third States.

16. The CHAIRMAN said that if there was no objection he would take it that the Commission decided to refer articles 35 and 36 to the Drafting Committee.

*It was so decided.*

17. In regard to article 36 *bis*, Mr. CALLE Y CALLE said that if a State or international organization was not a party to a treaty, then clearly no obligations could arise for it, as a third State or organization, save with its consent. In practice, however, obligations that had been collectively assumed through a collective body might have to be

met on a direct and individual basis. It was quite conceivable, for example, that the Intergovernmental Council of Copper Exporting Countries might enter into a contract with a State or another body on special terms whereby the members of the Council were required to meet directly the undertakings which the Council, acting as a collective body, had assumed on their behalf. Article 36 *bis* therefore seemed to him to be very much in point. He was quite certain that if the draft were to be laid before a plenipotentiary conference the same problems would arise and an attempt would be made to draft a provision to deal with them.

18. The wording of article 36 *bis* had been simplified (see 1675th meeting, para. 27). Formerly, the text of that article had been somewhat peremptory in tone, and had been drafted in terms of the effects on third States of a treaty entered into by an organization. The new wording was based more on the modalities of consent and on consent given collectively and in advance by the member States of an organization. Such consent would be an intimation not that those States were renouncing entirely their capacity to conclude treaties, but rather that they found it more practical for treaties on specific subjects to be concluded by their organization.

19. In the light of these considerations, it might be advisable to refer expressly in the article to the advance or pre-established consent of the member States of an international organization, and also, in connection with the reference to the obligations arising for third States, the word "directly", so as to distinguish between direct obligations and the other obligations of a more or less general nature that were incumbent on member States. There was, for instance, a general obligation under article 18<sup>3</sup> not to do anything that would defeat the object and purpose of a treaty prior to its entry into force: once a treaty concluded by an international organization had entered into force States had a clear obligation to co-operate within the framework of the organization in fulfilling their obligations. In article 36 *bis*, the emphasis was on obligations that arose directly for States—obligations governed not by the rules of the organization but by international law.

20. He was in favour of retaining article 36 *bis*, but considered that the drafting required clarification.

21. Mr. RIPHAGEN said that article 36 *bis*, like several other articles in the draft, raised a general problem, that of the relationship between a treaty with an international organization and the internal rules of that organization. Obviously, in view of the wide variety of treaties and organizations, it was difficult to determine the nature of that relationship, and the Commission could therefore do no more than state a number of rebuttable presumptions.

22. The basic rule of the law of treaties was, of course, that a treaty could not take effect without

<sup>2</sup> See 1644th meeting, footnote 3.

<sup>3</sup> For text, see 1647th meeting, para. 1.

mutual consent. It seemed to him, however, that treaty instruments could introduce the modalities of consent, as also of effect. In that connection, he considered that the rules laid down in the Vienna Convention concerning the effect of treaties and the procedure for concluding them could not be applied to international organizations without adaptation, since such an organization was itself the product of a treaty between States. The technique of personalizing an international organization could perhaps be used, as had been the case when dealing with the treaty-making power of such organizations. But, in his view, personalization was an awkward legal device, since an international organization was more than the creation of a decision-making power: it was, after all, a social system. Quite apart from the general obligation of solidarity incumbent upon its members, there was the special matter with which the organization was itself directly concerned.

23. There were many ways in which the characteristics of each international organization might be reflected, but he did not think sharp distinctions could be made between supranational organizations, such as the EEC, which were not normal international organizations, and intergovernmental organizations.

24. So far as treaties with international organizations were concerned, he would, however, be inclined to make a distinction between three categories: first, treaties between an international organization and an outside entity; secondly, treaties between an international organization and its member States; thirdly, treaties between one international organization and another where both had substantially the same membership.

25. The analogy with treaties between States was far greater in the case of the first of those three categories of treaty than in the second. In that connection, he would remind members of the mandate treaties between the League of Nations and some of its members. The International Court of Justice had decided that those treaties could be unilaterally terminated by the organization without the need to have recourse to any procedure for the settlement of disputes. They were a very special category of treaty, and should perhaps be distinguished on the ground that they had not always been entered into on the basis of equality.

26. The position in regard to treaties between one international organization and another was a little different. He noted, in that connection, that article 5 of the Vienna Convention seemed to recognize that there were treaties with special characteristics where international organizations were concerned.

27. Article 36 *bis* dealt with the requirement of consent, but not in any revolutionary way. It was quite clearly concerned with not only the modalities of consent but also with its effects; in that connection, the various types of rights and obligations arising from a

treaty between an international organization and an outside entity should perhaps be considered further.

28. It must be assumed that the member States of an international organization had no rights or obligations in respect of action to be taken with regard, for example, to the amendment or revocation of a treaty concluded by the organization. Only the organization itself could take action of that kind.

29. In exceptional cases, however, the rights and obligations of an international organization that concluded a treaty could become the rights and obligations of the member States vis-à-vis the outside entity with which the treaty was concluded, as, for example, in the case of the customs union referred to by the Special Rapporteur in paragraph 101 of his tenth report (A/CN.4/341 and Add.1).

30. Another category of phenomena, which might be taken into account but not necessarily explicitly referred to in article 36 *bis*, were what Mr. Calle y Calle had described as the negative obligations of the member States of an international organization, including the obligation not to defeat the object and purpose of a treaty concluded by the organization and an outside entity and the obligation not to contribute to the non-performance of a treaty by the organization and an outside entity.

31. Except in the cases to which he had just referred, he did not think that the member States of an international organization had any rights and obligations under a treaty concluded by that organization and an outside entity, unless, of course, the treaty itself made it clear that such rights and obligations existed.

32. A treaty concluded between an international organization and an outside entity could, however, have effects within the organization itself, particularly in respect of the rights and obligations of the member States of that organization *inter se*, as in the case of the EEC, whose member States had the possibility of invoking treaties concluded by the Community and outside entities. Such a possibility nevertheless depended on the internal rules of the organization, which could take precedence over a treaty concluded by the organization, as was made clear in article 27, paragraph 2,<sup>4</sup> and article 46, paragraph 3.<sup>5</sup>

33. Mr. ŠAHOVIĆ said that he had followed with great interest the evolution of article 36 *bis* in the course of the Commission's deliberations. Its consideration in second reading was, in fact, a third stage. The Special Rapporteur had first proposed a draft article 36 *bis* entitled "Effects of a treaty to which an international organization is party with respect to States members of that organization",<sup>6</sup> and in first reading the Commission had provisionally adopted an article

<sup>4</sup> *Idem*, 1673rd meeting, para. 4.

<sup>5</sup> See 1647th meeting, footnote 1.

<sup>6</sup> See *Yearbook... 1977*, vol. II (Part One), pp. 128-129, document A/CN.4/298.

entitled “Effects of a treaty to which an international organization is party with respect to third States members of that organization”. In second reading, the Special Rapporteur’s report proposed a new version, for which the suggested title was “Assent to the establishment of obligations for the States members of an organization”.<sup>7</sup>

34. The development was surprising, and was the combined outcome of the Commission’s deliberations and the comments of Governments and international organizations. He was grateful to the Special Rapporteur for his unremitting efforts to take into account the various comments on his proposals.

35. Unlike the earlier text, the text proposed by the Special Rapporteur in second reading was not limited to the effects on third States members of an international organization of a treaty concluded by the organization. That issue was set aside, and the new provision constituted essentially the statement of a rule concerning assent. The purpose and advisability of that change needed to be considered.

36. From a theoretical point of view, the situation of a third State member of an international organization with respect to a treaty concluded by the organization was certainly a question that could be raised. For his own part, he had felt from the beginning that the situation was one that concerned the organization, and that the draft adopted on first reading was not satisfactory.

37. Turning to the new wording proposed by the Special Rapporteur (1675th meeting, para. 27), he noted that it was concerned with the effects of treaties as well as with the question of assent. It was arguable that all the States members of international organizations must, as States possessing a legal personality of their own, be treated as third States with respect to treaties concluded by the organization of which they were members and which had its own legal personality and was capable of concluding treaties independently. In practice, however, only certain States members might be parties to treaties concluded between an international organization and States, and some States members would be third parties with respect to a treaty concluded by it.

38. He pointed out that if the proposed article was concerned with the assent of States members of an international organization and not to the situation of third member States, it was out of place in Part III, Section 4 of the draft, “Treaties and third States or third international organizations”.

39. Although he was not persuaded that the proposed article was necessary, he was prepared to accept it as the statement of an extremely general rule, applicable to all international organizations. He thought that the wording of the introductory phrase and of subparagraph (a) was not completely satis-

factory, and believed that subparagraph (b) should be drafted more precisely and coupled with an interpretation clearly explaining the scope of the article with respect to the position of members regarding treaties and their effects.

40. He would therefore be prepared to accept the new provision suggested by the Special Rapporteur, on the understanding that its meaning as compared with the version adopted on first reading was clearly indicated. He would nevertheless reserve his position if it turned out that the text could be interpreted as the equivalent in another form of the text provisionally adopted on first reading. The Commission should eschew a formal approach and should consider the concrete consequences of the draft it was preparing.

41. Mr. VEROSTA said that, unlike Mr. Šahović, he thought that the new article 36 *bis* proposed by the Special Rapporteur was properly included in the Commission’s draft. International organizations such as the EEC might conclude treaties with third States or third international organizations that affected member States. An article dealing with that possibility had a logical place in Part III, Section 4 of the draft.

42. In its written comments (A/CN.4/339), the EEC had pointed to the case of “mixed agreements” to which the Community might become a contracting party together with its member States when they involved treaties covering areas within which the competences were mixed. The EEC declared in that connection that “it should be clear that article 36 *bis* also applies in the case of mixed agreements to those rights and obligations provided for in the agreement which fell within the competence of the international organization”. It also noted that “in the case of mixed agreements, the member States of the international organization would not necessarily be ‘third States’”.

43. He suggested that the title of the new article should be “Effects of a treaty to which an international organization is party with respect to States members of that organization” and that the words “with a third State or a third international organization” should be inserted after the words “by that organization” in the introductory part of the article proposed by the Special Rapporteur.

*The meeting rose at 6 p.m.*

## 1677th MEETING

*Tuesday, 23 June 1981, at 11.25 a.m.*

*Chairman:* Mr. Robert Q. QUENTIN-BAXTER

*Present:* Mr. Aldrich, Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz Gonzáles, Mr. Evensen, Mr. Francis, Mr. Pinto, Mr. Reuter, Mr. Riphagen, Mr.

<sup>7</sup> A/CN.4/341 and Add.1, footnote relative to para. 104.

Šahović, Mr. Sucharitkul, 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.4/339 and Add.1-7, A/CN.4/341 and Add.1)

[Item 3 of the agenda]

**DRAFT ARTICLES ADOPTED BY THE COMMISSION:  
SECOND READING (continued)**

**ARTICLE 36 bis** (Effects of a treaty to which an international organization is party with respect to third States members of that organization)<sup>1</sup>  
(continued)

1. Mr. USHAKOV reaffirmed that article 36 *bis* was based on the very special situation of an international organization, the EEC, which was partly a typical international organization and partly a supranational organization. The draft text adopted on first reading and the new wording proposed by the Special Rapporteur (1675th meeting, para. 27) were virtually identical although the new version raised many problems.

2. Thus, it would have seemed logical to use in article 36 *bis*, as in articles 34 to 36,<sup>2</sup> the expression "a State" rather than "the States". However, a proposal to that effect would undoubtedly have met with strong objections on the part of the members of the Commission who were nationals of States members of the EEC and for whom it was impossible for one State member to act independently of the others. There was nevertheless some justification for questioning the use of the words "States members" in subparagraph (a) of the new provision, since that text enunciated a general principle. It seemed that an attempt was thereby being made to conceal the fact that a treaty could not be concluded with a member State in the case of certain special types of organizations whose commitments were necessarily binding on all their member States, whereas organizations of the classical type such as the United Nations could conclude a treaty with one of their member States. Without actually saying so, article 36 *bis* would then be covering the special situation of the EEC, thus justifying the departure from the position forming the basis for draft articles 34 *et seq.*

3. Under the new version proposed by the Special Rapporteur, it was possible to envisage the case where

a treaty was concluded between two international organizations, one of which imposed on its member States, by its signature, the obligations which it had contracted, while the other organization did not have that power. In such a case, the absence of reciprocity of obligations between States members of the international organizations would be sure to give rise to many difficulties.

4. Furthermore, subparagraph (a) of the new text mentioned the "rules of the organization", which the Commission had defined as comprising the relevant decisions and resolutions of the organization. In the case of an international organization of the usual type, it was possible for a resolution adopted by a majority of members to decide on the conclusion of a treaty, which would obviously be binding only on the international organization. In that case, it would be of little consequence that a State member had voted against the resolution, since only the international organization would be bound and would undertake obligations in accordance with its statute. On the other hand, if the text proposed by the Special Rapporteur was adopted, a State which, in the same case, opposed the resolution in accordance with the relevant rules of the organization would nevertheless be bound by the treaty concluded in accordance with the relevant rules of the organization, and would have to assume obligations it had not accepted. Such an end result was obviously inadmissible.

5. The situation was, of course, different in the case of the EEC, since its member States had relinquished their capacity to conclude treaties in certain fields and it was the supranational organization that exercised the relevant powers.

6. The very terms of subparagraph (a) were contrary to the rules laid down by the Commission's draft articles and contrary to the provisions of the Vienna Convention,<sup>3</sup> since neither instrument provided that a treaty could bind an entity that was not a party to it. It would be inconceivable for article 36 *bis* to lay down a rule that departed from the law of treaties and provided that such an instrument could bind an entity which had not signed it, acceded to it or ratified it. The desire to take account of the special situation of the EEC as a supranational organization would oblige the Commission to draft its article 36 *bis* not with reference to the ordinary international law that applied to the usual type of international organizations, but rather, with reference to the international law that was in the process of developing and that applied to supranational international organizations, which did, of course, exist, since the European Economic Community existed and concluded treaties establishing obligations for its member States.

<sup>1</sup> For text, see 1675th meeting, para. 1.

<sup>2</sup> *Idem.*

<sup>3</sup> See 1644th meeting, footnote 3.

7. Subparagraph (b), which concerned in particular the special situation of the EEC, made use of the concept of acknowledgement of the obligations arising from a treaty, a new concept whose meaning was not defined. Furthermore, that provision would tend to impose obligations not only on the States and organizations participating in the negotiation of the treaty, but also on the States members of the organization which might not have participated in the negotiation. In that connection, it should be borne in mind that draft article 2, paragraph 1 (e),<sup>4</sup> defined the terms “negotiating State” and “negotiating organization”. However, in the case where the international organization alone was a party to the treaty and the signatory of that instrument, it was difficult to see on what basis the member State could be considered to have participated in the negotiation.

8. With regard to the concept of “acknowledgement”, he did not think that the mere participation of a State or an organization in the negotiation of a treaty could establish obligations for it so long as it had not formally adopted the text. For example, a State member of an international organization that had acknowledged, during the negotiation, a text subsequently signed by the international organization of which it was a member could not on that basis alone be regarded as being bound by the obligations arising from the treaty, which bound only the signatory international organization. Participation in the elaboration of the text could not definitively bind the participants under any rule of international law.

9. In normal practice, there was no doubt that an international organization could bind its members by a treaty, through certain formalities. For example, the CMEA, which was an international and not a supranational organization, could not bind its member States through its signature. If it signed a treaty establishing obligations for itself and for its member States, it included in the instrument a special clause providing that the treaty had to be expressly approved by all the member States in a written decision of the competent bodies of the latter. Such a mechanism seemed entirely satisfactory, since the member States could participate in the negotiation, as observers for example, although a member State which had not approved the treaty was not automatically bound by it.

10. In the case of the EEC, such a solution was not feasible, because the Community could not allow the member States to act independently. That was, however, the special situation that article 36 *bis* sought to cover, to the detriment of the general situation.

11. Referring to the case of organizations that were difficult to characterize, he mentioned the example of a customs union which consisted of two or three countries and in respect of which there were good grounds for asking whether it was an international organization or an agreement setting up joint ma-

chinery for its members exclusively in the field of customs duties. In his opinion, if the union was not called upon to take decisions, but only established customs duties and rules governing the import and export of goods, it was merely an agreement. However, if such an entity was considered to be an organization, it would represent a new special case.

12. In fact, the Commission’s draft was concerned essentially with international organizations of the classical type, such as the United Nations, its specialized agencies and its regional commissions. He doubted whether the draft could and should provide for all types of international organizations, and recalled that Mr. Calle y Calle (1676th meeting) had mentioned the example, which was also a special one, of organizations of countries which exported a given raw material and were not competent to take decisions, particularly in respect of international relations. The basic problem facing the Commission resulted from the absence of an accurate definition of the concept of international organization, which was virtually impossible to formulate. Nevertheless, doctrine recognized the existence of certain criteria for an international organization: it had to be established by a treaty between States, have representative bodies (composed of State representatives), act as a subject of international law distinct from the States members and therefore be capable of concluding agreements establishing obligations for the organization as such, and, lastly, be governed by the rules of international law. That was, however, a theoretical and general definition, which did not cover all the various types of existing organizations. It was for that reason that the Commission had included in its draft the definition of an international organization previously used in other conventions.

13. In his opinion, the draft could not take account of all the special types of international organizations. Indeed, it was a fact of life that it was possible to formulate general rules only for the most frequent cases and that there were always special cases that did not fall into that category. In the case in question, the EEC was of a special character. It existed and concluded treaties that were binding on its States members, but the situation called for certain special rules, which must, however, be applicable to international organizations of the classical type.

14. He therefore considered it impossible to include in the draft a rule that took account of all special situations, including that of the EEC. He thought that the Commission should first seek to formulate general rules to govern the most universal cases.

15. Mr. BARBOZA noted that, rather than focusing attention on regulating the effects of all treaties concluded by an international organization for its member States, the Special Rapporteur had confined himself to two specific cases, as stated in article 36 *bis*, subparagraphs (a) and (b). As he had concluded in his very clear report, it was simply a question of the

<sup>4</sup> For text, see 1647th meeting, para. 1.

modalities of expressing consent. Article 35 of the Vienna Convention provided that, in the case of obligations arising for third States, there must be express consent in writing. The Commission had, however, decided that it could depart from the rules laid down in the Vienna Convention where necessary and where the structure and functions of international organizations so dictated. Article 36 *bis*, which was concerned with international organizations, seemed to be a case in point.

16. As he saw it, article 36 *bis* should seek to protect the position of third States by imposing the formal requirement that consent must be expressed in writing, while allowing international organizations a measure of flexibility in their day-to-day operations by relieving them of the obligation of meeting that cumbersome requirement in all cases.

17. In that connection, he noted that in its written observations, the Federal Republic of Germany (A/CN.4/339) had expressed the view that, strictly speaking, States members were not to be regarded as third States where international organizations were concerned—but that view was based on the special relationship that existed between international organizations and their States members. The Special Rapporteur's proposal (1675th meeting, para. 27) overcame the problem of that special relationship and had the advantage of dispensing with the need to refer to the legal personality of an international organization, since it was necessary only to refer to the assent of its members. Efforts would be made to take account of the needs of international organizations in their day-to-day operations on the basis not of that special relationship, but of the assent of their States members. Such assent, as referred to in draft article 36 *bis*, subparagraph (a), must, in his view, be based on the participation of the member State in the constituent instrument of the international organization.

18. It had been suggested that, if the definition of the rules of the organization was to include resolutions and decisions adopted by a majority, it would be open to question whether all member States had assented whenever one of those States had not adopted such a resolution or decision. His own view was that such a simplistic approach could not be adopted: resolutions and decisions would have to be based on the constituent instrument, since no important measures could be adopted unless authorized by the instrument to which all States were parties.

19. For those reasons, he regarded the Special Rapporteur's new proposal as an improvement on the earlier proposal; he also favoured the alternative version of subparagraph (b) (*ibid.*, para. 29), which read:

(b) any unequivocal manifestation of such assent.

It was clear, however, that another place would have to be found for the article and, in his view, the proper place would be after article 35.

20. Mr. EVENSEN said that some of Mr. Ushakov's reservations seemed to be based on the assumption that the article contained some kind of EEC clause in disguise. He could not agree with that view, since the article was not applicable only to that organization. The EEC was also not the only organization that had supranational powers. A number of other organizations—such as the OAS, for example—had such powers, although perhaps to a lesser extent than the Community; and some fisheries organizations had a decision-making rule whereby acquiescence could suffice, even when indicated by mistake. In addition, the permanent members of the United Nations Security Council could be said to exercise supranational powers in certain important cases. (Admittedly, the latter example was not strictly in point in the context of the draft, but it was indicative of a trend.)

21. He believed Mr. Ushakov's concern that CMEA would be affected by the terms of article 36 *bis* was unwarranted. The new wording proposed by the Special Rapporteur expressly stated that the article would apply where the rules of the organization "provide that States members of the organization are bound by such a treaty". As CMEA had no such rules, it could not be affected by the terms of the article.

22. With regard to the wording of article 36 *bis*, he considered that the new formulation was preferable to the original one and that it would be advisable for a provision of that kind to be included in the convention. Specifically, the reference in the opening phrase of the article to the assent of States members of an international organization was acceptable to him, but the French and Spanish versions of that phrase should perhaps be brought into line with the English. The reference to the relevant rules of the organization, in subparagraph (a), was also acceptable to him, since it would avoid misunderstanding. He failed to see how that paragraph could be formulated in any other way or, indeed, why it should be.

23. Since a detailed discussion had taken place on the two alternative versions of article 36 *bis*, he recommended that they should now be referred to the Drafting Committee.

24. Mr. ALDRICH said that it was important to bear constantly in mind the very limited nature of the exception provided for in article 36 *bis* and to recognize that the problem at issue was more a terminological and psychological one than a truly legal one. In the case of many international organizations, it was somewhat strange to speak of the members of the organization as though they were like all other third States—non-participants in the whole process. That tended to create some need, which might otherwise not be felt, for an additional provision to make it clear that the States members of an international organization might not always be exactly like all other third States where a treaty was concerned.

25. There was also the question of the practical operation of an organization: how was it going to make its decision to become a party to a treaty? How were its members going to make their decisions, and what practical problems were involved in complying with the rules laid down in article 35? During the discussion, he had not heard mention of any of the practical problems that would arise in that connection for an organization such as EEC. Why was the matter so difficult that a new article 36 *bis* was needed to provide for exceptions to article 35? In the absence of any definite explanation, his instinct was that Mr. Ushakov had rather had the better of the discussion. The problems were real, but the one article 36 *bis* sought to solve was not as real as it might seem.

26. Article 36 *bis* was limited, in the first place, because it dealt only with how the assent of States members could be expressed and, secondly, because it provided for an exception to article 35, which required assent to be given in writing. It was therefore not creating a situation in which the other parties to the treaty would discover, once the treaty had entered into force, that the States members of the international organizations had acquired obligations and rights under it; that was something that would have to be established during the negotiations. Article 36 *bis* was concerned solely with the question of how the assent of the States members of the organization was expressed; it did not deal with the other, much larger, part of the problem of how the assent of the other parties to the treaty was established. Unless both halves of the equation were present, the article would not be effective. It might also be useful to bear in mind that article 36 *bis* was not needed in order to require States members of an organization to act in conformity with the obligations established by a treaty to which the organization was party. If the rules of the organization, as agreed by its States members, permitted the organization to require its members to act in conformity with treaties to which the organization was party, those members could be so required merely as a matter of the internal rules. They did not have to be parties to the treaty for that purpose. In many cases, all the organization really needed was the ability to compel its members to act as if they were bound. In most cases, it was merely of academic interest whether they owed obligations to other States parties to the treaty, provided the organization, as a party to the treaty, could ensure that its States members did not act contrary to that treaty.

27. He therefore considered that the new alternative proposal provided for a better approach to the problem of laying down an exception to article 35. There were, however, a number of drafting problems, some of which went beyond mere points of drafting. In the first place, there was the basic problem of whether the article was referring to all the States members of an international organization or only to some of them. In his view, if the article was to provide for any rule at all, it must refer to all States members. Secondly, the rules

of the organization could be written, and recorded and adopted, in a variety of ways. Thirdly, what would be the position of third State participants at the conference at which the treaty was produced? How would they know what the rules were? How were they to know whether the rules provided that States members of the organization were bound by the obligations of the organization or not? Was there not some requirement that the rules should be brought to the attention of the other participants in the conference and that the consequences for States members of the organization should be made clear? And, if so, when? If those points could be clarified, the article would be greatly improved—always assuming that a provision along those lines was in fact really necessary. Sub-paragraph (b) of the article also raised the problem of knowing what form the acknowledgement referred to would take.

28. In practice, the real problem which the other States participating in the negotiations that were not members of the organization would probably have to face was whether and under what circumstances to allow the organization to become a party to a treaty without its States members necessarily being bound. In his view, those other States would on many occasions have to insist that the States members be bound, as well as the organization, for their own protection. Whenever the question arose, however, the end result would have to be clear at the time of the negotiations. That must also be so to meet the standards of article 35.

29. In the circumstances, he wondered whether article 36 *bis* did not create more problems than it solved.

*The meeting rose at 12.50 p.m.*

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## 1678th MEETING

*Wednesday, 24 June 1981, at 10.10 a.m.*

*Chairman: Mr. Milan ŠAHOVIĆ*

*Present: Mr. Aldrich, Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Reuter, Mr. Riphagen, Mr. Sucharitkul, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.*

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**Question of treaties concluded between States and international organizations or between two or more international organizations (continued)**  
(A/CN.4/339 and Add. 1–7, A/CN.4/341 and Add. 1)

[Item 3 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:  
SECOND READING (*continued*)

ARTICLE 36 *bis* (Effects of a treaty to which an international organization is party with respect to third States members of that organization)<sup>1</sup> (*continued*)

1. Mr. REUTER (Special Rapporteur) said that two of the comments made by Mr. Ushakov at the preceding meeting had been perfectly justified.

2. First, in subparagraph (*a*) of the new text of article 36 *bis* proposed by the Special Rapporteur (1675th meeting, para. 27), the words "States members of the organization are bound by such a treaty" might give the impression that those States had become parties to the treaty. Those words should be replaced by the words "States members of the organization are bound by those obligations"—namely, the obligations referred to in the introductory phrase of the article. In that connection, he stressed the fact that it was not unusual for a subject of international law to be bound by obligations arising from a treaty to which it was not a party. By way of example, he referred to collateral agreements and certain treaties between States which concerned international organizations but to which the international organizations could not be parties, although they could, on certain conditions, accept the obligations arising therefrom.

3. Secondly, the reference in subparagraph (*b*) to "the States and organizations participating in the negotiation of the treaty" was incorrect. Those words should be replaced by: "the States and organizations parties to the treaty".

4. Sir Francis VALLAT said that paragraphs 95 *et seq.* of the Special Rapporteur's report (A/CN.4/341 and Add.1) set out a very convincing case for the inclusion of article 36 *bis* in the draft. After carefully re-examining articles 35 and 36,<sup>2</sup> he thought that in the case of rights there was no need for undue concern. The real problem, in his view, arose out of article 35, paragraph 1, which followed the text of the Vienna Convention<sup>3</sup> in requiring the third State to accept the obligation expressly and in writing. If it was indeed the intention that a treaty concluded by an international organization should be operative and effective for each of its members and that obligations should be imported as between the members and the other parties to the treaty, some provision should be made to deal with that situation. The reason was quite simple: the members of the organization were clearly third States within the meaning of the definitions laid down in article 2.<sup>4</sup> In the circumstances, it must generally be in the interests of other States parties to the treaty that they should have direct recourse against the members of the organ-

ization without necessarily having to resort to the machinery of the organization itself. As originally formulated, article 36 *bis* did require revision, and specifically it should be narrowed down to deal with obligations only; the new draft proposed by the Special Rapporteur pointed in the right direction. Personally, he preferred the original drafting, but the general substance of the new draft was on the right lines. In his view, the article was not only desirable but necessary to fill what would otherwise be a gap in the scheme created by the Vienna Convention and the draft articles.

5. Mr. PINTO said that the text of article 36 *bis* did not make clear who were the prospective parties to the treaty referred to. One party, of course, was the international organization whose actions were at issue. He assumed that the other parties were not members of that organization, although it was not readily apparent from the article.

6. The case covered by article 36 *bis* did not fall directly under article 35, since a State member of the organization which concluded the treaty should not be placed in the category of "third State" as defined. It had a legal, factual and constituent connection with the organization by virtue of its membership therein. He therefore agreed that the case should be treated separately. In drawing up a rule to govern the situation, three categories of concern had to be borne in mind: first, the concern of the organization entering into the treaty regarding the implementation of its rules and treaty intentions; second, the concern of the member State of the organization to ensure that it was bound only in a manner provided for by the rules of the organization or, in the absence of any such provision in the rules, by its express consent, however demonstrated; and, third, the concern of the other States and organizations negotiating the treaty to ensure that the scope of the treaty, in the terms of who their treaty partners would be, should be known and acceptable to them.

7. The new version of article 36 *bis* proposed by the Special Rapporteur did not perhaps meet all those concerns, although paragraph (*a*) took full account of the need to observe the rules of the organization and thus, to some extent, afforded a guarantee for members that the scope of their automatic involvement in the organization's treaty activities was circumscribed by a known provision. The consent of member States in cases where the rules did not contemplate automatic binding of members was covered by paragraph (*b*), which was an alternative to paragraph (*a*) and separated from it by the disjunctive "or". The consent of the negotiating entities, however, was covered in paragraph (*b*) only, although it also seemed relevant to paragraph (*a*). The alternative version of paragraph (*b*) proposed by the Special Rapporteur (1675th meeting, para. 29) seemed to cover only the consent of members of the international organizations and not the consent of the other negotiators since the term "such assent" was used in reference to the introductory clause which

<sup>1</sup> For text, see 1675th meeting, para. 1.

<sup>2</sup> *Idem.*

<sup>3</sup> See 1644th meeting, footnote 3.

<sup>4</sup> For text, see 1647th meeting, footnote 1.

covered only the assent of members of the international organization.

8. To take account of the concern to which he had referred, he would suggest that a provision, based on article 36 *bis* but borrowing certain elements from article 35, be drafted to read:

“An obligation arises for a State member of an international organization from a provision of a treaty by that organization if:

“1. the relevant rules of the organization applicable at the moment of the conclusion of the treaty so provides, or the State member of the international organization acknowledges that it is bound by that obligation;

“2. the parties to the treaty intend that provision as a means of establishing the obligation.”

9. Lastly, he did not think that the terms “assent” and “acknowledgement”, as used in the text of article 36 *bis* proposed by the Special Rapporteur, had the content to distinguish them from more commonly used terms such as “consent”. Possibly it should be left to the Drafting Committee to find a solution.

10. Mr. USHAKOV noted that at the preceding meeting Mr. Evensen had said that the expression “relevant rules of the organization” covered only the rules providing that member States were bound by an obligation arising from a treaty. If the General Assembly were to adopt a resolution by which it decided that the United Nations would provide financial assistance to a given State, and the Soviet Union voted against that resolution, the only obligation which could arise from it for the Soviet Union would be to pay its contribution to the regular budget. According to draft article 35, an obligation arose for a third State from a provision of a treaty “if the parties to the treaty intend the provision to be the means of establishing the obligation”. The obligation had therefore to be established directly for the third State. In the case in question, if the General Assembly resolution provided that the Soviet Union must contribute 1 billion roubles for assistance to be provided by the United Nations to a given State, the result would be a direct obligation for the Soviet Union even if it had voted against the resolution. Such a situation was obviously unacceptable, but it was provided for in the draft articles, because the expression “rules of the organization” encompassed not only the rules proper, but also resolutions, decision and practice. However, practice did not imply express consent. In the case in question, practice could not have the effect of obliging the Soviet Union to pay out 1 billion roubles.

11. Article 36 *bis*, as adopted on first reading by the Commission, also referred to the observation by the States members of an international organization of the obligations arising for them from the “provisions of a treaty” to which that organization was a party. A State might, however, be a member of two organizations

which concluded treaties from which conflicting obligations for that State arose.

12. Some members of the Commission had expressed the view that it was unnecessary to refer to the rights which could arise for the States members of an international organization from a treaty to which that organization was a party. He did not share that view. In the case of a treaty concluded between the Soviet Union and the EEC in an area within the competence of the Community only, and not of its member States, the draft articles provided that the member States would be bound by the obligations established by that treaty, in accordance with the relevant rules of the EEC. For its part, the Soviet Union would be committed to the Community and not to the member States. The rights corresponding to the Soviet Union’s obligations would thus not be the rights of the member States, unless it was otherwise agreed. On the other hand, the Community’s obligations would also be those of its member States. The draft articles would thus have the effect of establishing an obligation for the Soviet Union not only towards the EEC, but also towards the member States, and that without its express consent.

13. He stressed the fact that the hypothesis of a resolution whereby the General Assembly decided that the Soviet Union was bound to pay out 1 billion roubles for financial assistance was not a far-fetched one. Such a decision could be aimed at a number of the more wealthy member States. If the draft articles always referred to the member States collectively, it would be designed to cover the specific case of the EEC, whose member States could not undertake treaty commitments separately. There was no doubt that the members of the Commission who favoured a provision relating to the specific case of the Community would not agree to the draft articles referring to a member State. Unlike the States members of the CMEA, the member States of the EEC had all to accept the obligations arising from treaties concluded by the Community, which meant that they had given up part of their sovereignty. In his view, the case of the EEC was unique. The Member States of the United Nations, for example, were not bound by the obligations arising from treaties concluded by the Security Council in the exercise of its functions of maintaining international peace and security. If an agreement concluded between the Security Council and a Member State established obligations for other States, they had to give their express consent.

14. In conclusion, he stressed the fact that an attempt to formulate a provision aimed at a single specific case would create almost insuperable difficulties.

15. Mr. JAGOTA said that the question raised by article 36 *bis* had also been under discussion at the negotiations on the law of the sea, namely, whether the future convention on the law of the sea should be open

for participation to international organizations such as the EEC. As yet, no solution had been reached.

16. The old and new versions of article 36 *bis* referred to the rights and obligations of member States of an international organization under a treaty which arose from the "relevant rules of the organization applicable at the moment of the conclusion of the treaty". That was a question of fact, evidence of which could be adduced by placing before the other parties to the treaty a copy of the relevant rules. The relationship of the organization with its member States might, however, subsequently be modified, and the question which therefore arose was whether such subsequent modification would affect the cases covered by article 36 *bis* and, specifically, in what circumstances a member of an international organization should be regarded as a third State.

17. States which became members of an international organization did not, of course, thereby lose their sovereignty, but a question concerning their competence to conclude treaties did arise: whether, in becoming members of an organization, States transferred their competence entirely to that organization. The members of the EEC, for example, had vested exclusive powers in the Community to conclude treaties on specific matters. Where such treaties were concerned, the question arose to what extent the members of EEC were to be regarded as third States. His own view was that, in cases where exclusive competence had been vested in an international organization, the term "third State" should not be used in reference to members of that organization. It followed, however, that, if an international organization had not been vested with exclusive competence, it must have been vested with what might be termed residual or concurrent competence. In other words, the member States of an organization as well as the organization itself might conclude treaties on the same subject, in which case the treaty concluded by the organization would prevail. In cases of residual and concurrent competence, the member States of an international organization should, in his view, be termed third States.

18. If his interpretation of the term "third State" was correct, he would have no objection to the substance of article 36 *bis* however drafted, although he favoured the alternative version of paragraph (b) proposed by the Special Rapporteur (1675th meeting, para. 29). Alternatively, Mr. Pinto's proposal could be used. He would be grateful for the Special Rapporteur's confirmation of his understanding of the concept of third State.

19. Mr. ALDRICH said that certain comments made during the discussion posed the question whether all members were working on the same assumption. That applied in particular to paragraph (b) of the new version of article 36 *bis*. He had assumed that the reference to States and organizations participating in the negotiation of the treaty as well as to the States

members of the organizations would be omitted. As he understood it, the purpose of the revised version of the article was simply to make an exception to the requirement laid down in article 35 that consent must be given expressly and in writing. Consequently, article 36 *bis* dealt only with the kind of expression of assent required of States members; it had nothing to do with the attitudes of other States parties to the treaty, which were protected by articles 35 and 36. That, it seemed to him, was one of the answers to the point raised by Mr. Ushakov. No rights or obligations could arise for the States members of an international organization which became party to the treaty unless that was intended by the parties to the treaty. The protection of other parties was clear. All article 36 *bis* was concerned with was to make it somewhat easier for the States members of an international organization which was itself a party to the treaty to become directly bound to other parties. He therefore considered that article 36 *bis* should be limited to the way in which the acceptance of States members of the organization was expressed and should not deal with issues otherwise dealt with in articles 35 and 36.

20. His inquiry at the previous meeting as to why article 36 *bis* was regarded as so important did not seem to have been answered. It had been said that the intent of the article was mainly to protect the interests of non-members of the EEC by providing other parties to the treaties it concluded with direct recourse against the members of that organization—assuming once again that the requisite intent to create rights and obligations was established as required under articles 35 and 36. He still did not see why it was so difficult to establish expressly and in writing the intent of the members of the organization to be bound. All the parties to a treaty had a certain interest in knowing who their treaty partners were. Perhaps, therefore, it would be possible to agree on a compromise solution whereby it was made clear that no exception was being made to the requirement under articles 35 and 36 that all parties to the treaty must intend to confer the obligations and rights on the States members of the organization. Perhaps it could also be made clear that the rules which brought about that binding effect, or the acknowledgement by members in the absence of such rules, should be made public or available to the other participants in the negotiations. He did not think that was an unreasonable idea.

21. It was essential to be quite clear that article 36 *bis* dealt solely with cases in which all members of the international organization were to be bound by the obligations. It was not dealing with cases where only one or two members decided to become bound, which would be governed by the requirement of article 35.

22. So far as concerned Mr. Ushakov's point that article 36 *bis* could be used in other organizations to bind States to obligations which they never intended to undertake, the answer basically was that States must take care to see that they did not agree to anything they

were not willing to undertake. In practice, he did not think that it would be a frequent occurrence, although it was perhaps on the increase in the economic area.

23. Sir Francis VALLAT, having noted that the discussion had clarified the position to some extent, said that the matter could certainly have been dealt with differently, since it arose out of the whole structure of the draft articles including the definitions of "party" and "third State", the provisions regarding the manner in which consent to be bound could be expressed, and the position of third States.

24. He fully agreed that, so far as a member of an organization was concerned, the term "third State" was not a happy one, but it seemed absolutely clear that, within the meaning of the draft articles, a State member of an organization did not become a party to the treaty merely by virtue of the fact that the organization to which it belonged had become a party. As a matter of principle, therefore, where it was intended that a member should have the rights and be bound by the obligations contained in the treaty, some provision must be made to fill a gap in the structure of the draft articles. That in fact was the essence of the problem. He did not see it as an EEC problem as such, since it could arise in any case where an organization had competence to make treaties that were to be binding on individual members.

25. While rights were adequately covered by article 36, a problem arose in the case of obligations, since consent in writing was required. The matter was important for two reasons. One was that, where an organization had authority and competence to enter into treaty obligations on behalf of its members, it was desirable that its authority should be maintained, and it would undermine progress in the world, as it were, if they were to say that in order for an individual member to be bound to the treaty in such cases, its consent must be expressed in writing. Another reason was that, where a number of States parties were members of the organization and the intent was that they should be bound by the obligations under the treaty, it was questionable whether all members of the organization would take the trouble to express their consent in writing. That was just a fact of life.

26. So far as unanimity was concerned, he could not see in principle why a treaty should not be made on behalf of some members of the organization, and he would therefore hesitate to limit article 36 *bis* to cases where the treaty would apply to all members. Possibly, however, the matter required further consideration.

27. The fact that the other parties to the negotiations might not be familiar with the rules of the international organization concerned was an added reason why article 36 *bis* was desirable, for it should be made clear to other States that when negotiating with an international organization they must acquaint themselves with the position under its rules. There was

nothing new about that; when negotiations were being held with Governments, account had to be taken of the constitutional position in the State concerned, and there was no reason why the same should not apply to international organizations. He agreed, however, that there were some obscurities in the article that should be cleared up, although he had to confess that he would have difficulty in giving a precise answer as to the position in the case of EEC. If the draft articles could call attention to that kind of need, they would serve a useful purpose.

28. Mr. USHAKOV said that his position had always been quite close to that of Mr. Jagota. The article under consideration covered the particular case of States that had conferred upon an organization of which they were members the capacity to conclude treaties in certain areas, without retaining a parallel capacity for themselves. In relation to such a supranational organization, those States were not genuine third States, but, rather, undercover parties: they were clandestinely parties to the treaties concluded by the organization. What was more, article 36 *bis* formed part of the section entitled "Treaties and third States or third international organizations", even though it did not relate to genuine third States. In his opinion, that article had no place in the draft articles, because it was aimed at a unique situation with characteristics that were not those of international organizations.

29. Mr. REUTER (Special Rapporteur) said that, in the first place, the intent of article 36 *bis* and the way it had been expressed arose from the fact that, on the one hand, the Commission was bound by a rule that it had laid down, namely, that there were only two possible positions vis-à-vis a treaty: that of parties and that of third entities; and that, on the other hand, a very formalistic solution for the establishment of treaty obligations for third States had been adopted in the Vienna Convention. Since the Vienna Convention had entered into force, it could obviously be interpreted only by the parties. Within that general framework, his only concern had been to see how the strict formalism imposed by article 35 could be made more flexible. That objective was nevertheless tempered by the fact that all the problems that might arise could not be solved in a single provision.

30. A number of the comments that had been made with regard to the Commission's draft articles had shown that in general the position of the States members of an organization with regard to the treaties concluded by that organization gave rise to many difficulties. It should be recognized, therefore, that it would be a considerable over-simplification to say that only two possible positions should be allowed for, namely, that of parties and that of third entities. On first reading, the Commission had examined a number of possible cases, including the amendment of the constituent instrument of an organization and a change in the organization's membership, and although they

were all very interesting, they went beyond the scope of the Commission's task, as it had clearly indicated when it had adopted draft article 73.<sup>5</sup>

31. Some members of the Commission had emphasized the special case of the EEC. He was, however, of the opinion that that institution was of no particular interest in the current context. The EEC had concluded treaties with a large number of countries, and only the Community's partners could decide how to solve the problems of the effects of those instruments. With regard to the practice of the United Nations, he pointed out that that Organization had concluded a treaty with the United States of America concerning the establishment of its headquarters in New York, and that that treaty established obligations for the States Members of the Organization, which had not, however, accepted them in writing. It might therefore be asked whether the United States was entitled to approach a Member State directly in order to remind it that it was bound by the treaty. It had been in order to try to cater for that type of situation that the Commission had drafted article 36 *bis*. A provision of that kind was of great importance, not for the States members of the organization or even for the organization itself—and Mr. Pinto had correctly analysed the interests at stake in such a case—but, rather, for the countries which had concluded a treaty with an international organization.

32. Mr. Aldrich and Mr. Pinto took the view that article 36 *bis* tended to establish a legal basis for direct relations between the treaty partner of an international organization and the States members of that organization. It would therefore be necessary to be sure of the assent of the partners and to determine whether they had agreed to the establishment of such direct relations. The fact was that the partners of the international organization had no obligations to the States members of the organization with which they had concluded a treaty. It had also been said that it must be the intent of the partners of the organization that rights would arise for them. In that connection, he recalled that, early on in the discussion of article 36 *bis*, the Commission had decided that it was unnecessary to provide for the case of rights if provision was made for that of obligations, since the obligations of the States members to the partners of the international organization corresponded to the rights of the latter. Moreover, draft article 36 made it clear that it was presumed that such rights would arise because it was in the interests of the partners of the organization to have such rights. He was, however, prepared to accept any drafting amendment on which the Commission might decide. He realized that subparagraphs (a) and (b) of the version he had proposed did not fully solve the problem that arose and that they were only two possible approaches, one specific and the other more general.

33. The text he had originally proposed in 1977<sup>6</sup> had been accompanied by a commentary stating the foregoing considerations. The text itself was, however, slightly different in that it referred to both rights and obligations, mentioned the constituent instruments of the organization and not its relevant rules, and described the second case in rather a cumbersome way. The version that had been provisionally adopted on first reading referred instead to the relevant rules, while subparagraph (b) had a simplified wording with a slightly broader meaning and tended towards the idea of implied consent. The new version (see 1675th meeting, para. 27) was drafted along the same lines, but his underlying intention was expressed by the words "The assent of States members of an international organization to obligations arising from a treaty concluded by that organization shall derive from", which were designed not to eliminate the concept of assent, but, rather, to make the means of expressing it more flexible. Moreover, the new wording no longer referred to rights and included an alternative for subparagraph (b) (*ibid.*, para. 29) affording greater flexibility.

34. The need for the solution thus proposed would be apparent to the Commission. It was obvious that article 36 *bis* would be totally unnecessary if its only purpose was to express approval of the European Communities, which was indifferent to such approval. If that were the situation, that provision, which was as unnecessary as it was dangerous, should simply be deleted.

35. There were, in fact, good reasons for the proposed text. The problem to which it related could, of course, be solved through the participation of the States members of the international organization in the conclusion of treaties into which it entered. In practice, however, it would be difficult to see how an international organization with more than one hundred members could be accompanied by all its member States during the negotiations, or how all the members could be required solemnly to accept the convention in question. It was precisely to meet that particular case that article 36 *bis* was required, and it was justified *a contrario* by the example, given by the EEC in its comments (A/CN.4/339), of "mixed agreements", which had disastrous consequences for the time of entry into force of treaties.

36. By way of example, he referred to the case of a customs union personified by an international organization which was entitled to conclude tariff agreements. In such a case the importance of the absence of formalism was obvious, because it was quite certain that the States which would apply any possible agreement through the intermediary of their administrations would approve the agreement concluded. The same was true of fisheries agreements, in the case of which it could be particularly advantageous for the

<sup>5</sup> See 1647th meeting, footnote 1.

<sup>6</sup> See *Yearbook ... 1977*, vol. II (Part One), pp. 128–129, document A/CN.4/298.

State partner of the international organization to be able to invoke the agreement of the member States without going through the organization, especially if a dispute arose, since an international organization, unlike a State, could not be brought before the International Court of Justice.

37. In his view, there would be a definite advantage in trying to reduce formalism in the matter of consent. The solution proposed in article 36 *bis* was, moreover, favourable to international organizations. Although in all probability the number of international organizations could be expected to increase in the future, it was clear that they would not have very extensive powers and that they would certainly not be in a position to conclude many treaties. There was thus an obvious advantage in reducing the formalities guaranteeing the implementation of treaties by member States.

38. Draft article 36 *bis* had encountered only two basic objections, which were both of a political nature and both entirely valid, since political considerations alone could determine the Commission's choice.

39. The first objection was that article 36 *bis* referred only to the situation of a particular European organization. The exchange of views which had taken place in the Commission had shown that some members considered that that article did indeed apply to the EEC and doubted that it could apply in any other area. Such an attitude was a purely political one, because the real problem was one of the future, since it had to be decided whether or not an increase in the number of international organizations was desirable and whether the new institutions provided for in draft conventions, such as that on the law of the sea, should one day be able to come into existence. In that connection, the Commission had to decide whether it intended, in its draft articles, to place formalist obstacles in the way of the application of an agreement of that kind. In the case in question, it should not be forgotten that the countries most concerned were the developing countries. He pointed out that although it could legitimately be maintained that the article under consideration represented a regressive development of international law because it focused on the situation of the EEC, it could just as legitimately be stated that it represented a progressive development of law, since it would eliminate the requirement of formalism and ensure the application by the States members of an international organization of the agreements concluded by it.

40. The second basic objection amounted to determining whether the future of or the need for international law would lead towards a very rigorous or a less rigorous formalism. He stressed the fact that, in that connection, reference was being made only to the formalities for the consent of member States and not for that of international organizations, about which some hesitation would be understandable. He was of the opinion that the two options were equally legitimate

and would determine the Commission's decision whether to retain or to delete article 36 *bis*.

41. The members of the Commission had also made a number of detailed comments.

42. The first related to the position of a possible article 36 *bis* in the draft. Mr. Barboza (1677th meeting) had rightly said that, if the Commission confined itself to referring in the provision to the establishment of obligations, the draft article should become article 35 *bis*.

43. Mr. Verosta (1676th meeting) had been of the opinion, rightly also, that the article should have a title different from that which the Commission had adopted on first reading. Although he himself had no specific suggestions to make, he thought that the title should refer to the actual purpose of the article, namely, the reduction of formalism.

44. The expression "the relevant rules of the organization" had been considered dangerous because it would allow for the possibility that an international organization could itself establish rules under which some obligations arising from treaties would have effects on the member States. That was indeed a problem to be taken into account, and he recalled that in his original draft, article 36 *bis* had referred to the constituent instruments of the organization. He was nevertheless of the opinion that the words "relevant rules" meant only the rules of the organization that were in keeping with the constituent instruments. There would thus be no valid reason to deprive an international organization of the right to develop its constitutional law. The Commission should merely acknowledge the fact that some organizations followed a strict practice while others followed a more flexible one. It would be for the Drafting Committee to decide that question.

45. The use of the words "the member States" had been criticized, and Mr. Aldrich had proposed the words "all member States". He himself would prefer to retain the more flexible wording in order not to hamper any future evolution and to avoid the contradictory and dead-end situation in which a State that had concluded an agreement with an international organization of which it was a member would have to be considered as both a party and a third State.

46. The Drafting Committee would also have to clarify the meanings of the word "acknowledgement" and the words "derive from", because it was quite legitimate to try to protect the assent of member States. It was, moreover, for that reason that he had proposed the second alternative for subparagraph (b), which required an unequivocal manifestation of assent or, in other words, more than an implied consent.

47. In conclusion, he said that, since the Commission would adopt a position only on a final text, he would like article 36 *bis* to be referred to the Drafting Committee. It would be for the Drafting Committee to

determine the desired degree of flexibility, taking account of the fact that article 36 *bis* had been drafted to serve the Commission and not to defend in any way the EEC—which, moreover, had no need of such defence.

48. Mr. USHAKOV said that, although he too was in favour of referring article 36 *bis* to the Drafting Committee, he reserved the right to comment on it beforehand.

*The meeting rose at 1.05 p.m.*

## 1679th MEETING

*Thursday, 25 June 1981, at 10.05 a.m.*

*Chairman:* Mr. Robert Q. QUENTIN-BAXTER

*Present:* Mr. Aldrich, Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, 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.4/339 and Add.1-7, A/CN.4/341 and Add.1)

[Item 3 of the agenda]

#### DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

ARTICLE 36 *bis* (Effects of a treaty to which an international organization is party with respect to third States members of that organization)<sup>1</sup> (*concluded*).

1. Mr. USHAKOV said that he was neither for nor against the EEC as such; it was a reality whose existence had to be recognized. However, the Community was not an ordinary international organization; it was also a supranational organization, and in the present circumstances, the only real interest of article 36 *bis* of the draft was that it applied to the case of the Community. In his opinion, the other examples given by the Special Rapporteur at the previous meeting were not valid.

2. A headquarters agreement, for example, provided for obligations for the host country and for rights for member States and international organizations. Furthermore, any obligations that might arise from a headquarters agreement such as that between the United Nations and the United States of America did not arise by virtue of the rules of the organization or

the participation of member States in the negotiation, for participation could not suffice to bind States. It should be noted also that the headquarters agreements referred to by the Special Rapporteur had all been concluded before the Vienna Convention,<sup>2</sup> under which obligations did not arise for a third State unless the State expressly accepted the obligations in writing. It would certainly be better for the host country if obligations arising from a headquarters agreement were expressly confirmed in writing by States which recognized them as binding. Acceptance would then be perfectly clear. Headquarters agreements were not a relevant example.

3. The example of a hypothetical fisheries organization was equally unconvincing. The EEC was, he believed, the only international organization to which member States had transferred the power to conclude fisheries agreements on their behalf. An organization of that kind could accept treaty obligations only for itself. If the organization was empowered by its constituent instrument to conclude treaties on behalf of its member States, the example was pointless.

4. The same was true of commodity marketing organizations. There was no example in contemporary practice of such an organization empowered to create obligations for its members in respect of the sale of commodities, and it was unlikely that commodity organizations with supranational powers would come into being in the foreseeable future. Apart from the EEC, therefore, the examples mentioned by the Special Rapporteur to justify the inclusion of the situation covered by article 36 *bis* were artificial.

5. The Special Rapporteur had said that he wished to make the procedure for the acceptance of treaties more flexible. In contrast, States at the United Nations Conference on the Law of Treaties had been anxious to strengthen the formalities for the acceptance by a third State of obligations arising for it from a treaty. He himself believed that the rules for the acceptance of obligations by a third State should be sufficiently rigid, and that view was as legitimate as the opposite. It might be noted in passing that if the object was to make the rules for acceptance more flexible, article 35<sup>3</sup> would have to be amended, in addition to dealing with the case of member States of international organizations. He did not question the good faith of the Special Rapporteur, but considered that the views he had expressed were no less valid than those of the Special Rapporteur.

6. Nor did he question the good faith of the Special Rapporteur's argument that adoption of article 36 *bis* would help to protect the interests of the third world. For his own part, he believed he was legitimately defending the interests of the developing countries by opposing the article. In the first place, article 36 *bis* concerned the obligations rather than the rights of

<sup>1</sup> For text, see 1675th meeting, para. 1.

<sup>2</sup> See 1644th meeting, footnote 3.

<sup>3</sup> For text, see 1675th meeting, para. 1.

developing countries, and it was hard to see how a greater flexibility in the procedures whereby countries could be bound by obligations contracted for them by an international organization under a treaty to which they were not parties could help to protect the interests of the third world. The Special Rapporteur seemed to believe that the future of the countries of the third world lay in the constitution of supranational organizations, whereas for his part he believed that countries which had recently gained full independence and sovereignty were not necessarily anxious to transfer those attributes to supranational organizations yet to be created. The two conflicting views pursued the same goal and were equally valid.

7. Mr. SUCHARITKUL suggested that the Commission should take account of international practice. In his view article 36 *bis* served a useful purpose, quite apart from the particular situation of the EEC.

8. The Community was in a special position, as it had the capacity to conclude treaties that could create obligations and rights for its members, but headquarters agreements were a good illustration of treaties concluded by an international organization that could be binding on member States. International practice in that matter was well established, in the case both of universal and of regional international organizations. Article 36 *bis* should perhaps confirm that practice.

9. A degree of relativity was observed in treaty rights. The headquarters agreement between France and UNESCO, for example, contained what might be termed a “most-favoured-international-organization clause” for the privileges and immunities of officials of the organization and of representatives of States. Finally, practice had evolved in the direction of graduations in the treatment of international organizations. Thus, the headquarters agreement of the EEC provided for less favourable treatment than that accorded by the Belgian Government to the NATO secretariat, since for example, the property of the Community was not systematically exempt from distraint.

10. The CHAIRMAN proposed that the Commission should refer article 36 *bis* to the Drafting Committee.

*It was so decided.*

**ARTICLE 37 (Revocation or modification of obligations or rights of third States or third international organizations)**

11. The CHAIRMAN invited the Special Rapporteur to introduce article 37, which read:

**Article 37. Revocation or modification of obligations or rights of third States or third international organizations**

1. When an obligation has arisen for a third State in conformity with paragraph 1 of article 35, the obligation may be revoked or modified only with the consent of the parties to the

treaty and of the third State, unless it is established that they had otherwise agreed.

2. When an obligation has arisen for a third international organization in conformity with paragraph 2 of article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third organization, unless it is established that they had otherwise agreed.

3. When a right has arisen for a third State in conformity with paragraph 1 of article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

4. When a right has arisen for a third international organization in conformity with paragraph 2 of article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third organization.

[5. When an obligation or a right has arisen for third States which are members of an international organization under the conditions provided for in subparagraph (a) of article 36 *bis*, the obligation or the right may be revoked or modified only with the consent of the parties to the treaty, unless the relevant rules of the organization applicable at the moment of the conclusion of the treaty otherwise provide or unless it is established that the parties to the treaty had otherwise agreed.]

[6. When an obligation or a right has arisen for third States which are members of an international organization under the conditions provided for in subparagraph (b) of article 36 *bis*, the obligation or the right may be revoked or modified only with the consent of the parties to the treaty and of the States members of the organization, unless it is established that they had otherwise agreed.]

7. The consent of an international organization party to the treaty or of a third international organization, as provided for in the foregoing paragraphs, shall be governed by the relevant rules of that organization.

12. Mr. REUTER (Special Rapporteur) said that article 37 had not been the subject of comment by Governments or international organizations.

13. The article raised major drafting problems, however, and even some substantive problems. The wording adopted on first reading included four initial paragraphs which were based on the corresponding text of the Vienna Convention, although the Commission had in the interests of clarity separated the case of States from that of international organizations. The Drafting Committee had discussed at some length whether to retain the four initial paragraphs or reduce them to two.

14. With regard to substance, paragraphs 5 and 6—which were placed in square brackets in the text adopted on first reading and should remain so at the present stage—dealt with a specific situation which might arise out of article 36 *bis*, which was itself placed in square brackets on first reading. Although it might be premature to consider paragraphs 5 and 6 of article 37 before the Drafting Committee had reached a decision on article 36 *bis*, he wished to draw the Commission’s attention to two difficulties.

15. In the first place, paragraphs 5 and 6 took into account article 36 *bis* as adopted on first reading and therefore related to both the creation of an obligation

and the creation of a right. That point had been discussed at length by the Commission, and if the Drafting Committee restricted article 36 *bis* to the creation of an obligation, or adopted a new text for the provision, paragraphs 5 and 6 would have to be amended accordingly. Furthermore, paragraphs 5 and 6 dealt separately with the cases referred to in article 36 *bis*, paragraphs (a) and (b), and the solutions adopted for article 36 *bis* were not wholly consistent with the general solutions proposed in paragraphs 1 to 4 of article 37.

16. The fundamental choice depended on whether article 36 *bis* related to both rights and obligations or only to obligations. It was also linked with a more general matter, as the Commission's discussion of article 36 *bis* on second reading seemed to have shown more clearly that the purpose of the article was to make the formalities of consent more flexible without affecting the principle of consent. A number of members of the Commission who had spoken appeared to favour that view of article 36 *bis*. If that interpretation was correct, the Commission would have to settle the substantive question whether article 36 *bis* should set out the same solutions as the initial paragraphs of article 37.

17. Mr. ALDRICH said that most of the doubts he had had with regard to article 36 *bis* had been created by paragraphs 5 and 6 of article 37. Although some of the doubts had been removed as a result of the discussion in the Commission, his reaction to paragraphs 5 and 6 was that they should be deleted.

18. It was certainly arguable that there were good reasons for making it possible for the member States of an international organization to become bound by the treaty obligations of the organization with less formality than was required for other third States, but it stretched the limits of tolerance and raised serious questions about the integrity of the system being created if, at the same time, the member States of an international organization could also ask that the rights and obligations they obtained under a treaty concluded by that organization should be substantially different from those of other third States. That was particularly true in the context of article 37, paragraph 5, in which the revocation or modification of the obligations of the member States of an international organization depended on the internal rules of the organization, whereas the revocation or modification of the obligations of all other third States depended on paragraphs 1 to 4 of article 37. In the absence of convincing proof to the contrary, he would continue to be of the opinion that the prospects for article 36 *bis* would be better if those paragraphs were deleted.

19. Mr. CALLE Y CALLE observed that the inclusion in the draft of article 36 *bis*, containing particular rules governing consent to be bound by obligations, would also require the inclusion in the draft of the provisions of article 37, paragraphs 5 and 6, relating to the revocation or modification of such obligations.

20. In his view, article 36 *bis* was a necessary, useful and practical provision relating to the expression by the member States of an international organization of their consent to be bound by the obligations resulting from a treaty concluded by that organization. In that connection, he drew attention to article 11 of the Vienna Convention, which provided that States could express consent to be bound by a treaty "by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed". One such means was to express consent through international organizations, whose internal rules could provide that the treaties they concluded were binding on their members. The member States thus consented in advance to be bound by the treaties concluded by international organizations.

21. In conclusion, he considered that article 36 *bis* must form part of the Commission's draft and that paragraph 37 must include provisions relating to means of revoking or modifying the obligations referred to in article 36 *bis*.

22. Mr. RIPHAGEN, noting that, in his statement on article 36 *bis* (1676th meeting), he had drawn a distinction between the modalities and the effects of consent, said it seemed to him that paragraphs 5 and 6 of article 37 dealt more with the effects of consent than with the modalities. Indeed, he found the paragraphs went too far, because they appeared to give the consent of the member States of an international organization the effect of creating vested rights and interests that were, for all intents and purposes, not subject to change.

23. During the discussion at the United Nations Conference on the Law of Treaties of the text which became article 37 of the Vienna Convention, he had had the definite impression that that article was influenced by specific multilateral treaties establishing a particular regime for certain parts of territory and creating rights for third States. It was, however, unlikely that treaties of that kind would, in the near future, be concluded by international organizations. It was also doubtful whether the provisions of article 37 of the Vienna Convention could be said to apply, without modification, to the particular situation of third States which were members of an international organization, because the rights and obligations of an international organization relating to a treaty concluded by it were, presumably, not always automatically transferable to the member States of that organization. In view of those problems, he agreed with Mr. Aldrich that paragraphs 5 and 6 of article 37 should be deleted.

24. Mr. USHAKOV said that he was against paragraphs 5 and 6 of article 37. Once an obligation had been accepted, its revocation could not depend on the will of a single party, whatever the form in which the consent had been given.

25. What was more, the new draft of article 36 *bis* submitted by the Special Rapporteur (1675th meeting, para. 27), referring to “the relevant rules of the organization applicable at the moment of the conclusion of the treaty”, would raise the question of the duration of the obligations of a member State of the organization bound by virtue of those rules if that member State left the organization. On that point, the Special Rapporteur had involved the existence of a safeguard clause concerning the composition of the organization. However, that clause only applied to the organization itself and not to the member States who would, in such a case, be forever bound by the treaty. Draft article 73<sup>4</sup> said nothing with regard to the position of member States of an organization and their obligations arising from article 36 *bis*. However, the relevant rules of the organization could obviously not release member States from any obligations they might have, because the member State had accepted obligations by virtue of a treaty that was governed not by the internal rules of the organization but by international law.

26. The Commission should attempt to solve the concrete problem which was thus raised. Practice had, of course, always been more flexible than legal rules, but it seemed risky to leave such an important matter to be settled by practice, which was always skilful at bypassing the rules.

27. Mr. JAGOTA agreed with Mr. Calle y Calle's view that if the Commission decided to include article 36 *bis* in its draft it would also have to include paragraphs 5 and 6 of article 37, since they could be regarded as an explanation or extension of the provisions of article 36 *bis*. Thus, article 36 *bis* stated that the obligations of the member States of an international organization which had concluded a treaty derived only from the relevant rules of the organization applicable at the moment of the conclusion of the treaty—and the time factor was a crucial one—while article 37 explained how long those obligations would continue and whether they could subsequently be revoked or modified.

28. Since article 36 *bis* contained no reference to the revocation or modification of the obligations of third States members of international organizations, that concept must be mentioned either in article 37, paragraphs 5 and 6, or somewhere else in the draft. Otherwise, it would be a matter that was open to interpretation.

29. The inclusion of paragraphs 5 and 6 of article 37 would, moreover, be helpful to the States parties to a treaty concluded with an international organization, to the international organization itself and to the member States of that organization. It would be clear that the intention of the parties at the time of the conclusion of that treaty had been that the relevant rules of the

organization should be applicable not only at the moment when the treaty was concluded but also if and when obligations arising from the treaty were revoked or modified.

30. Mr. ALDRICH said that, in his earlier statement, he had failed to make it clear that paragraphs 5 and 6 of article 37 should be deleted only if paragraphs 1 to 4 of that article were amended to include a reference to the revocation or modification of any of the third party rights and obligations acquired under articles 35, 36 or 36 *bis*. Paragraphs 1 to 4, which should, of course, show that all third party rights and obligations, however acquired, should be treated in the same way, might ultimately be reduced to two paragraphs.

31. Mr. VEROSTA said that he was in favour of retaining paragraphs 5 and 6. The Commission might ask the Special Rapporteur to redraft paragraphs 1 to 4.

32. Mr. REUTER (Special Rapporteur) said that a drafting question had been raised: leaving aside paragraphs 5 and 6, could paragraphs 1 to 4 of the text adopted on first reading be reduced to two? Mr. Aldrich had spoken in favour of that solution. The matter would have to be decided by the Drafting Committee.

33. Various opinions had been expressed with regard to the substantive issues raised by paragraphs 5 and 6. Mr. Aldrich and Mr. Riphagen considered that the rules for the modification and revocation of rights and obligations in the cases envisaged by article 37 should be reviewed so as to assimilate them to the general regime. On the other hand, other members, such as Mr. Calle y Calle and Mr. Jagota, thought that such a substantive modification of paragraphs 5 and 6 was not desirable, or that the provisions should be retained in their present form.

34. Clearly, the Commission should first settle the content of a possible article 36 *bis* and decide whether to retain the reference to rights in the article, in conformity with the text adopted on first reading, but contrary to the opinion expressed at the end of the discussion of the first reading.

35. Mr. Aldrich had widened the substantive problem by saying that he was in favour not only of telescoping paragraphs 1 to 4 in two paragraphs, but also of introducing into the new text a number of elements referring to the question dealt with in paragraphs 5 and 6 of the text adopted on first reading. That position clearly showed to what extent substance and form were linked. In the circumstances, the best course was to refer the matter to the Drafting Committee.

36. With regard to Mr. Ushakov's observations, he noted that he had already said that the modification of the composition of an international organization was a difficult problem, but that draft article 73 contained a provision in which it was explained that it was not intended to cover that question. Mr. Ushakov con-

<sup>4</sup> See 1647th meeting, footnote 1.

sidered that that reservation was not enough, in view of the fact that if draft article 36 *bis* was retained, the result in the case of a treaty concluded by an international organization with a State and providing for obligations for member States would be a collateral agreement between member States of the organization and the organizations or States parties to the original treaty. Such a treaty, however, concerning the obligations of member States, was not covered by the reservation set forth in article 73. A consideration of that type had serious consequences, especially bearing in mind the possibility that article 36 *bis* might not be retained and that only draft articles 35 and 36 would be included.

37. In the case of a headquarters agreement such as that between the United Nations and the United States of America, even if the view was accepted that a State which left the organization remained bound by the obligations arising from the treaty, it must be recognized that the object of the treaty disappeared once the State left the organization. On the other hand, a more complex solution was called for where a member State of a customs union left the organization. In practice, however, tariff agreements negotiated by a customs union on behalf of its members generally provided for reciprocal advantages, and it could reasonably be assumed that the State which had concluded the agreement with the union could consent to retaining the treaty regime in its relations with the former member State of the union, on the basis of reciprocity.

38. In theory, Mr. Ushakov's comments were entirely justified. The Commission would no doubt take note of them when considering draft article 73, which should perhaps be modified in such a way as to expressly exclude the question of the survival of obligations from the scope of the draft articles. It was none the less true that an agreement related to a main agreement was, from the standpoint of causality, closely linked with that agreement. The Vienna Convention had never considered the problem of the legal regime of interrelated treaties. They should, he thought, be left aside. He had no objection to referring article 37 to the Drafting Committee.

39. Mr. USHAKOV pointed out that the concrete problem he had raised concerned the case in which an international organization had concluded a treaty with a State. There were then two possibilities. The third member State could accept the obligations created for it, in writing and on its own account, in which case the first four paragraphs of article 37 applied. Alternatively, a member State of an organization might have undertaken to respect the obligations arising for it by virtue of the constituent instrument of the organization. In that case, two questions had to be answered: was the State bound by that instrument after it left the organization? and, if so, how long was it bound by an agreement whose obligations it had accepted through

consent given in conformity with a constituent instrument which remained in force in absolute terms?

40. Mr. REUTER (Special Rapporteur) said that Mr. Ushakov had, in a sense, answered the question he had raised, having regard to the point made by Mr. Aldrich when he had suggested that article 36 *bis* should refer to the information made available to entities dealing with an international organization. The crucial issue was the intention of the parties, and it could reasonably be assumed that the partner of the international organization in the initial treaty must have known whether the organization's constituent instrument provided that member States were bound by treaties concluded by the organization only for the duration of their membership, or beyond. The Drafting Committee should study these problems in connection with article 36 *bis*.

41. The CHAIRMAN proposed that the Commission should refer article 37 to the Drafting Committee.

*It was so decided.*

ARTICLE 38 (Rules in a treaty becoming binding on third States or third international organizations through international custom)

42. The CHAIRMAN invited the Commission to consider article 38, which read:

**Article 38. Rules in a treaty becoming binding on third States or third international organizations through international custom**

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State or a third international organization as a customary rule of international law, recognized as such.

43. Mr. REUTER (Special Rapporteur) said the article, which was almost identical with the corresponding article in the Vienna Convention, had elicited no comment.

44. The CHAIRMAN said that, if there were no objection, he would take it that the Commission decided to refer article 38 to the Drafting Committee.

*It was so decided.*

ARTICLE 39 (General rule regarding the amendment of treaties),

ARTICLE 40 (Amendment of multilateral treaties), and

ARTICLE 41 (Agreements to modify multilateral treaties between certain of the parties only)

45. The CHAIRMAN invited the members of the Commission to consider articles 39, 40 and 41, which constituted Part IV of the draft articles, entitled "Amendment and modification of treaties". The texts read as follows:

*Article 39. General rule regarding the amendment of treaties*

1. A treaty may be amended by the conclusion of an agreement between the parties. The rules laid down in Part II apply to such an agreement.
2. The consent of an international organization to an agreement provided for in paragraph 1 shall be governed by the relevant rules of that organization.

*Article 40. Amendment of multilateral treaties*

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.
2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States and organizations or, as the case may be, to all the contracting organizations, each one of which shall have the right to take part in:
  - (a) the decision as to the action to be taken in regard to such proposal;
  - (b) the negotiation and conclusion of any agreement for the amendment of the treaty.
3. Every State or international organization entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such a party.

5. Any State or international organization which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State or organization:

- (a) be considered as a party to the treaty as amended; and
- (b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

*Article 41. Agreements to modify multilateral treaties between certain of the parties only*

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

- (a) the possibility of such a modification is provided for by the treaty; or
- (b) the modification in question is not prohibited by the treaty and:
  - (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
  - (ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless, in a case falling under paragraph 1 (a), the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

46. Mr. REUTER (Special Rapporteur) said that no comments had been made on articles 39 to 41.

47. As a result of the introduction of the term “the contracting entities” into the language of the draft articles, the first part of paragraph 2 of article 40 could be simplified; the words “to all the contracting States and organizations or, as the case may be, to all the

contracting organizations” could be replaced by “to all the contracting entities”.

48. The CHAIRMAN said that, in the absence of any comment, he would take it that the Commission wished to refer articles 39 to 41 to the Drafting Committee.

*It was so decided.*

*The meeting rose at 12.30 p.m.*

## 1680th MEETING

*Monday, 29 June 1981, at 3.20 p.m.*

*Chairman: Mr. Doudou THIAM*

*Present: Mr. Aldrich, Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Ushakov, Sir Francis Vallat, Mr. Yankov.*

### Tribute to Mr. Pierre Raton

1. The CHAIRMAN recalled that at the opening meeting of the current session the Acting Chairman of the Commission had indicated that Mr. Pierre Raton, Chief of the Legal Liaison Office at the United Nations Office at Geneva, was about to retire. On 30 June 1981, Mr. Raton would end a career of more than thirty years with the United Nations Secretariat. During that long and brilliant career, first with the Legal Service in New York, then with the Directors-General in Geneva, he had rendered invaluable service and given precious advice.

2. Mr. Raton's departure was a loss not only for the Secretariat, which would be deprived of a devoted jurist, but also for the Commission, which would lose a friend and advocate of the codification and progressive development of international law. At the beginning of his career as a jurist, Mr. Raton had attended the Commission's second session, held at Geneva in 1950. Since then, he had taken part in the Commission's work in various capacities. Of all those present at the current meeting, he was certainly the one who had attended the greatest number of sessions and taken part in the preparation and publication of the largest number of Commission documents. His most remarkable contribution was no doubt the creation of the International Law Seminar. After having set it up almost singlehandedly in 1965, he had continued to organize it with so much care, devotion and success that the Seminar had become intimately connected with the sessions of the Commission.

3. On behalf of the members of the Commission, past and present, he wished to express to Mr. Raton the

Commission's deep gratitude for everything it owed him.

4. Mr. JAGOTA said that, in subscribing to the tribute voiced by the Chairman, he wished to add a personal note of thanks to Mr. Raton for the recent gift of Mr. Raton's book on Liechtenstein. The gift had been all the more appreciated as the book had shown Mr. Raton to be as competent an authority on mini-States as he had been a servant of the Commission and the United Nations.

5. Mr. DÍAZ GONZÁLEZ said that Mr. Raton had truly been a man of the Commission. Of Mr. Raton's many achievements, he wished to single out the creation of the International Law Seminar, which, by the guidance it had provided for young lawyers and civil servants, had been of particular benefit to small States. That Mr. Raton should be especially warmly remembered by the smaller nations was doubly fitting for one who, as Mr. Jagota had remarked, had an extra-professional interest in their development.

6. Mr. ŠAHOVIĆ said that he had had an opportunity to follow Mr. Raton's activities in all the areas in which he had worked, whether as the collaborator of a former member of the Commission, Mr. Bartoš, in the Sixth Committee of the General Assembly, or in the International Law Commission. The Commission's success was no doubt largely due to the work of Mr. Raton, who had always looked after the Commission's interests within the United Nations system. Similarly, he had always defended the interests of the members of the Commission and had helped them settle a good many practical matters in Geneva. Indeed, the success of the Commission's work depended above all on the solution of practical problems.

7. Not only was Mr. Raton the author of a book on Liechtenstein, but for decades he had regularly analysed the work of the Sixth Committee and the International Law Commission in the *Annuaire français de droit international*. As a member of the Commission, he himself had often referred to those critical studies of the Commission's work.

8. As for Mr. Raton's contribution to the organization of the International Law Seminar, it should be emphasized that his work had been recognized and appreciated for its true value countless times outside the Commission and, in particular, in the Sixth Committee.

9. Mr. USHAKOV associated himself with the praise of Mr. Raton and expressed to him best wishes, particularly for the technical activities which he would no doubt be sure to carry out and from which the Commission would be able to benefit. He expressed the hope that ties of friendship would continue to link Mr. Raton to the members of the Commission.

10. Mr. REUTER paid a tribute to Mr. Raton's qualities of efficiency and discretion. There had been two sides to that great international civil servant's

career: a visible side, marked by the brilliant service he had rendered to the Commission, and a hidden side, made up of patience and painstaking daily work. No matter what kind of hospitality a State offered, countless material difficulties always arose and they could be overcome only by dint of unfailing patience. Throughout his career, Mr. Raton's commitment had never flagged, and it was thanks to that commitment that he had successfully met the challenge of creating the International Law Seminar. Two former members of the Commission, Mr. Bartoš and Mr. Scelle, had not been mistaken about him. If, in his tribute, he had emphasized the man more than his work, it was because the value of Mr. Raton's work derived from his qualities as a man.

11. Sir Francis VALLAT said that although Mr. Raton had habitually been as modest and silent as he had been talented, it was impossible for the members of the Commission not to declare the esteem they felt for someone who had been a friend not only to the Commission as a whole, but also to each of them individually. All who had known Mr. Raton were aware what a loss his retirement represented to the Commission and the International Law Seminar.

12. Mr. YANKOV said that the value of the contribution which Mr. Raton, as a model international civil servant, had made to the work of the Commission and to the development of future generations of international lawyers had rapidly become apparent even to a relative newcomer to the Commission like himself. He would remember Mr. Raton for the substance of that contribution, for his unfailing friendliness and kindness and for his exceptional knowledge of international law and other fields.

13. Mr. BARBOZA associated himself with all the tributes that had been paid to Mr. Raton.

14. Mr. RATON (Senior Legal Officer, Legal Liaison Office) thanked the Chairman and the members of the Commission for the tribute they had paid him. He had always had a soft spot for the Commission because it had provided a breath of fresh air in his life as an international civil servant. It was thanks to the Commission that he had been able to maintain and perfect his knowledge of international law, and thanks to the Seminar that he had been able to remain abreast of the thinking of the new generation of diplomats and professors.

15. He was pleased to note that the members of the Commission who had had such kind words to say about him came from all over the world. While organizing the Seminar, he himself had always striven to be absolutely impartial. He had always seen to it that the Seminar was open only to young jurists from developing countries because it was essential for them to be in contact with jurists from developed countries.

**Co-operation with other bodies**

[Item 11 of the agenda]

**WELCOME TO THE OBSERVER FOR THE  
INTER-AMERICAN JURIDICAL COMMITTEE**

16. The CHAIRMAN welcomed Mr. Aja Espil, Observer for the Inter-American Juridical Committee.

17. Mr. BARBOZA welcomed Mr. Aja Espil as the representative of a venerable organ embodying the Latin-American legal tradition, which had contributed so much to international law in general, as a distinguished compatriot and as a friend and collaborator.

18. Mr. PINTO said that, as the Commission's representative to the January 1981 session of the Inter-American Juridical Committee, he had not merely had the good fortune to meet Mr. Aja Espil and his distinguished colleagues, but had been able to see at first hand that their work was of the highest order. The Commission should avail itself of Mr. Aja Espil's presence to discuss the many ideas which he knew Mr. Aja Espil had for strengthening the relationship between it and his Committee.

19. Mr. AJA ESPIL thanked the Commission for its welcome and associated himself with the tribute paid to Mr. Raton.

*The meeting rose at 4 p.m.*

**1681st MEETING**

*Tuesday, 30 June 1981, at 10.15 a.m.*

*Chairman: Mr Doudou THIAM*

*Present: Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Suchar-itkul, Mr. Ushakov, Sir Francis Vallat, Mr. Yankov.*

**Questions of treaties concluded between States and international organizations or between two or more international organizations (continued)\*  
(A/CN.4/339 and Add.1-7, A/CN.4/341 and Add.1, A/CN.4/L.327)**

[Item 3 of the agenda]

**DRAFT ARTICLES PROPOSED BY THE  
DRAFTING COMMITTEE<sup>1</sup>**

1. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that he had the honour to introduce the draft articles proposed by the Committee, contained in document A/CN.4/L.327.

2. In order to highlight the relationship between the draft articles and the corresponding provisions of the Vienna Convention,<sup>2</sup> the Drafting Committee had retained the numbering adopted on first reading, which was the same as for the Convention. Provisions of the draft which had no equivalent in the Convention were designated *bis, ter*, etc., as appropriate. The Committee had borne in mind that it was not the intention of the Commission to complete the second reading of the draft articles at the present session. The question of the final numbering and the title of the articles could be dealt with after the second reading, at which stage the Drafting Committee would, in accordance with past practice, also undertake the final polishing of the draft as a whole. In that respect, the Committee had sought to do everything possible for the time being. For example, square brackets had been eliminated wherever they appeared in the draft adopted on first reading.

3. In reviewing the draft articles referred to it, the Committee had considered whether it was possible, in specific instances, to consolidate the text of individual articles, as had been suggested in the observations of Governments and in comments made in the Commission, and as had been proposed by the Special Rapporteur in his tenth report (A/CN.4/341 and Add.1). Whenever the characteristics of the types of treaty so warranted, the Drafting Committee had decided to maintain the textual distinctions made in the articles adopted on first reading, with a view to achieving clarity and precision and thus facilitating the application and interpretation of the rules concerned. On the other hand, when repetition was deemed less justified, the Committee had proceeded to simplify the text as far as possible by merging two paragraphs into one paragraph, which was applicable to all the treaties that were the subject-matter of the draft. That had been done in the case of articles 13, 15 and 18.

4. In drafting the various language versions of the articles, the Committee had attempted to reflect the Commission's intention to maintain to the maximum the spirit and language of the Vienna Convention. In some instances it had therefore reverted to the language of that Convention. The titles of parts I and II and of part II, section 1, reproduced those found in the Vienna Convention.

5. The Drafting Committee proposed that the title of part I should read: "Part I. Introduction".

*The title of Part I was adopted.*

**ARTICLE 1<sup>3</sup> (Scope of the present articles) and**

\* Resumed from the 1679th meeting.

<sup>1</sup> For the initial discussion at the present session of the draft articles, see 1644th to 1652nd, and 1673rd to 1679th meetings.

<sup>2</sup> See 1644th meeting, footnote 3.

<sup>3</sup> For the initial consideration of the text by the Commission at the present session, see 1644th meeting, paras. 28 to 36.

ARTICLE 2<sup>4,5</sup> (Use of terms)

6. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following texts for articles 1 and 2:

*Article 1. Scope of the present articles*

The present articles apply to:

- (a) treaties concluded between one or more States and one or more international organizations, and
- (b) treaties concluded between international organizations.

*Article 2. Use of terms*

1. For the purposes of the present articles:

(a) "treaty" means an international agreement governed by international law and concluded in written form:

- (i) between one or more States and one or more international organizations;
- or
- (ii) between international organizations, whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(b) "ratification" means the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(b bis) "act of formal confirmation" means an international act corresponding to that of ratification by a State, whereby an international organization establishes on the international plane its consent to be bound by a treaty;

(b ter) "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State or an international organization establishes on the international plane its consent to be bound by a treaty;

(c) "full powers" means a document emanating from the competent authority of a State and designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty between one or more States and one or more international organizations, for expressing the consent of the State to be bound by such a treaty, or for accomplishing any other act with respect to such a treaty;

(c bis) "powers" means a document emanating from the competent organ of an international organization and designating a person or persons to represent the organization for negotiating, adopting or authenticating the text of a treaty, for communicating the consent of the organization to be bound by a treaty, or for accomplishing any other act with respect to a treaty;

...

(e) "negotiating State" and "negotiating organization" mean respectively:

- (i) a State
- (ii) an international organization

which took part in the drawing-up and adoption of the text of the treaty;

(f) "contracting State" and "contracting organization" mean respectively:

- (i) a State
- (ii) an international organization

<sup>4</sup> Except for subparagraphs (d) and (h) of paragraph 1.

<sup>5</sup> For the initial consideration of the text by the Commission at the present session, see 1644th meeting, paras. 28 *et seq.*, 1645th meeting, paras. 3 *et seq.*, 1646th meeting, paras. 1-35 and 47-71, and 1648th meeting, para. 23.

which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(g) "party" means a State or an international organization which has consented to be bound by the treaty and for which the treaty is in force;

...

(i) "international organization" means an intergovernmental organization;

(j) "rules of the organization" means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the organization.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meaning which may be given to them in the internal law of any State or in the rules of any international organization.

7. The Drafting Committee had not made any changes in the text of article 1.

8. In the case of article 2, it had decided to consider the meanings attributed to the terms included in paragraph 1 in conjunction with the draft articles in which those terms were first employed. However, it would decide on subparagraphs (d) and (h) of paragraph 1 at a later stage. The text of the article remained unchanged, except for some minor amendments to subparagraphs 1 (c) and (c bis) of the English version, where the words "the purpose of" had been deleted and the word "performing" had been replaced by "accomplishing", in order to make it consistent with the other language versions and with the corresponding article of the 1969 Vienna Convention. Similarly, in paragraph 2, the word "by" in the English text had been replaced by "in" and, in the Spanish text, the word "*normas*" had been replaced by "*reglas*", which was used in subparagraph 1 (j) and in subparagraph 1 (34) of the corresponding article of the 1975 Vienna Convention.<sup>6</sup>

9. Mr. USHAKOV proposed that, in article 1, subparagraph (a), the comma after the words "international organizations" should be replaced by a semi-colon and that, in article 2, subparagraph 1 (a) (i), the semi-colon after the words "international organisations" should be replaced by a comma.

10. Mr. REUTER (Special Rapporteur) said that United Nations practice regarding punctuation had always been uncertain, and the text of the Vienna Convention was extremely erratic in that respect. In his view, it would be better if the reply came from a member of the Secretariat.

11. Mr. ROMANOV (Secretary to the Commission) said he thought it would be preferable, in view of the structure of the provision, to retain the comma in article 1, subparagraph (a), to replace the semi-colon in article 2, subparagraph 1 (a) (i) by a comma, and then to add a semi-colon after the words "international organizations" in subparagraph 1 (a) (ii) of the same article.

<sup>6</sup> See 1644th meeting, footnote 7.

12. Mr. CALLE Y CALLE, referring to the comments by Mr. Reuter, said that individual subparagraphs of an article normally ended with a semi-colon, but subdivisions of subparagraphs were normally separated only by commas.

13. Sir Francis VALLAT noted that the punctuation used in the English version of the Convention differed from that used in the French version.

14. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to replace the semi-colon at the end of article 2, paragraph 1 (a) (i), by a comma.

*It was so decided.*

*Articles 1 and 2 were adopted.*

ARTICLE 3<sup>7</sup> (International agreements not within the scope of the present articles)

15. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 3:

*Article 3. International agreements not within the scope of the present articles*

The fact that the present articles do not apply:

- (i) to international agreements to which one or more international organizations and one or more subjects of international law other than States or international organizations are parties; or
- (ii) to international agreements to which one or more States, one or more international organizations and one or more subjects of international law other than States or international organizations are parties; or
- (iii) to international agreements not in written form concluded between one or more States and one or more international organizations, or between international organizations;

shall not affect:

- (a) the legal force of such agreements;
- (b) the application to them of any of the rules set forth in the present articles to which they would be subject under international law independently of the articles;
- (c) the application of the present articles to the relations between States and international organizations or to the relations of international organizations as between themselves, when those relations are governed by international agreements to which other subjects of international law are also parties.

16. In the light of the discussion in the Commission, the Drafting Committee had replaced the word "entities" in subparagraphs (i) and (ii) of the introductory paragraph and in subparagraph (c) by the expression "subjects of international law", which was used in the Vienna Convention.

*Article 3 was adopted.*

ARTICLE 4<sup>8</sup> (Non-retroactivity of the present articles)

<sup>7</sup> For the initial discussion of the draft articles at the present session, see 1646th meeting, paras. 1–35.

<sup>8</sup> *Idem.*

17. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 4:

*Article 4. Non-retroactivity of the present articles*

Without prejudice to the application of any rules set forth in the present articles to which treaties between one or more States and one or more international organizations or between international organizations would be subject under international law independently of the articles, the articles apply only to such treaties concluded after the entry into force of the present articles with regard to those States and those organizations.

18. The only change made in the draft article was in the English version, where the words "the said articles as regards" had been replaced by "the present articles with regard to", which was the wording used in the Vienna Convention.

*Article 4 was adopted.*

19. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed that the titles of Part II and of Part II, Section 1, should read: "Part II. Conclusion and entry into force of treaties", and "Section 1. Conclusion of treaties".

*The titles of Part II and of Section 1 were adopted.*

ARTICLE 6<sup>9</sup> (Capacity of international organizations to conclude treaties)

20. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee had made no change to the text of article 7, which read: by the Commission on first reading, which read:

*Article 6. Capacity of international organizations to conclude treaties*

The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization.

*Article 6 was adopted.*

ARTICLE 7<sup>10</sup> (Full powers and powers)

21. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee had made no change to the text of article 7, which read:

*Article 7. Full powers and powers*

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty between one or more States and one or more international organizations or for the purpose of expressing the consent of the State to be bound by such a treaty if:

- (a) he produces appropriate full powers; or
- (b) it appears from practice or from other circumstances that that person is considered as representing the State for such purposes without having to produce full powers.

<sup>9</sup> *Idem.*, paras. 36–46.

<sup>10</sup> *Idem.*, paras. 47–60.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty between one or more States and one or more international organizations;

(b) heads of delegations of States to an international conference, for the purpose of adopting the text of a treaty between one or more States and one or more international organizations;

(c) heads of delegations of States to an organ of an international organization, for the purpose of adopting the text of a treaty between one or more States and that organization;

(d) heads of permanent missions to an international organization, for the purpose of adopting the text of a treaty between one or more States and that organization;

(e) heads of permanent missions to an international organization, for the purpose of signing, or signing *ad referendum*, a treaty between one or more States and that organization, if it appears from practice or from other circumstances that those heads of permanent missions are considered as representing their States for such purposes without having to produce full powers.

3. A person is considered as representing an international organization for the purpose of adopting or authenticating the text of a 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 such purposes without having to produce powers.

4. A person is considered as representing an international organization for the purpose of communicating the consent of that organization to be bound by a 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 such purpose without having to produce powers.

*Article 7 was adopted.*

ARTICLE 8<sup>11</sup> (Subsequent confirmation of an act performed without authorization)

22. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 8:

*Article 8. Subsequent confirmation of an act performed without authorization*

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State or an international organization for that purpose is without legal effect unless afterwards confirmed by that State or that organization.

23. The word "that" had been inserted before "organization" in the English version for the purposes of consistency with the other language versions.

*Article 8 was adopted.*

ARTICLE 9<sup>12</sup> (Adoption of the text)

<sup>11</sup> *Idem*, paras. 61-71.

<sup>12</sup> *Idem*.

24. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 9:

*Article 9. Adoption of the text*

1. The adoption of the text of a treaty takes place by the consent of all the international organizations or, as the case may be, all the States and organizations participating in its drawing-up except as provided in paragraph 2.

2. The adoption of the text of a treaty between States and one or more international organizations at an international conference of States in which one or more organizations participate takes place by the vote of two-thirds of the States and organizations present and voting, unless by the same majority they shall decide to apply a different rule.

25. In order to achieve greater precision, the word "participants" in paragraph 1 had been replaced by "international organizations or, as the case may be, all the States and organizations participating", which corresponded more closely to the terminology used in article 9 of the Vienna Convention.

26. In paragraph 2, the word "participants" had been replaced by "States and organizations", which also corresponded more closely to the relevant article of the Vienna Convention. The reason why different expressions were used in paragraphs 1 and 2 to replace the noun "participants" was that, in paragraph 1, the word "treaty" covered the two kinds of treaties that were the subject-matter of the draft, whereas paragraph 2 related to only one kind of treaty. Also, paragraph 2 further specified that the international conference was a conference of States in which one or more international organizations participated. In the English version, the words "the latter" had been replaced by "they", which was used in the corresponding provision of the Vienna Convention, and the equivalent term was used in the other language versions of the article.

27. Finally, in keeping with the drafting technique used throughout most of the draft, the term "international organization" was used only the first time that it appeared in a paragraph or subparagraph, the word "international" having been deleted when it recurred. The technique was not intended to be unalterable; it might not be applicable in certain cases—for example, when two types of treaty were described—and its uniform use could more appropriately be reviewed after consideration of all the draft articles had been completed.

28. Mr. JAGOTA, referring to paragraph 2, wondered whether texts were to be adopted by the vote of two-thirds of the States and two-thirds of the organizations present and voting, or by a majority of two-thirds of the States and organizations present and voting combined.

29. Mr. REUTER (Special Rapporteur) said that the answer to Mr. Jagota's question was provided by the syntax of the French text as proposed by the Drafting Committee: the two-thirds majority was calculated in terms of all the States and international organizations,

since the adjectives “*présents*” and “*votants*” were in the masculine plural. That was indeed the solution which the Drafting Committee had had in mind when it had taken its decision.

30. The French text did not call for any change, but he would not comment on whether the other language versions were also an accurate reflection of the solution sought by the Drafting Committee.

31. Mr. BARBOZA said that he agreed with the Special Rapporteur’s interpretation of paragraph 2. It might be advisable to include a brief reference to that interpretation in the commentary to the draft article.

*Article 9 was adopted.*

ARTICLE 10<sup>13</sup> (Authentication of the text)

32. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 10:

*Article 10. Authentication of the text*

1. The text of a treaty between one or more States and one or more international organizations is established as authentic and definitive:

(a) by such procedure as may be provided for in the text or agreed upon by the States and organizations participating in its drawing-up; or

(b) failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those States and those organizations of the text of the treaty or of the final act of a conference incorporating the text.

2. The text of a treaty between international organizations is established as authentic and definitive:

(a) by such procedure as may be provided for in the text or agreed upon by the organizations participating in its drawing-up; or

(b) failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those organizations of the text of a treaty or of the final act of a conference incorporating the text.

33. The only change was in the English version, in which the word “those” should be inserted before the word “organizations” in paragraph 1 (b).

*Article 10 was adopted.*

ARTICLE 11<sup>14</sup> (Means of expressing consent to be bound by a treaty)

34. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 11:

*Article 11. Means of expressing consent to be bound by a treaty*

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations may

be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

2. The consent of an international organization to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed.

35. The Committee had concluded that there was no convincing reason for maintaining the distinction implied by the use of the words “express” and “establish” and had therefore replaced “established”, in paragraph 2, by “expressed”. Furthermore, in both paragraphs 1 and 2, the word “is” had been replaced by “may be” to align the text with that of article 11 of the Vienna Convention.

*Article 11 was adopted.*

ARTICLE 12<sup>15</sup> (Consent to be bound by a treaty expressed by signature)

36. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 12:

*Article 12. Consent to be bound by a treaty expressed by signature*

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by the signature of the representative of that State when:

(a) the treaty provides that signature shall have that effect;

(b) it is otherwise established that the negotiating States and negotiating organizations were agreed that signature should have that effect; or

(c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of an international organization to be bound by a treaty is expressed by the signature of the representative of that organization when:

(a) the treaty provides that signature shall have that effect;

(b) it is otherwise established that the negotiating organizations or, as the case may be, the negotiating States and negotiating organizations were agreed that signature should have that effect; or

(c) the intention of the organization to give that effect to the signature appears from the powers of its representative or was expressed during the negotiation.

3. For the purposes of paragraphs 1 and 2:

(a) the initialling of a text constitutes a signature when it is established that the negotiating organizations or, as the case may be, the negotiating States and negotiating organizations so agreed;

(b) the signature *ad referendum* of a treaty by the representative of a State or an organization, if confirmed by his State or organization, constitutes a full signature.

37. For the reasons already given in connection with article 11, the Committee had decided to replace, in

<sup>13</sup> *Idem.*

<sup>14</sup> *Idem.*

<sup>15</sup> *Idem.*, 1647th meeting, paras. 1–33.

paragraph 2, the word “established” by “expressed” when referring to the consent of an international organization to be bound by a treaty.

38. In addition, in subparagraphs 1 (b) and 3 (a) the words “participants in the negotiation”, which had been considered ambiguous, had been replaced by a reference to the negotiating States and negotiating organizations, as appropriate, in keeping with the wording of the Vienna Convention.

39. Finally, a new subparagraph on the lines of subparagraph 1 (b) had been inserted as 2 (b), so that paragraph 2 now paralleled paragraph 1. The Committee had found no justification for maintaining the distinction that had been drawn between the situation of international organizations and of States in respect of expression of consent by signature.

*Article 12 was adopted.*

ARTICLE 13<sup>16</sup> (Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty)

40. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 13:

*Article 13. Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty*

The consent of international organizations or, as the case may be, of States and international organizations to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

(a) the instruments provide that their exchange shall have that effect; or

(b) it is otherwise established that those organizations or, as the case may be, those States and those organizations were agreed that the exchange of instruments should have that effect.

41. The Drafting Committee had decided to merge the two paragraphs of article 13 adopted on first reading, as proposed by the Special Rapporteur and as suggested by Governments and members of the Commission. The article did not describe the type of treaty involved, for the term “treaty” was already defined in article 2. The title and text had been aligned with those of the corresponding article of the Vienna Convention by replacing the word “established” by “expressed”, and also by inserting the phrase “it is otherwise established”.

*Article 13 was adopted.*

ARTICLE 14<sup>17</sup> (Consent to be bound by a treaty expressed by ratification, act of formal confirmation, acceptance or approval)

42. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 14:

*Article 14. Consent to be bound by a treaty expressed by ratification, act of formal confirmation, acceptance or approval*

1. The consent of a State to be bound by a treaty is expressed by ratification when:

(a) the treaty provides for such consent to be expressed by means of ratification;

(b) it is otherwise established that the negotiating States and negotiating organizations were agreed that ratification should be required;

(c) the representative of the State has signed the treaty subject to ratification; or

(d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of an international organization to be bound by a treaty is expressed by an act of formal confirmation when:

(a) the treaty provides for such consent to be expressed by means of an act of formal confirmation;

(b) it is otherwise established that the negotiating organizations or, as the case may be, the negotiating States and negotiating organizations were agreed that an act of formal confirmation should be required;

(c) the representative of the organization has signed the treaty subject to an act of formal confirmation; or

(d) the intention of the organization to sign the treaty subject to an act of formal confirmation appears from the powers of its representative or was expressed during the negotiation.

3. The consent of a State or of an international organization to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification or, as the case may be, to an act of formal confirmation.

43. The Committee had made changes similar to those made in earlier articles, for the purpose of uniformity. As in article 13, the description of the type of treaty had simply been replaced by the term “treaty”. In that connection, one member of the Committee had expressed reservations about the simplified formula and had taken the view that the saving of a few words did not compensate for the loss of precision. In paragraph 3, the words “or as the case may be” had been added, between commas, for greater clarity.

44. Mr. USHAKOV said that it might be better to replace the expression “an act of formal confirmation”, in subparagraphs 2 (a), (b) and (c), by “the act of formal confirmation”.

45. Mr. REUTER (Special Rapporteur) said that retention of the expression “an act of formal confirmation” was justified for reasons of substance. In modern practice, ratification was a well-established procedure which had the same significance for all States, and the Commission had not wished to extend that concept to the case of international organizations. For the latter, therefore, it had decided to use the concept of formal confirmation; accordingly, article 14 provided for a category of legal acts having the effect

<sup>16</sup> *Idem*, paras. 34–38.

<sup>17</sup> *Idem*, para. 3, and 1648th meeting, paras. 1–4.

of formal confirmation, and the international organization was left free to choose the form of act that would have the requisite effects. Consequently, the indefinite article was essential.

*Article 14 was adopted.*

ARTICLE 15<sup>18</sup> (Consent to be bound by a treaty expressed by accession)

46. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 15:

*Article 15. Consent to be bound by a treaty expressed by accession*

The consent of a State or of an international organization to be bound by a treaty is expressed by accession when:

(a) the treaty provides that such consent may be expressed by that State or that organization by means of accession;

(b) it is otherwise established that the negotiating organizations or, as the case may be, the negotiating States and negotiating organizations were agreed that such consent might be expressed by that State or that organization by means of accession; or

(c) all the parties have subsequently agreed that such consent may be expressed by that State or that organization by means of accession.

47. The article had been simplified by merging the two original paragraphs. As a result, no description was given of the types of treaty involved, since the same rule applied to both types. One member of the Committee had abstained in the decision to adopt the consolidated text on the grounds that it was not possible to contemplate a treaty between international organizations that would allow for subsequent accession by States; such a situation could not be dealt with in the draft, for the reverse situation, namely, treaties between States that provided for accession later on by international organizations, had not been covered by the Vienna Convention.

48. Changes similar to those already made in preceding articles had also been introduced.

49. Mr. USHAKOV said that he had never favoured the wording adopted by the Drafting Committee for article 15. For instance, subparagraph (c) meant that, even in the case of a treaty between international organizations, the parties alone could agree that a State could accede to it, whereas such a possibility always existed, once the parties decided accordingly. The article seemed to be superfluous and had the disadvantage of not specifying which categories of treaty were covered. If the Commission adopted it, the wording might give rise to difficulties of interpretation and application, particularly in respect of settlement of disputes.

*Article 15 was adopted.*

<sup>18</sup> *Idem*, 1647th meeting, para. 3, and 1648th meeting, paras. 5–10.

ARTICLE 16<sup>19</sup> (Exchange or deposit of instruments of ratification, formal confirmation, acceptance, approval or accession)

50. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 16:

*Article 16. Exchange or deposit of instruments of ratification, formal confirmation, acceptance, approval or accession*

1. Unless the treaty otherwise provides, instruments of ratification, formal confirmation, acceptance, approval or accession establish the consent of a State or of an international organization to be bound by a treaty between one or more States and one or more international organizations upon:

(a) their exchange between the contracting States and the contracting organizations;

(b) their deposit with the depositary; or

(c) their notification to the contracting States and to the contracting organizations or to the depositary, if so agreed.

2. Unless the treaty otherwise provides, instruments of formal confirmation, acceptance, approval or accession establish the consent of an international organization to be bound by a treaty between international organizations upon:

(a) their exchange between the contracting organizations;

(b) their deposit with the depositary; or

(c) their notification to the contracting organizations or to the depositary, if so agreed.

51. The text of the article remained basically unchanged, except for the deletion of the words “or notification” from the title, which thus corresponded exactly to the title of the relevant article of the Vienna Convention. In addition, the terms “contracting international organizations” and “*les États et les organisations internationales contractantes*” had been replaced by “contracting organizations” and “*les États contractants et les organisations contractantes*”, in the English and French texts respectively.

52. Mr. USHAKOV proposed that, in the title and in paragraphs 1 and 2, the words “formal confirmation” should be replaced by “an act of formal confirmation”.

53. Mr. REUTER (Special Rapporteur) supported that proposal.

*Article 16, as amended, was adopted.*

ARTICLE 17<sup>20</sup> (Consent to be bound by part of a treaty and choice of differing provisions)

54. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 17:

<sup>19</sup> *Idem*, 1647th meeting, paras. 2 and 4, and 1648th meeting, paras. 11–17.

<sup>20</sup> *Idem*, 1648th meeting, paras. 18–20.

*Article 17. Consent to be bound by part of a treaty and choice of differing provisions*

1. Without prejudice to articles 19 to 23, the consent of a State or of an international organization to be bound by part of a treaty between one or more States and one or more international organizations is effective only if the treaty so permits or if the other contracting States and contracting organizations so agree.

2. Without prejudice to articles 19 to 23, the consent of an international organization to be bound by part of a treaty between international organizations is effective only if the treaty so permits or if the other contracting organizations so agree.

3. The consent of a State or of an international organization to be bound by a treaty between one or more States and one or more international organizations which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

4. The consent of an international organization to be bound by a treaty between international organizations which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

55. As in article 16, use had been made of the term "contracting organization", and the word "*contractants*" had therefore been inserted after the word "*États*" in the French version of the last part of paragraph 1.

*Article 17 was adopted.*

ARTICLE 18<sup>21</sup> (Obligation not to defeat the object and purpose of a treaty prior to its entry into force)

56. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 18:

*Article 18. Obligation not to defeat the object and purpose of a treaty prior to its entry into force*

A State or an international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) that State or that organization has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, an act of formal confirmation, acceptance or approval, until that State or that organization shall have made its intention clear not to become a party to the treaty; or

(b) that State or that organization has expressed its consent to be bound by the treaty pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

57. The changes in the article were similar to those made in articles 13 and 15.

58. Mr. USHAKOV said he was not certain whether the words "or has exchanged", in subparagraph (a), made it sufficiently clear that the State and the organization covered by the article acted separately and were not regarded as partners.

59. Mr. REUTER (Special Rapporteur) said that the State or the organization in question were viewed individually. He suggested that Mr. Ushakov's point could be met by using the words "has proceeded to

exchange instruments". He would, however, point out that only the Drafting Committee could, if need be, embark on a further detailed discussion of the matter.

60. Mr. CALLE Y CALLE said that, since the obligation in question was of a general nature, the article should be stated in general terms throughout, rather than in specific terms, as in subparagraphs (a) and (b).

61. Mr. ŠAHOVIĆ, referring to the amendment to article 16, said that he had some doubt about the need to change the wording of paragraph 1 of that article by underlining the concept of an act of formal confirmation as defined in article 2, subparagraph 1 (*b bis*), which referred to ratification and described the legal content of the two concepts. Article 16, on the other hand, dealt with the documents—the physical medium—and hence there was no need to alter the wording of paragraph 1 or that of the later articles, since article 2 gave a precise meaning to the concept of an act of formal confirmation and ratification was itself described as an international act. Consequently, the Commission could have retained the text proposed by the Drafting Committee.

62. He was not asking for the decision already reached on the amendment to be revoked, but he would none the less like the matter to be clarified in the commentary, with a view to forestalling any questions that would inevitably arise when it came to applying the articles.

63. Mr. JAGOTA said that the wording of article 18, subparagraph (a), and of article 16, paragraph 1, should be harmonized, since one referred to "an act of formal confirmation", whereas the other referred to "instruments of formal confirmation". He would prefer the latter wording, used in article 16, paragraph 1.

64. Mr. REUTER (Special Rapporteur) said that the difficulties stemmed from the fact that, in French, the word "*acte*" could mean both the legal operation and the instrument itself. The Commission had, however, made it clear in article 2 that it was using the concept of an act of formal confirmation in the sense of a legal act and not of an instrument. It was therefore not superfluous to speak of the instrument of an act of formal confirmation, for the legal act had to be reflected in a physical instrument.

65. He therefore hoped that the Commission would keep the two forms of wording: "act of formal confirmation" and "instrument of an act of formal confirmation", and while he understood the doubts expressed, he would prefer the Commission to retain the amendment it had made to articles 16 *et seq.* He also hoped that the text of article 18 would remain unchanged, since it was perfectly logical.

66. Sir Francis VALLAT recalled that, in defining an act of formal confirmation, the Committee had been careful to avoid using the word "instrument". Consequently, the Commission should adopt article 16 in

<sup>21</sup> *Idem*, paras. 21–22.

its amended form and retain article 18 as proposed by the Drafting Committee.

67. The CHAIRMAN noted that the Commission decided to retain the amendment to article 16, on the understanding that the article would be accompanied by an appropriate commentary to reflect the doubts expressed by some members.

68. If there were no objections, he would take it that the Commission agreed to adopt the text of article 18 proposed by the Drafting Committee.

*It was so decided.*

*The meeting rose at 11.55 a.m.*

## 1682nd MEETING

*Wednesday, 1 July 1981, at 10.10 a.m.*

*Chairman:* Mr. Doudou THIAM

*Present:* Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitul, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

### **Question of treaties concluded between States and international organizations or between two or more international organizations (continued)** (A/CN.4/339 and Add.1-7, A/CN.4/341 and Add.1, A/CN.4/L.327)

[Item 3 of the agenda]

#### **DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)**

#### **ARTICLE 2, SUBPARA. 1, (c), AND ARTICLES 7, 9, 10 AND 17 (continued)<sup>1</sup>**

1. Mr. USHAKOV said that he wished to make a few comments that had come to mind on reading the Russian version of the articles the Commission had adopted at the previous meeting further to the proposals by the Drafting Committee (A/CN.4/L.327).

2. Under article 7, subparagraph 2 (d), heads of permanent missions to an international organization were considered as representing their State “for the purpose of adopting the text of a treaty between one or more States and that organization”. However, under the terms of article 7, subparagraph 2 (b), of the Vienna Convention,<sup>2</sup> heads of diplomatic missions

were considered as representing their State only “for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited”. As they were competent only to adopt the text of a treaty concluded by the States which had accredited them, it would be advisable to replace the last part of draft article 7, subparagraph 2 (d), by the words “for the purpose of adopting the text of a treaty between the accrediting States and that organization”.

3. Similarly, in the case provided for in article 7, subparagraph 2 (e), heads of permanent missions to an international organization should only be considered as representing their State for the purpose of signing or signing *ad referendum* a treaty “between the accrediting States and that organization” and the clause should be amended accordingly.

4. Under article 7, subparagraph 2 (c), heads of delegations of States to an organ of an international organization were considered as representing their State “for the purpose of adopting the text of a treaty between one or more States and that organization”. If the Commission adopted draft article 5, which the Drafting Committee had prepared after the previous meeting and which was modelled on article 5 of the Vienna Convention, the last part of article 7, subparagraph 2 (c), should be replaced by the words “for the purpose of adopting the text of a treaty within that organization”.

5. The phrase “The adoption of the text of a treaty between States and one or more international organizations at an international conference of States in which one or more international organizations participate”, at the beginning of article 9, paragraph 2, could be replaced by “The adoption of the text of a treaty between States and international organizations at an international conference of States in which international organizations participate”, wording which would clearly cover cases in which only one international organization was involved.

6. If that amendment were adopted, it would be necessary to specify that the international conference contemplated under article 7, subparagraph 2 (b) was an international conference of States in which international organizations participated, and even if it were not adopted, to specify that it was an international conference of States in which one or more organizations participated. In the latter part of the provision, the words “between one or more States” should be replaced by “between States”, in line with the wording of article 9, paragraph 2, the words “and one or more international organizations” being replaced, if necessary, by “and international organizations”.

7. As to article 10, subparagraph 2 (b), he wondered whether it would be advisable to provide for the unlikely case of the adoption of a treaty of a universal character by international organizations. In that connection, he pointed out that article 9, paragraph 2, laid down a procedural rule for the adoption of the text

<sup>1</sup> Resumed from the 1681st meeting.

<sup>2</sup> See 1644th meeting, footnote 3.

of a treaty at a conference of States in which international organizations participated but that there was no corresponding rule for the adoption of the text of a treaty by international organizations alone. Provision could be made for the case of a conference involving participation solely by international organizations, but it would seem that the special case of the adoption of a treaty of a universal character by organizations could be omitted and that the words at the end of the subparagraph, "or of the final act of a conference incorporating the text", could therefore be deleted.

8. In the light of articles 19 to 23, and particularly article 20, the last part of article 17, paragraph 1, should be amended to read: "or if the other contracting States and contracting organizations or, as the case may be, the other contracting organizations and contracting States, so agree". In the first instance, the situation was viewed from the standpoint of a State, and in the second, from that of an international organization.

9. Referring to the definition of the term "full powers" in article 2, subparagraph 1 (c), he said that the words "between one or more States and one or more international organizations" could be deleted, since the concept of full powers had nothing to do with the parties to the treaty in connection with which the full powers were conferred. The treaty could be one between any subjects of international law, whether one or more States, one or more international organizations, or other entities regarded as subjects of international law.

10. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee), suggested that there should be no discussion on the points of drafting raised by Mr. Ushakov, more particularly because the Special Rapporteur on the topic was absent.

11. The articles to which Mr. Ushakov had referred could be remitted to the Drafting Committee, which could re-examine them in the presence of the Special Rapporteur. There was no reason why the Commission should not refer to the Drafting Committee articles which it had already adopted, so that the Committee could make improvements in matters of form.

*It was so decided.*

**State responsibility (continued)\* (A/CN.4/344)**

[Item 4 of the agenda]

***The content, forms and degrees of international responsibility (Part 2 of the draft articles) (continued)***

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

**ARTICLES 4 AND 5<sup>3</sup> (continued)**

12. Mr. RIPHAGEN (Special Rapporteur) said that, before formally introducing articles 4 and 5 (A/CN.4/344, para. 164), he wished to remind the Commission of a number of general remarks he had made when it had discussed articles 1 to 3.

13. First, he had said that State responsibility as a legal notion was only one link in the realization of the requirements of the law. Second, he had pointed out that a particular wrongful act was only one among the many elements that comprised a particular situation. Third, he had observed that the administration of justice, especially in the international sphere, often took the form of an attempt to restore the balance disturbed by a wrongful act, rather than to bring about the situation to which the law in question had been intended to give rise. Fourth, he had noted that the enormous variety of "wrongful acts"—ranging, for example, from an incidental breach of a technical obligation to intentional aggression—made some degree of categorization inevitable.

14. Articles 4 and 5 dealt with what he had termed the "first parameter" of State responsibility, namely, the new obligations of the author State which had committed an internationally wrongful act (see A/CN.4/344, para. 7). As he hoped his report made clear, that parameter could not be viewed in isolation. For example, it might well be that no consequences would ensue for the perpetrator of a wrongful act if the State affected by the act made no request for redress. More important, however, the first parameter was linked to the later part of the draft articles by the fact that it specified what the author State must do if it was to escape the legal consequences described in the second and third parameters.

15. Broadly speaking, articles 4 and 5 made two kinds of distinction: between "belated performance" and "substitute performance" of an obligation, and between two types of wrongful acts. The concept of "belated performance" of a primary obligation implied voluntary performance of the obligation by the author State through three forms of action: the stopping of the breach, the application of local remedies, and what Mr. Reuter had termed "the most perfect performance possible of the original obligation" (see 1666th meeting, para. 24)—in other words, re-establishment of the situation as it had existed before the breach. "Substitute performance" entailed reparation *lato sensu*, whether *ex nunc*, *ex tunc* or *ex ante*.

16. By dealing with the articles in terms of different types of wrongful acts, he had made an initial attempt at categorizing such acts, a categorization which was justified by practice, jurisprudence and doctrine, and which the Commission had already accepted in connection with Part 1 of the draft. Basically, the categorization involved a division of wrongful acts into

\* Resumed from the 1670th meeting.

<sup>3</sup> For texts, see 1666th meeting, para. 9.

acts that directly infringed the rights of a foreign State and acts that infringed those rights only indirectly, through the person of the foreign State's nationals. However, the division between the two types of acts was not necessarily absolute: the true intention of a State's breach of an obligation towards aliens might be to harm the interests of the aliens' State of origin, in which case the act would then also be a breach of an obligation towards a State. Similarly, if a State breached an obligation to accord certain treatment to aliens, it might also act in breach of another obligation to observe internationally recognized "minimum standards"—for example, because it failed to provide those aliens with effective local remedies. The draft articles must take account of such cases of coincident breaches.

17. As an extension of their categorization of wrongful acts, articles 4 and 5 represented an attempt to introduce an element of "proportionality" between wrongful acts and their consequences for the author State. However, he had deliberately refrained from mentioning the concept of proportionality in those provisions and considered that it should not be cited anywhere in Part 2. It underlay the draft, but it would not be appropriate for the Commission to enunciate it in the form of a rule.

18. Turning to the actual text of the articles, he said that article 4 began with a reference to article 5 because each article dealt with a different type of obligation. Paragraph 1 of article 4 detailed the successive stages of belated performance of an obligation. Thus, a State must first stop the breach and take action to "prevent [its] continuing effects", a concept borrowed from Part 1 of the draft, and then apply such remedies as were possible under its internal law. The reference to article 22 of Part 1 of the draft<sup>4</sup> was intended to show that, whereas, in a case of injury to aliens, it was those aliens who must take the initiative in seeking the benefit of the local remedies, in a case of direct damage to the interests of another State—for example, in an attack upon one of its diplomatic missions—it was the author State itself which must automatically extend those remedies. The rule stated in subparagraph (c) was, as could be seen from his report, the most controversial.

19. Paragraph 2 provided for substitute performance of the obligation through the payment of a sum of money if it proved materially impossible for the author State to apply the provisions of paragraph 1. Since the amount of the payment could only be determined in the light of the specific damage caused, he had merely reproduced the very general wording used in the judgement of the Permanent International Court of Justice in the *Factory at Chorzow* case (see A/CN.4/344, para. 37).

20. Paragraph 3 provided for substitute performance *ex ante*. He was uncertain whether paragraphs 2 and 3

should always go together, and had included the latter provision simply because material impossibility to comply with paragraph 1 would, after all, be the fault of the author State, and he did not think that payment of damages by that State would be sufficient, particularly if the harm suffered by the other State was not of the kind that could be offset by monetary payment.

21. With regard to article 5, paragraph 1, it should be noted that article 22 of Part 1 of the draft stipulated that local remedies must have been exhausted before a damaging act could be considered a wrongful act of a State. Since the wrongful act would have occurred within the domestic jurisdiction of the author State, it was justifiable to give that State the option of re-establishing the situation that had existed before the breach or of paying monetary compensation. He favoured the incorporation in the text of the words "within its jurisdiction", but had placed them within brackets in deference to the members of the Commission who had expressed the opposite view during the lengthy discussions on that subject in connection with article 22 of Part 1 of the draft.

22. Paragraph 2 of article 5 covered cases in which the wrongful conduct against aliens was aggravated by an intention to harm their State of origin or by the non-availability or inadequacy of local remedies. In his opinion, the author State should once again be given a choice of procedure in such circumstances, but if it opted to act in conformity with article 4, paragraph 2, it should also be required to comply with article 4, paragraph 3, since it would not have been materially impossible for it to repair the breach.

*The meeting rose at 11.25 a.m.*

## 1683rd MEETING

*Thursday, 2 July 1981, at 10.10 a.m.*

*Chairman: Mr. Doudou THIAM*

*Present: Mr. Barboza, Mr. Calle y Calle, Mr. Diaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.*

### Relations with the International Court of Justice

1. The CHAIRMAN said that the Commission was greatly honoured to welcome Mr. El-Erian, Member of the International Court of Justice. He asked Mr. El-Erian to convey the Commission's greetings and good wishes to the Members of the Court and the Registrar.

2. Mr. EL-ERIAN, representing the Court in the absence of Sir Humphrey Waldock, thanked the

<sup>4</sup> See 1666th meeting, footnote 3.

Commission for the opportunity to participate in its work.

3. In a letter to the Chairman of the Commission, Sir Humphrey, who was unable to attend the meetings in person, had stressed the significance of the Commission's codification work for the judicial activity of the Court. The Court valued, and wished to maintain, its strong links with the Commission.

4. In its latest judgements and advisory opinions, the Court had applied and interpreted a number of conventions concluded on the basis of draft articles prepared by the Commission. In one judgement concerning diplomatic and consular immunity,<sup>1</sup> the Court had based itself on the rules clearly formulated in the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations. The Court had also examined with great care and appreciation the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. In an advisory opinion,<sup>2</sup> the Court had made use of the 1969 Vienna Convention on the Law of Treaties.

5. The Commission's work was indeed useful to the Court even before it became an international convention. Article 56 of the Commission's draft articles on treaties concluded between States and international organizations or between international organizations had been relied upon by the Court as illustrative of customary law and a guiding indication of a residual rule.

6. He would be happy to convey the Commission's message to the members of the Court.

#### State responsibility (*continued*) (A/CN.4/344)

[Item 4 of the agenda]

#### *The content, forms and degrees of international responsibility (Part 2 of the draft articles) (continued)*

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

#### ARTICLES 4 AND 5<sup>3</sup> (*continued*)

7. Mr. USHAKOV noted that unlike articles 1 to 3,<sup>4</sup> which dealt with primary rules, articles 4 and 5 were concerned with State responsibility.

8. Turning to article 4, he said that the use of the word "shall" implied the existence of an obligation or

obligations. No beneficiary was specified, although it seemed essential to indicate the holder of the right corresponding to the obligation imposed on the author State of an internationally wrongful act. The problem was a very general one and did not arise in respect of Part 1 of the draft articles, since the international responsibility of the State was a result of its wrongful act whoever might be the beneficiary of the obligation.

9. In Part 2, on the other hand, it was important to know the beneficiary of the obligation, the subject of international law, in order to determine the parties towards which the State had an obligation. In his opinion, the Commission should limit the scope of the articles to internationally wrongful acts constituted by the breach of an obligation in respect of which another State was the beneficiary. It was desirable that the Commission should indicate its position on that point clearly, beginning with the initial provisions of Part 2 of the draft.

10. If the Commission restricted the scope of its work to inter-State relations, it would have to determine whether the relationship of responsibility existed only between the responsible State and the injured State or whether other States also had an interest in the matter. It seemed obvious that in some cases other States were also affected by the breach of an international obligation, the source of responsibility. It was essential to indicate those cases precisely, and it was certainly not sufficient to say that the State "shall".

11. Furthermore, the limits of responsibility depended on the category of the obligation breached, since it could be an obligation *erga omnes* or an obligation arising, for example, from a bilateral treaty. As the consequences of the breach would be different, the Commission should clarify its views before enunciating rules on the content of responsibility, which would depend on the identity of the beneficiary and the category of the obligation breached. A further difficulty was that article 4 did not make it clear whether the author State of an internationally wrongful act was bound by the secondary rules, i.e. the rules on responsibility, or by the primary rules.

12. The Commission would have to decide on what basis it would enunciate the secondary rules, the wording of which would clearly indicate that they were rules on the effects of responsibility. The approach should, he thought, be the reverse of that adopted in the case of Part 1, which was concerned with the responsibility of the author State for the breach of obligations, whereas Part 2 should look at the problem from the standpoint of the rights of the directly injured State and, where the primary obligations breached were obligations *erga omnes*, other States also.

13. It would be better to begin with a form of words such as "An internationally wrongful act of a State creates for the injured States . . .", and then to state the content of the new rights arising for the injured States

<sup>1</sup> United States Diplomatic and Consular Staff in Tehran, Judgment: *I.C.J. Reports 1980*, p. 3.

<sup>2</sup> Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion; *I.C.J. Reports 1980*, p. 73.

<sup>3</sup> For texts, see 1666th meeting, para. 9.

<sup>4</sup> *Idem*.

from the internationally wrongful act, thus clearly placing the article in the category of secondary rules. It had to be recognized that it was for the injured State to decide whether to invoke or to refuse to invoke the responsibility of the author State.

14. The words “discontinue the act” at the beginning of subparagraph 1 (a) were unsatisfactory. The point was not that the author State should discontinue its wrongful act, but that it should not have committed a wrongful act in the first place. It was odd to say that the State should not continue to act unlawfully when it was under a duty not to embark on unlawful conduct. Without changing the meaning of the provision, it would be more logical to say that the wronged State had the right to call on the responsible State to discontinue its wrongful act.

15. The opening words of paragraph 2, “To the extent that it is materially impossible for the State”, were puzzling, since it was difficult to see how it could be materially impossible for a State to discontinue its unlawful act. Moreover, paragraph 2 contained a very general formula which derived from the notion of *restitutio in integrum*. In his opinion, that notion was only applicable where it was possible to make full restitution of goods. In some situations, restitution was impossible and the injured State or other States had the right to request a return to the *statu quo ante*, i.e. a return to the situation which existed before the breach. However, a concrete situation that no longer existed could not be re-established. Only the legal situation could be re-established, for example, by reinstating a treaty which had been violated, or laws which had been abolished or by restoring a territory to its former status. It was a question of re-establishing a situation in law and not in fact. In addition to the right to *restitutio in integrum*, the injured State had the right to reparation for damage caused by the wrongful act of a State, as well as the right to request the punishment of persons physically responsible for the wrongful act, or an apology or other amends, in the case of insult to the flag, for example.

16. The Commission should draw up a list of the rights arising for the injured State from an internationally wrongful act. Logically, the list should begin with the most serious offences, the international crimes defined in draft article 19 of Part 1,<sup>5</sup> since they created the greatest rights for the victims. The list should go on to enumerate the other offences described as international delicts, and then identify the beneficiary States of the obligations created by the offence and define the meaning of such terms as *restitutio in integrum*, reparation, rule of assessment, etc. The adoption of a general approach of that kind would simplify the drafting of the secondary rules of responsibility.

17. Article 5, subparagraph 2 (a), raised the question of intent. Although it was of little importance in

determining the origin of responsibility to determine whether the obligation was breached “with premeditation”, to borrow the terms used in ordinary criminal law, the existence of attenuating or aggravating circumstances, on the other hand, was relevant to the consequences of responsibility. During its consideration of Part 1, the Commission had already touched on that question, which was of major importance in Part 2 and should therefore be studied in depth.

18. Turning to a more general issue, he believed that an internationally wrongful act affecting individuals, whether natural or juridical persons, did not differ from any other internationally wrongful act of a State. The notion of “local remedies” was not relevant to the consequences of international responsibility, but only to its origin, as was clear from the text of articles 21 and 22 adopted by the Commission. If local remedies had been exhausted (in the case of article 22) or a breach of an international obligation to achieve a specified result had been observed (in the case of article 21), the wrongful act existed, responsibility was entailed, and the fact that the responsibility resulted from a State’s breach of obligations affecting individuals was of little significance. The individuals were not parties to any subsequent proceedings and retired into the background behind the injured State if the responsibility of the author State resulted from breach of one of its international obligations.

19. There would be no justification for the Commission to take up the question of the treatment of aliens and their property at the beginning of Part 2, since it would thus give an unfavourable impression to States by deliberately reverting to an outmoded concept of international responsibility, whereas contemporary international law concentrated its attention in that matter on international crimes and the most serious offences, such as armed aggression. It would therefore be preferable to begin with the most important aspects.

20. Mr. BARBOZA said that, having been unable to participate in the Commission’s previous discussion of the topic, he wished to comment on draft articles 1 to 3.

21. On grounds of logic, he had many misgivings about article 1. Violation of a primary rule was irreversible, and it seemed to be generally recognized that, once breached, a primary obligation could no longer be performed as such. Thus, an obligation to pay a sum of money by a certain date could never be executed if it was not performed within the specified period, since it was impossible to reverse the flux of time. The new obligation arising under the secondary rules was necessarily a different obligation, whatever the category to which it belonged according to the definitions in articles 20 *et seq.* of Part 1.

22. It could not therefore be said that an obligation which had been breached continued to exist. It would surely be better to state that the breach of an obligation

<sup>5</sup> See 1666th meeting, footnote 3.

created an obligation to make reparation. While understanding the arguments put forward by the Special Rapporteur in his report (A/CN.4/344), he thought that the Commission's approach should be above all strictly logical.

23. Article 2 was acceptable in principle, subject to the comments made, particularly, by Mr. Reuter and Mr. Aldrich at the 1669th meeting.

24. Article 3 seemed to express an undeniable truth, but it would be better to say that a breach of an international obligation had no consequences other than those provided for in the draft articles.

25. Article 4 was satisfactory as a whole. Paragraph 1 seemed to refer to the case of *restitutio in integrum*, as was confirmed by the wording of subparagraph (c). He was not, however, certain that the list of measures in subparagraphs (a), (b) and (c) was exhaustive and would prefer the provision to be drafted along the same lines in more general terms.

26. The machinery of *restitutio in integrum*, which sought to remove the consequences of a breach, was frequently only an ideal solution, and paragraph 2 dealt with a situation in which such a solution was materially impossible. It therefore provided for the possibility of reparation to restore the balance destroyed by the breach.

27. With regard to paragraph 3, he noted that the injury could have moral aspects, and thought that provision should be made for reparation of the same kind. The provision raised the question of sanctions, which tended to upset the balance between the parties involved for specific reasons. He noted that that concept existed in international law, since the Security Council could decide to apply sanctions—which were, however, different in nature from those that might arise in the draft, since they reflected the public interest of the international community as a whole.

28. Lastly, article 5 seemed to be a special case of application of article 4, since it gave the State the choice between *restitutio in integrum* and reparation in the event of a breach of certain individual obligations. In that connection, he was not in favour of the distinction mentioned by the Special Rapporteur in paragraph 72 of his report.

29. Sir Francis VALLAT said that he wished to raise what he felt was the key question in approaching Part 2 of the draft articles, namely, that of the precise relationship between those articles and the provisions in Part 1 of the draft. While the articles in Part 1 had only been adopted on first reading and were, therefore, open to modification, the form of the articles was the result of very careful and mature reflection within the Commission. It therefore seemed to him that, in devising Part 2 of draft, the Commission would be well advised to build on and work within the framework of Part 1. It would then be easier to adapt Part 2 to any changes that might subsequently be decided in Part 1.

30. To illustrate his point, he observed that the key to the structure of Part 1 was founded in article 3, for the articles in that part were concerned with responsibility, which was linked to the internationally wrongful act of a State. Article 3, then, had two parts, corresponding to the two branches of such an act. In subparagraph (a), every word was of vital importance, and the inclusion of the term “omission” was basic to the presentation of the articles throughout Part 1. In that connection, he wondered whether it was appropriate to refer in Part 2, article 4, paragraph 1, to a State which had “committed an internationally wrongful act”, for the word “committed” automatically implied action, as opposed to omission. In his view, it would be wiser to follow the approach of article 3 Part 1.

31. He noted too that subparagraph (b) of article 3 in Part 1 spoke of conduct constituting “a breach of an international obligation of the State”, and that nowhere in Part 1 was a State described as having committed a breach of an obligation. The whole structure of that part was built on the idea of the attributability to a State of a particular act on the basis of conduct which constituted a breach of an international obligation. In Part 2, however, which was supposed to deal with the legal consequences of an internationally wrongful act, articles 1 to 3 referred to a “breach of an international obligation by a State”. In the circumstances, he doubted whether they could be accepted, as they stood, as statements of general principles.

32. He had a further difficulty with the initial articles of Part 2 in as much as they expressed ideas that were very different in character from those contained in the opening articles of Part 1. The articles in Part 1 laid down, not principles akin to rules, but the basic framework of the part concerned. As Mr. Ushakov had in effect been saying, Part 2 should similarly begin with a statement of its framework. That was all the more important as the present articles 1 to 3 had no logical connection with articles 4 and 5. Such a statement might read:

“An internationally wrongful act of a State gives rise to obligations for that State and to rights for other States in accordance with the provisions of this part of the present articles”.

The reference to “an internationally wrongful act of a State” would be a direct reflection of the terminology of Part 1 of the draft, and the sentence as a whole would provide a starting point for consideration of the obligations and rights arising from the act. The rights, as Mr. Ushakov had remarked, were not necessarily limited to the rights of the injured State, but might include rights of other States.

33. The next article in Part 2 might reflect article 1 of Part 1 and express a point central to the study of the consequences of wrongful acts. It might read:

“An internationally wrongful act of a State does not as such affect for that State the existence of the

obligation of which the conduct attributed to that State constitutes a breach”.

The later articles on compensation, restitution and the like should reflect jurisprudence far more than seemed at present to be the case. For example, it seemed to him that the core of most judgements of the Permanent Court of International Justice and the International Court of Justice had been a declaration of the rights of the claimant State; reparation had been treated as a secondary matter, and restitution had come even further down the scale. He believed that the Commission should follow an inductive approach based on such known practice.

34. With regard to articles 4 and 5, it seemed to him, from an examination of international practice and jurisprudence, that article 19, paragraph 1 of Part 1, however important it might be was not a natural starting point for the Commission's work. Once again, the Commission should begin from matters of which it had experience and on which it could hope to make practical progress. The Commission lacked experience of the application of the rules stated in article 19. Furthermore, the article was closely concerned with the primary obligations of States and, unlike the other articles in the draft, it depended on the consequences of the breach of an obligation that fell within its ambit, a matter which the Commission might have to consider if it was asked to resume work on a draft code of offences against the peace and security of mankind.

35. That being so, his advice was that the Commission should not rush into the examination of the consequences of internationally wrongful acts falling within the scope of article 19, but should, as it usually did, start from the ground floor and work gradually up to the higher storeys, where problems might be more difficult.

36. Mr. RIPHAGEN (Special Rapporteur) agreed with Mr. Ushakov that it was possible to approach the subject-matter of articles 4 and 5 from the point of view of the rights of the injured State and other States, rather than from that of the obligations of the author State. While he himself had not followed that procedure, he had noted, in introducing the articles, that there was a close connection between the various parameters associated with the topic. Mr. Ushakov's point could be at least partly met by adopting an opening article for Part 2 of the kind suggested by Sir Francis Vallat, although that would not resolve the problem of the failure to identify the beneficiaries of the obligations to which Part 2 related. The reason for the omission of such identification was, perhaps, that he had been over-influenced as Special Rapporteur by the abstract approach followed in Part 1 of the draft, which considered obligations virtually as having an independent existence. His personal opinion—and, no doubt, the opinion of many other members of the Commission—was that obligations must always be owed to someone.

37. To his mind, it would be very difficult to deal fully with the question of the identity of the beneficiaries of obligations in the opening articles of Part 2. The problem was a very intricate one, on which he had touched in his preliminary report.<sup>6</sup> While the “directly injured State” and the “other States” might indeed have rights, and even obligations, in respect of an obligation of the author State, whether they did or not was dependent on the nature of the primary obligations applicable to that State and the nature of the breach in question. Even if—as was not his intention—that matter was dealt with at the beginning of Part 2, it would be necessary to discuss the substance of the present articles 4 and 5 in conjunction with it, for the rights of States other than the author State must be described by reflection upon the obligations of that State. As he had already mentioned at the previous meeting, he had begun Part 2 by considering the new obligations of the author State because the draft as a whole dealt with obligations.

38. The answer to Mr. Ushakov's question whether the obligations listed in article 4 were primary or secondary was that they were something in between the two. That was because he himself had distinguished between “belated performance” and “substitute performance” of an obligation: belated performance might be considered “primary”, but substitute performance was obviously “secondary”. Basically, the question was related to the use of particular terminology. Mr. Ushakov's suggestion for the rewording of article 4 seemed to be covered by Sir Francis Vallat's proposal for a new introductory article for Part 2.

39. Mr. Ushakov's contention that article 4, subparagraph 1 (a), was pointless since an author State was inevitably subject to a primary obligation not to continue a wrongful act should be set against the claims that had been advanced in the literature to the effect that an obligation disappeared with its breach, since it could no longer be fulfilled. While he rejected such claims—a debt, for example, was not cancelled simply because it was not paid on the due date—the fact that they had been made justified the retention of the provision in question.

40. As for Mr. Ushakov's contention that article 4, paragraph 2, could not refer to subparagraph 1 (a) of that same article because it was never materially impossible to stop a breach, he himself was not certain that that was always the case. In any event, paragraph 2 referred not only to the first part of paragraph 1, but to all the parts of that paragraph.

41. Mr. Ushakov appeared to believe that “*restitutio in integrum*” was possible only in the case of physical objects and could not be effected in the case of rights. It should be noted in that respect that, while he had used the phrase in his report, he had deliberately refrained from including it in any of his draft articles.

<sup>6</sup> See *Yearbook ... 1980*, vol. II (Part One), document A/CN.4/330.

As could be seen from several references in his report, he agreed with Mr. Ushakov that it was only legal situations that could be re-established. He also agreed with Mr. Ushakov that, in certain circumstances, the author State could be required by another State to punish the person physically responsible for a wrongful act. Indeed, he had also noted in his report that some national legal systems authorized individuals to petition a court for the punishment of a wrongdoer if no State organ took such a step. Both those kinds of situation were covered by article 4, subparagraph 1 (b). Similarly, Mr. Ushakov's reference to the fact that in some instances an apology might be sought was covered by the provisions of article 4, paragraph 3, where the making of an apology was presented as an obligation.

42. On the very important question whether the draft articles should begin by discussing the obligations arising from aggression and proceed to those arising from lesser offences, he believed with Sir Francis Vallat, but for different reasons, that they should in fact do the reverse. In his view, the regime of State responsibility in cases of aggression was very special and was closely linked to the existence of the United Nations and of the Charter of the Organization. He doubted the wisdom of starting with a special regime, rather than raising the general issue of State responsibility; he also doubted, with regard to the special regime in question, whether the Commission could improve on the consensus relating to aggression that was apparent from the Charter of the United Nations, the Definition of Aggression<sup>7</sup> and the other relevant United Nations instruments.

43. With regard to Mr. Ushakov's comment that article 5 gave the impression of a return to the old approach of considering State responsibility only in terms of the treatment of aliens, he wished to emphasize that that was in no way what he had sought in drafting the article. He had mentioned the treatment of aliens merely because of the necessity, when discussing new obligations, to distinguish between types of breach. In point of fact, article 5 denied the existence of an automatic obligation upon the author State to restore the situation that had existed before the breach; whether that approach was acceptable or not, it was certainly not the old approach.

*The meeting rose at 1.05 p.m.*

<sup>7</sup> General Assembly resolution 3314 (XXIX), annex.

## 1684th MEETING

*Friday, 3 July 1981, at 10.10 a.m.*

*Chairman:* Mr. Doudou THIAM

*Present:* Mr. Barboza, Mr. Calle y Calle, Mr. Diaz González, Mr. Francis, Mr. Njenga, Mr. Quentin-

Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

### State responsibility (*concluded*) (A/CN.4/344)

[Item 4 of the agenda]

#### *The content, forms and degrees of international responsibility (Part 2 of the draft articles) (continued)*

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*concluded*)

#### ARTICLES 4 AND 5<sup>1</sup> (*concluded*)

1. Mr. QUENTIN-BAXTER said that, in the light of applying the first of the Special Rapporteur's three suggested parameters (see A/CN.4/344, para. 7), articles 4 and 5 could be regarded as a test bore which went right through the strata of the subject.

2. In regard to the substance of those two articles, he had serious doubts about the content of article 4, subparagraph 1 (b), since article 22 of Part 1 of the draft,<sup>2</sup> which dealt with exhaustion of local remedies, was a very important example of the broader obligation under article 21, paragraph 2. That provision allowed a State which had failed in its first line of conduct an opportunity to substitute conduct before the question of breach of the obligation was settled. He would therefore have thought that article 22 would always be applied before an internationally wrongful act was deemed to have occurred, and he wondered why it was necessary to refer to that article in a provision dealing with the consequences of the breach of the obligation.

3. He also had some doubts about the phrase at the end of that same subparagraph 1 (b), which read "such remedies as are provided for in, or admitted under, its internal law": it seemed at least to suggest that the inadequacies of internal law could be used as an excuse for failure to comply with obligations under international law. In general, the limitations of internal law were never an answer to the duties that arose under international law, and he therefore failed to see the need for such a reference in the context in question.

4. He wondered whether the obligation to re-establish the situation as it had existed before the breach should be modified in, and only in, the particular case of the treatment of aliens, dealt with in article 5. He appreciated that the Special Rapporteur's line of reasoning was based on a large body of State practice, but he considered that the balance between restitution and compensation should be stated in somewhat more general terms. He noted in that connection that under article 5 the Special Rapporteur

<sup>1</sup> For texts, see 1666th meeting, para. 9.

<sup>2</sup> See 1666th meeting, footnote 3.

had provided for two exceptions to the basic rule, one relating to cases in which there was malice and the other to cases where there were no effective remedies under local law. While the first of those two exceptions was readily understandable, it was a little difficult to characterize the extent of the “effective remedies” rule. There might be no effective remedies within the ordinary scope of the judicial branch of the government, but remedies might be offered by the executive or, conceivably, by legislative branches.

5. More generally, he considered that, because the subject was so vast, it was necessary to move into detail by degrees and to be careful not to deal too quickly with rules that were stated with great particularity. The experience of Part 1 suggested that it was necessary to maintain a very open texture in the articles on State responsibility. The method of approach required differed entirely from that adopted by a domestic lawyer who, when drawing up a conveyance, sought to close every loophole. The Commission was trying to crystallize perceptions of some generality that would have to be qualified in the context of the draft articles, but also explained in the commentary.

6. He doubted the need for article 4, subparagraph 1 (a), which seemed to involve a degree of circularity. The mere fact that an act was wrongful meant that it should be discontinued; discontinuance, moreover, was not the only means of avoiding wrongfulness.

7. Lastly, he considered that the Commission’s best approach would be to use the data it gathered from the test bore to see whether more opencast methods should not be applied, at least for the immediate future.

8. Mr. VEROSTA, remarking that at the 1668th meeting he had asked the Special Rapporteur whether the three articles in chapter 1 of Part 2 were exhaustive or whether it might be necessary to add to the general principles when formulating new rights of the injured State and rights of third States, quoted the comments made in that connection by the Special Rapporteur (1668th and 1670th meetings) and Mr. Reuter (1669th meeting).

9. At the present stage of the debate, however, he wondered whether articles 1 to 3 should be maintained, even in an improved draft. Members of the Sixth Committee might share some or most of the doubts voiced by members of the Commission and might be misled by three articles which dealt mainly with the situation of the guilty or other State. In his view, therefore, the Drafting Committee should give serious consideration to the possibility of replacing articles 1 to 3 by an introductory article that would link Part 2 to Part 1 of the draft. The wording proposed by Sir Francis Vallat (1683rd meeting, para 32) would provide a convenient starting point for the Drafting Committee.

10. He noted that, in article 4, paragraph 1, the three new obligations of a State which had committed an

internationally wrongful act were linked by the word “and”; so far as subparagraph 1 (b) was concerned, however, it should be preceded by the word “or”.

11. He further noted that in article 5 the word “option”, used in the sense of a right on the part of the guilty State, appeared twice. Bearing in mind the content of articles 1 to 3, that created the impression that the Commission was mainly interested in the position of the wrongdoer. It was unfortunate that the draft article dealt first with the wrongdoer, then with new obligations of the wrongdoer and, lastly, with the option open to the wrongdoer. It would have been preferable to start with the rights of the injured State, which corresponded to the obligations of the wrongdoer. In that connection, he observed that lawyers would do well to avoid the word “parameter”, which was more appropriate in the context of sociology.

12. He had understood the Special Rapporteur to say that chapter III, concerning the new rights of the injured State, might involve no more than a suspension of obligations. He would appreciate it if his understanding could be confirmed.

13. If the articles were maintained as drafted, it should be made clear in the commentary that no attempt was being made to draw up a “Magna Carta” for the State that had committed the wrongful act.

14. On two points of drafting, he said he considered that article 4 should not start with a reference to article 5. If such a reference was really necessary, it should be placed at the end of article 4, possibly in a separate paragraph. He also considered that the words “has the option”, in article 5, paragraph 1, should be replaced by the word “may”, leaving it to be explained in the commentary that what was involved was an option for the State that committed the internationally wrongful act.

15. Mr. USHAKOV, supplementing his statement made at the previous meeting, said that of all the rights of the injured State, the most important was undoubtedly the right to take countermeasures in consequence of an internationally wrongful act. Draft article 30 of Part 1, which was devoted to countermeasures, concerned not only international crimes, but also international delicts. Whatever the internationally wrongful act, the injured State could therefore take countermeasures—provided, of course, that they were legitimate under international law. Countermeasures could be taken as soon as an internationally wrongful act had been committed and in advance of any request for *restitutio in integrum* or for reparation. The Special Rapporteur did not seem to have taken that right into consideration in his listing of the rights of the injured State. In doctrine, however, the injured State, and possibly other States, had the right to take countermeasures, which were sometimes described as measures of retaliation or unarmed reprisals. It followed that, even if the Commission confined itself in the first instance to international delicts, it would have

to make allowance, on the basis of doctrine as well as of States practice and international jurisprudence, for the right to take countermeasures.

16. Mr. YANKOV, agreeing that the subject under discussion called for careful study in all its facets, said he greatly appreciated the theoretical value of the suggestions which the Special Rapporteur had made. His initial thought on reading a set of draft articles, however, was always: How would Governments react? Would they feel that the rules were too general and theoretical to be of practical use to diplomats and practising lawyers? He raised the point not out of any wish to criticise, but as a general warning. In future, for example, it might be desirable to concentrate more on State practice than on analyses of a purely theoretical nature. It would also be useful to take account of the work being pursued by other bodies concerned with codification.

17. On specific points, he said that he endorsed, in particular, the views set forth in paragraphs 82 to 86 of the Special Rapporteur's report (A/CN.4/344). He also agreed on the need to link Parts 1 and 2 of the draft. He considered, however, that the reference in article 4, subparagraph 1 (a), to release and return of persons and objects held through the internationally wrongful act was a somewhat restrictive illustration of an otherwise very general rule. In his view, there were other equally important aspects of the wrongful act that might likewise deserve emphasis, so that if one such aspect was spelt out, it might be thought necessary to enumerate them all.

18. The same point arose in connection with the three-step approach provided for under articles 4 and 5—the three steps being stopping the breach, reparation, and restitution or re-establishment of the situation as it had existed before the breach. The question was whether release or return of persons and objects held through the breach might not be interpreted, in certain circumstances, as a re-establishment of the situation as it had existed before that breach.

19. Mr. SUCHARITKUL said that he agreed entirely with the Special Rapporteur regarding the need for a general approach not only to articles 1, 2 and 3, but also to articles 4 and 5. Paragraph 1 of article 4, in particular, called for careful consideration, since its wording had far-reaching implications. As he saw the matter, the obligations of a State which committed an internationally wrongful act could be divided into three types in terms of time: present obligations, past obligations, and future or continuing obligations.

20. Applying that approach to article 4, subparagraph 1 (a), which laid down a general obligation to discontinue the wrongful act, he would cite as an example of the first type of obligation one that arose out of an isolated act such as the killing of hostages. In such a case, the requirement under subparagraph 1 (a) would have little meaning if the hostages had already been killed, although to discontinue the wrongful act

could be interpreted to mean not killing any more hostages, in which case the obligation would be one for a future obligation. As an example of the second type of obligation he would cite the obligation that arose out of violation of air space. In such cases, the wrongful act was committed at the moment of the intrusion into the air space. It was not always easy to discontinue such an act immediately. Moreover, once the aircraft left the air space of a territory, there was no longer any violation and, consequently, discontinuance was no longer possible. Thirdly, an example of a future or continuing obligation was holding hostages or occupying diplomatic premises.

21. Bearing in mind those three types of obligation, he agreed fully that it was necessary to apply general principles, rather than enumerate all possible cases.

22. The concept of apology, provided for in article 4, paragraph 3, was also in the nature of a future obligation, inasmuch as it amounted to an assurance that there would be no recurrence of the wrongdoing. He knew of several instances when apologies, incorporating by implication such assurances, had been readily accepted by the wronged State. Apology, therefore, was more than a matter of comity.

23. Lastly, while he thought that there might be some justification for dealing with the treatment of aliens in a separate article, as in article 5, he wondered whether there might not be equal justification for dealing separately with other types of internationally wrongful act. Clearly, treatment of aliens was a classical concept of State responsibility, but the Commission was seeking to cover a much wider field of State responsibility.

24. He also shared the concern voiced regarding the subjective element: damage and compensation, in his view, had to be assessed on the basis of the extent of the damage suffered and damage intended. Consequently, the criterion should be the actual physical consequences suffered, rather than the wrongdoer's intent. In that connection, he noted the reference made to the inherent obligation to submit to, or accept, countermeasures.

25. Mr. REUTER, referring to the comments by Mr. Ushakov, stressed that, by deliberately using an expression as vague as that of "countermeasures" in the title of draft article 30 of Part 1, the Commission had placed itself in the position of having to make that term more specific in Part 2. In its report on the work of the current session, it would have to indicate whether it intended to exclude certain aspects of countermeasures or to deal with them later. The expression "countermeasures", which involved solely the idea of posteriority, denoted all measures taken in consequence of an internationally wrongful act. The problems which it raised were of four kinds.

26. Some of those problems had been examined by the Commission and were regulated in the Vienna

Convention.<sup>3</sup> That instrument indicated which countermeasures could be taken in consequence of a breach of an obligation arising from a treaty. However, no decision had been taken with regard to customary obligations, and it was perhaps time for the Commission to take up that matter.

27. Other problems related to the concept of equivalence, which made possible, in the event of a breach of an obligation arising from a treaty, the adoption of measures other than those authorized by the treaty. Still further problems arose from the fact that the concept of equivalence was rarely respected in practice. All too often, the State which took countermeasures acted with the idea of constraining *restitutio in integrum*. For example, could a State, in order to ensure observance of an air transport agreement, take measures which, while remaining within the framework of that agreement, were accompanied by coercion? In his opinion, such a situation did not involve responsibility, but the power to exercise coercion, particularly armed coercion. If the Commission shared his opinion, it should state so explicitly in its report.

28. Lastly, countermeasures posed the serious problem of penalty. In Part 1 of the draft articles, the Commission had taken the course of recognizing, in respect of responsibility, genuine criminal responsibility. In that connection, he observed that the concept of punishment deliberately decided upon *ex post facto* must be distinguished from the concept of coercion, which could go beyond self-defence. While it might be true that a State could disarm an aggressor in the heat of the action, could it impose a penalty on that aggressor after the event? By admitting the existence of international crimes, and perhaps even international delicts, the Commission seemed to be moving towards the acceptance of such a possibility.

29. Although he had not yet dealt with those questions, the Special Rapporteur no doubt had them in mind and intended to take them up at a subsequent stage. However, it might be appropriate for the Commission to refer to them without delay in its report.

30. Mr. USHAKOV stressed that the question of proportionality arose only in the case of countermeasures, and not in that of *restitutio in integrum* or reparation.

31. The rights of the injured State (and possibly of other States) should include the right to demand guarantees against the repetition of an internationally wrongful act, whether that act was a crime or international delict.

32. Mr. RIPHAGEN (Special Rapporteur), summing up the discussion, recalled that, in his preliminary report,<sup>4</sup> he had made clear his intention to deal

separately with the various aspects of the topic covered in Part 2 of the draft articles. Draft articles 4 and 5 were concerned not with the new rights of other States, but with the new obligations of the author State. Consequently, the references made by some members of the Commission to the question of countermeasures were not yet relevant, since that aspect was to be dealt with later.

33. As to the possibility of dealing with the question of countermeasures first, he saw no difficulty in re-drafting articles 4 and 5 to indicate what other States could require of the State which was the author of a wrongful act. However, to do so, it would first be necessary to define what were the obligations of the author State. Moreover, the draft articles would still have to deal with the question what the author State could do to avoid countermeasures.

34. Referring to observations made concerning draft article 4, subparagraph 1 (b), he said that the belated or substitute performance of an international obligation could not be equated with the equivalent result referred to in article 22 of Part 1 of the draft articles, although there was inevitably some overlapping.

35. A number of speakers had referred to the need for more references to practice and jurisprudence. As he had explained in paragraph 105 of his report, he had found that the past reports of the Commission on the topic contained a wealth of jurisprudence which he had considered it unnecessary to repeat. Moreover, very little jurisprudence existed concerning the questions dealt with in draft articles 4 and 5.

36. In referring to draft article 1, Mr. Barboza (1683rd meeting) had expressed some doubts as to whether an obligation could survive a wrongful act. It should be noted in that connection that, even in the event of the breach of an obligation to pay an amount of money by a certain date, the obligation to pay still existed.

37. With regard to draft article 4, subparagraph 1 (c), it was doubtful whether a standard as sweeping as that applied in the *Factory in Chorzow* case (see A/CN.4/344, para. 37) could be considered adequate in terms of modern international law.

38. Concerning the question of reparation as substitute performance of an obligation, he said that it might be somewhat optimistic to believe that a perfect balance could be achieved. Moreover, while he agreed that the question of the real sanctions which might be applied should be dealt with, it would not be appropriate to do so in the context of the obligations of the author State.

39. With regard to draft article 5, he said that he did not regard the re-establishment of the situation that had existed prior to the breach as a general obligation of the author State, but simply as a qualified obligation existing in cases relating to the treatment of aliens. Indeed, in practice, international tribunals most fre-

<sup>3</sup> *Ibid*, footnote 4.

<sup>4</sup> *Yearbook* ... 1980, vol. II (Part One), document A/CN.4/330.

quently called for reparations, rather than the re-establishment of the situation as it had existed before the breach.

40. He had already referred, at the previous meeting, to Sir Francis Vallat's proposal concerning the drafting of an article that would serve as a link between Parts 1 and 2 of the draft. That proposal was also consistent with the approach advocated by Mr. Ushakov, and should be accorded careful consideration. As he understood it, the proposed article was not to replace the existing draft articles 1 to 3, but was simply to serve as an introduction to them.

41. Referring to observations made by Mr. Quentin-Baxter concerning draft articles 4 and 5, he said that some overlapping between the three parameters proposed was inevitable.

42. With regard to the question of an analogy with draft article 22 of Part 1, he said that in substance there was a link between the obligation to exhaust local remedies and the typical nature of obligations relating to the treatment of aliens.

43. Referring to article 4, subparagraph 1 (b), he said that, while a State could certainly not invoke its internal law as an excuse for failure to perform its obligations, it was nevertheless helpful, when an obligation had been breached, if States could apply such remedies as were provided for within the framework of their own legal systems.

44. Without being presented with specific examples, it was difficult to determine whether the obligation to re-establish the situation as it had existed before the breach disappeared only in the cases mentioned in draft article 5. If there were other cases in which the provisions of article 4, subparagraph 1 (c), were not applicable, they could certainly be mentioned.

45. With regard to Mr. Quentin-Baxter's observations concerning article 5, subparagraph 2 (b), he said that he knew of no case in which a State had been required to enact legislative measures with retroactive effect.

46. Finally, Mr. Quentin-Baxter had correctly noted that article 4, subparagraph 1 (a), did not refer to remedies. He had in fact stated as much in his report. Although some authors referred to the practice of discontinuation of a wrongful act as an example of *restitutio in integrum*, the two generally did not coincide.

47. Referring to observations made by Mr. Verosta, he said that he still held the view that draft articles 1 to 3, if drafted in the manner proposed by Mr. Aldrich (1669th meeting, paras. 5 and 6), could serve a useful purpose as an introduction to Part 2.

48. With regard to draft article 4, subparagraphs 1 (a) and (b), he said that even if the breach was discontinued there could be consequences which required reparation, or even the re-establishment of the

situation as it had existed before the breach. In many cases, there were three quite separate steps to be taken.

49. Referring to observations made by Mr. Ushakov and Mr. Reuter concerning the question of counter-measures, he said that, as he had stated earlier, that question was to be taken up at a later stage. He believed that there was much to be said for a step-by-step approach to the topic.

50. Mr. Yankov had criticized the abstract approach to Part 2 of the draft articles. However, a similar approach had been adopted to Part 1. The Commission should endeavour to strike a balance between practice and theory, if the articles were to have any practical value.

51. Mr. Yankov had also wondered whether subparagraph 1 (a) of article 4 might not be too restrictive, and whether it had any place in that article. The answer to the second question depended on the approach adopted to the draft. There could be no doubt that the injured State had the right to call for a discontinuation of the breach. Moreover, the subparagraph in question was prevented from being excessively restrictive by the inclusion of the words "and prevent continuing effects of such act".

52. Mr. Sucharitkul had presented an interesting analysis of the time element of international obligations, with which he fully agreed.

53. Referring to other observations made by Mr. Sucharitkul, he said that the provision of an apology to the injured State was referred to extensively both in literature and in jurisprudence as one of the consequences of an international wrongful act.

54. The question whether the provisions of draft article 5 could cover types of international obligation other than those concerning the treatment of aliens could be taken up in the Drafting Committee.

55. The intent of the author State was important in the cases referred to in draft article 5. A clear distinction existed between an incidental violation of an obligation concerning the treatment of aliens by a State, which involved no deliberate intention to cause harm to another State, and the deliberate massacre of all the nationals of another State.

56. He proposed that draft articles 4 and 5 should be referred to the Drafting Committee.

57. Sir Francis VALLAT said that, in suggesting the insertion of a new introductory article, he had not intended to exclude the possibility of incorporating in the draft provisions based on draft articles 1 to 3. He did, however, have serious doubts as to the utility of including draft articles 2 and 3, at least in their current form.

58. Mr. VEROSTA, referring to his earlier statement, said that he had simply wondered whether any analogous norms discovered in the course of further research on the topic would be inserted in Part 2 of the

draft articles or whether it might not be more appropriate to place them in Part 1.

59. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer draft articles 4 and 5 to the Drafting Committee.

*It was so decided.*

*The meeting rose at 1 p.m.*

## 1685th MEETING

*Monday, 6 July 1981, at 3.30 p.m.*

*Chairman: Mr. Doudou THIAM*

*Present: Mr. Aldrich, Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitul, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.*

### International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/346 and Add.1 and 2)

[Item 5 of the agenda]

#### DRAFT ARTICLE SUBMITTED BY THE SPECIAL RAPPORTEUR

#### ARTICLE 1 (Scope of these articles)

1. The CHAIRMAN invited the Special Rapporteur to introduce draft article 1 (A/CN.4/346 and Add.1 and 2, para. 93), which read:

##### *Article 1. Scope of these articles*

*These articles apply when:*

*(a) activities undertaken within the territory or jurisdiction of a State give rise, beyond the territory of that State, to actual or potential loss or injury to another State or its nationals; and*

*(b) independently of these articles, the State within whose territory or jurisdiction the activities are undertaken has, in relation to those activities, obligations which correspond to legally protected interests of that other State.*

2. Mr. QUENTIN-BAXTER (Special Rapporteur) said that in preparing his second report (A/CN.4/346 and Add.1 and 2) he had been guided by the Commission's view, which was supported by the Sixth Committee, that the topic should be dealt with in absolutely general terms.

3. One of the most important bases established at the preceding session of the Commission had been that the

topic should be placed in the field of primary rules.<sup>1</sup> The many difficulties experienced by writers on the subject could be attributed to the lack of a distinction between primary and secondary rules. Usually the questions raised had been seen as involving a type of responsibility which was completely foreign to the classical rules of State responsibility. Out of that preconception had grown a very significant doctrinal impasse, in which the notion of strict liability had been seen as competing with the classical rules of State responsibility. In that regard, the distinctions emanating from Part 1 of the draft articles on State responsibility<sup>2</sup> had made it possible to reduce the real problem of strict liability to a more moderate perspective. Where the nature of an activity was such that the State in which the activity took place ought to have been aware of the possibility of injurious consequences arising out of the activity, or where representations had been made to it by the representatives of other States concerning such injurious consequences, the problem of strict liability scarcely arose. The problem of strict liability was limited to small categories of cases in which damage could not be foreseen and where wrongfulness was precluded, or in which no amount of care on the part of the State concerned could have prevented the occurrence of injurious consequences. However, those were exceptional cases which had, wrongly, been allowed to obscure much larger issues.

4. In the contemporary world, situations in which an activity conducted in one State produced harmful transboundary consequences were common, and it was more difficult than in the past to control or characterize such activities or to define the rights of the parties involved. Some writers on the topic considered it of paramount importance to maintain the traditional view that States were responsible only for consequences that were intended or foreseen and were still allowed to take place, while others, under the influence of municipal law, supported the concept of strict liability, under which certain activities were considered, by their very nature, as giving rise to consequences so harmful that any State allowing them to take place must accept responsibility for those consequences. However, that doctrine was not easily reconciled with the accepted doctrines of State responsibility. There had, therefore, been the strongest possible inducement to admit the doctrine, if at all, only in a very limited number of situations.

5. Great difficulty had been encountered in finding logically satisfying criteria to justify the abnormal admission of the doctrine. Those opposed to it saw it as an assertion of the view that all harm caused across a frontier was wrongful. However, Principle 21 of the Declaration of the United Nations Conference on the Human Environment (see A/CN.4/346 and Add.1

<sup>1</sup> See *Yearbook . . . 1980*, vol. II (Part Two), p. 160, para. 138.

<sup>2</sup> *Ibid.*, pp. 30 *et seq.*

and 2, para. 37) and the arbitral award in the *Trail Smelter* case (*ibid.*, paras. 22 *et seq.*) and the judgment of the International Court of Justice in the *Corfu Channel* case (*ibid.*, para. 37) had been subjected to doctrinal analysis, and it had usually been felt that the statement that all harm was wrongful was not to be interpreted absolutely.

6. Once it had been accepted that not all loss or injury caused beyond national frontiers to another State or its nationals was automatically wrongful, the nature of the problem changed, and it became necessary to determine what harm was wrongful and what happened in cases in which the harm caused was not sufficient to be considered wrongful. It would be a very curious reflection on customary international law if it were to provide merely that the harm must lie where it fell, except where otherwise stipulated in special arrangements. Consequently, in his report he had given pride of place not to the concept of strict liability, but to the question of the standard to be applied in judging situations arising from the exercise of legitimate activities which, in particular circumstances, caused conflict. To reach a judgement solely on the basis of the quality of the activity of a State would be tantamount to concluding that, as long as the activity was not prohibited and as long as it was carried out with due care, the State was without responsibility for any harmful consequences. That attitude could be tempered, in particular, by placing emphasis on the concept of rising standard of care. If in determining the care required it became necessary to consider the effects of one State's actions on another State, then the position of the acting State was no longer the sole consideration. The acting State must, in discharging due care, take account of the interests of the other State. If, on the other hand, a judgement was to be made on the basis of a violation of sovereignty the exactly opposite view was arrived at. That view was reflected in the position of the Government of the United States of America in the *Trail Smelter* case.

7. Between those two extremes lay the procedure of balancing of interests, in which every real interest was taken into account. That would mean neither that the freedom of States to conduct activities within their own borders must always prevail over the harmful consequences caused beyond those borders, nor that States were always liable for transboundary harm generated by activities conducted within their borders. There were numerous examples of regimes, many of them developed since the Second World War, which relied on a balance of factors. In some regimes for dealing with cases of the flow of rivers and non-navigable watercourses, those factors were set out in detail, and always with the proviso that they were not exhaustive, so that it became necessary for States to adjust factors. A similar approach should be adopted in situations that involved both the right of a sovereign State to be free to undertake or permit activities which it considered profitable within its own borders and the right of other States to be free of the threat of activities

which might give rise to harmful consequences. Consequently, some kind of balancing test appeared to be called for.

8. However, such a test could not achieve a true balance of interests if what was to be permitted or not permitted depended solely on the fixing of a point of wrongfulness below which the acting State would be free of all responsibility and above which it would be held responsible for a breach of an obligation. Such a situation would not be particularly conducive to the development of rules for the regulation of activities that caused transboundary harm, but would lead to a situation in which individual sovereign States insisted on their own right to assess the degree of harm that would render an activity unlawful. Naturally, the assessments of acting States and harmed States would differ. If in dealing with such situations States were prepared to accept that it might not, for the time being, be scientifically, technically or economically feasible really to rid an activity of all possibility of harmful consequences, it might be possible to provide for some measures of prevention in order to alleviate the possibility of harmful consequences, or for a system of compensatory benefits for the activities of the harmed State, or, in marginal cases, for a scheme of compensation.

9. Generally, States did not ask other States to carry their duty of prevention to the point where the activity in question was crippled. That was particularly apparent in conventions regulating the carriage of oil by sea, where the need to place some onus on the carrier was balanced by recognition that, beyond a certain level, the cost of prevention would tend to cripple an essential public service.

10. In his report he had suggested that, once it was recognized that not all harm was wrongful, it must also be recognized that any substantial harm was not legally negligible and created an interest of a kind which was always recognized when questions of transboundary harm were arbitrated. If the content of an obligation was then to be considered, account must be taken, in order to assess how much harm was permissible, of Principle 23 of the Declaration of the United Nations Conference on the Human Environment (see A/CN.4/346 and Add.1 and 2, para. 37).

11. In all cases, the aim should be to seek a balance between freedom and licence. The acting State could not be allowed total freedom—nor could the situation be governed solely by prohibitory rules. The scale of values to be applied was more complex than the single scale of right and wrong. The point at which an activity became wrongful must be determined by reference to the amount of harm that could be tolerated by the community of interests. That point was a shifting one, as was made clear in the major international conventions. The fixing of a point of wrongfulness on a scale also involved establishing the conditions under which an activity could be carried out without entailing wrongfulness. Negotiation of that

kind involved more than a simple scale of right or wrong; it involved achieving a true balance of interests.

12. The basic principle which he had attempted to develop in his report depended on qualifying the scale between right and wrong with the scale of harm and on determining the areas in which wrongfulness, non-wrongfulness and harm could be allowed to go together. That basic principle, if accepted, avoided the necessity of relying on a criterion of abnormality, such as strict liability. The criterion of normality and abnormality, while relevant in certain contexts, was not relevant to the broad topic under consideration, since States tended to regulate their affairs on the basis of a balance of factors. The principle also contained its own safeguards, in that it did not operate as an alternative to the traditional rules of State responsibility, but applied only in areas where such rules existed. It also helped in the application of such rules by breaking them down into smaller and more precise provisions.

13. The basic primary rule of obligation on which the topic hinged—namely, the obligation to protect States from harm arising in the territory of jurisdiction of another State—was essentially the same as that governing the duty of States to negotiate, to disclose information and to take account of representations by other parties. Consequently, the principle might be considered a fairly conservative one.

14. Referring to subparagraph (a) of draft article 1, he said that the term “jurisdiction” was an extension of the term “territory”, in that it applied to ships or expeditions outside the territory of the State concerned and to cases in which the activities of the State could not really be said to have a geographical location. The words “beyond the territory of that State” required the effects of an activity to be transboundary effects, and thus ruled out the difficult question of the treatment of aliens within the territory of a State. Although necessary, the phrase might be inadequate to cover cases such as the *Corfu Channel* case, in which the whole of the harm done and its cause arose in the territory of one State, but where concurrent jurisdictions were the cause of the situation. The phrase “actual or potential loss or injury” had been used because of the difficulty of drawing a line between actual and potential loss or injury. In situations where no action was taken to provide safeguards in respect of a potentially dangerous industry, the danger inherent in the industry might, in itself, amount to loss or injury to the other State. The emphasis placed on loss or injury to another State or its nationals was intended to indicate that the draft articles were not concerned with principles governing the relationship between States and their own nationals.

15. In subparagraph (b), the purpose of the words “independently of these articles” was to make quite clear that what was involved was an auxiliary set of rules which applied to situations where primary rules dealing with harmfulness already existed. The purpose of the current rules was to ensure that those primary

rules were not wholly ineffectual. However, since the principle involved belonged to customary international law, it might be preferable to use the expression “independently of the rules described in these articles”. Finally, the expression “legally protected interests” referred to interests which were entitled to protection.

16. Mr. USHAKOV observed that the words “acts not prohibited by international law” in the title of the English version of the topic had been rendered in French by the words “*activités qui ne sont pas interdites par le droit international*”. If the word “acts” was to have the same meaning as in the draft articles on State responsibility for internationally wrongful acts, it would have to be translated by the word “*faits*”, which denoted both acts and omissions. In his view, the topic under consideration did cover acts and omissions prohibited to States by international law. According to article 1, subparagraph (a), however, the draft articles applied to “activities undertaken within the territory or jurisdiction of a State”; no precise link was established between the activities and the State in question. Consequently, he wondered whether that provision applied to all the activities undertaken within the territory or jurisdiction of a State, irrespective of whether they were conducted by that State or by individuals and whether they were directed against another State or against individuals. In view of the English version of the title of the topic, he even wondered whether account should not be taken of the acts and omissions both of States and of individuals.

17. Mr. QUENTIN-BAXTER agreed that the Commission was concerned with the acts of a State. In the sense used in article 1, however, the word “activities” referred not to the acts of the State itself, but to the activities within the State, or within the jurisdiction or control of the State, in respect of which the State itself had obligations; in other words, it was not intended to describe the activities of the State as such, but rather to describe the circumstances in relation to which the State had obligations. The relation of the State to those obligations was governed by the second limb of the article.

18. In the *Corfu Channel* case, for example, it could not be said that the territorial State undertook the activities that gave rise to loss and damage, but merely that those activities, being within the knowledge of the State, created an obligation upon the State. The obligation in question, of course, related more to an omission than to an act, as was very frequently, though not always, the case.

19. Whether or not the word “jurisdiction” was appropriate was a separate matter. However, the expression “within the territory”, used on its own, would clearly be insufficient, since the State also had responsibility for what its agents did outside its territory—for instance, in relation to expeditions into outer space. That was one context in which the word

“territory” required amplification. Another possible context related to an act that did not have a very obvious geographical location.

20. He assured the Commission that in using the word “activities” he had not had in mind the quality of the act itself. The real issue was what the State did or did not do in relation to such activities.

21. Mr. USHAKOV said that he did not see why account should be taken only of activities within the control or sovereignty of a State, and not of omissions.

22. Mr. QUENTIN-BAXTER said that he had used the word “activities” in relation to what people did within the territory of the State, rather deliberately, since the application of the articles would depend upon the nature of the activity in question. The very fact that the activity was of a kind which could become wrongful at a certain point was what would relate that activity to the topic.

23. Mr. REUTER said that, some hesitation notwithstanding, he wished to make three general comments concerning the task before the Commission.

24. First, the draft articles would, basically, be more akin to a legislative programme than a set of specific technical rules (in the English text, the word “should” would frequently have to be used instead of the word “shall”). There probably were, at the national level, codes which embodied only general principles, but the application of those principles was guaranteed by the courts. The situation was different at the international level, for there were few, if any, international courts. Consequently, when faced with enunciating truly general principles, the Commission must bear in mind just how inadequate its effort would be. Although it would be desirable to elaborate conventions for the topic under consideration, the Commission would not be able to do so, and it should not hesitate to draft texts that appeared as guidelines calling for legislative provisions or agreements rather than as specific legal rules. Conventions on the topic already existed, and there would be more to come. That was probably the Special Rapporteur’s point of view, since he had stressed the need to formulate equitable rules. The task of an international judge who had to settle, on the basis of equity, matters relating to the limits of a continental shelf or the fixing of damages was a formidable one that could only be further complicated by the problems with which the Commission was now dealing. Consequently, even if the Commission produced texts which it described as articles, it must not shrink from proclaiming that all or some of those texts constituted a legislative programme. Although it was true that, as the Special Rapporteur had pointed out, the Commission must formulate principles which would foster the application of rules, the contrary was also true: rules elaborated by States would have to supplement some of the principles enunciated by the Commission.

25. Second, throughout the preparation of the articles in Part 1 of the topic of State responsibility, the

Commission had taken care not to state primary rules. In his view, however, it had not been careful enough when it had drafted provisions on the exhaustion of local remedies. On the other hand, in the articles concerning the topic under consideration, it would be able to enunciate only primary rules, even if it confined itself to general principles. That was because in order to formulate secondary rules it would have to acknowledge the fact that the only source of responsibility without wrongfulness was strict liability. In that connection, the Special Rapporteur had indicated that, in international law, strict liability could not be justified on the grounds of solidarity among States. The concept of ultra-hazard could not be employed because it was not clear enough in international law. To take strict liability as a basis, for the Commission’s present work would be to imply that the articles of Part 1 of the draft on State responsibility were based on some other type of liability. It would then be difficult to say that there existed rules for strict liability in particular.

26. The Special Rapporteur had also pointed out that international law seemed to abhor responsibility without wrongfulness. In the few international conventions relating to that type of responsibility, there were constant references to responsibility for wrongful acts.

27. Third, the main thing that the Special Rapporteur seemed to have in mind was the protection of the environment, an area characterized by the setting of thresholds delimiting the lawful and the wrongful. In that area, certain lawful activities were in the process of becoming wrongful. The problems to which the Special Rapporteur had referred in that connection not only often entailed both types of responsibility, but also concerned particular situations. The draft articles would therefore probably have to comprise two parts: the first embodying very general principles, and the second relating to the application of those principles to environmental problems. In the part relating to general principles, the Commission would have to take care not to give the impression that cases of absolute liability unrelated to technological advances or exceptional modern-day situations could easily arise. In some cases, liability could be clear even when it was not possible to prove a wrongful act by any of the parties involved. If two warships collided on the high seas and no wrongful act could be attributed to either of them, it was the rules relating to the liability of the captains that applied. A case of that kind was of no concern to the Commission.

28. Turning to article 1, he said that the words “obligations which correspond to legally protected interests” towards the end of subparagraph (b) showed clearly that the draft was in fact related to the concept of classical responsibility for internationally wrongful acts. That was, for him, a confirmation of the dual nature of the cases contemplated. The fact that the Special Rapporteur had taken the concept of territory in the broad sense plainly showed that what he had in

mind were problems of pollution, a special area that called for secondary rules. It therefore seemed a foregone conclusion that the Commission would not stay within an abstract framework and that many of the primary rules it would formulate would come close to being secondary rules.

29. Subparagraph (a) of article 1 referred to a physical situation, while subparagraph (b) referred to a legal situation. However, subparagraph (a) stated that the draft articles applied in the event of actual or potential injury. That provision seemed to come more within the scope of subparagraph (b). If reference was made to potential injury, it was because an obligation arose from the fact that the law took so much account of certain legally protected interests that it even prohibited threats to their safety. It was, however, a very serious matter to state as a general rule that endangering legally protected interests was forbidden. In his view, that problem should rather be dealt with in subparagraph (b), since subparagraph (a) applied to material situations while subparagraph (b) added a substantive condition.

30. Last, he shared Mr. Ushakov's view that the title of the topic under consideration should be made less rigid. Most of the activities which the Commission intended to treat were not currently "prohibited by international law", but were on the way to being so prohibited.

*The meeting rose at 6 p.m.*

## 1686th MEETING

*Wednesday, 8 July 1981, at 10.10 a.m.*

*Chairman:* Mr. Doudou THIAM

*Present:* Mr. Aldrich, Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitul, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat, Mr. Yankov.

### **International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/346 and Add.1 and 2)**

[Item 5 of the agenda]

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

**ARTICLE 1 (Scope of these articles)<sup>1</sup> (continued)**

1. Mr. RIPHAGEN joined with other speakers in congratulating the Special Rapporteur on his second

report (A/CN.4/346 and Add.1 and 2). However, he still had some difficulty with regard to the scope and content of the draft articles to be proposed by the Special Rapporteur. In paragraph 10 of his report, the Special Rapporteur appeared to suggest that the Commission was dealing with an inchoate law which had not yet been developed to the point where situations could be appraised in simple terms of right and wrong. In paragraph 78 of the report it was stated that, in the present age of interdependence, the topic could relate to every aspect of human affairs. While he did not disagree with that statement, he wondered whether it was possible to formulate a single set of rules with such wide coverage. Furthermore, while he agreed fully with the statement contained in paragraph 79 of the report that lawyers often regretted that the community of States still lacked the solidarity to respond to the logic of its crowded and disordered situation, it was again difficult to see how that question could be dealt with in one set of articles. The modern world provided examples of situations in which the economic activities of one State had an impact in other States. To meet those situations, rules had been developed which more or less embodied the idea of interdependence and solidarity. While he fully favoured the development of such rules in specific fields of economic intercourse, in which the balancing of interests mentioned by the Special Rapporteur had a role to play, he wondered whether it would be possible to establish an entire set of provisions. It was to be noted, in that regard, that an enormous gap still existed between the solidarity and the consent of States.

2. Since relevant State practice seemed to be directed specifically towards the area of shared resources, it was very difficult to see how the Commission could develop the concept of the balancing of interests in general rules outside the fields of the environment and of recognized ultra-hazardous activities. Even within the framework of the environment, the balancing of interests was a very complicated matter. It entailed determining whether the activity in question was beneficial, what limitations it could sustain and the relative priorities involved. The balancing of interests was a basic goal of all law, which was sometimes worked out in the form of hard and fast rights and obligations and sometimes in some other form. In the draft Convention on the Law of the Sea,<sup>2</sup> for example, the balancing of interests was provided for in terms of hard and fast rights and obligations and also in the form of very vague rules, such as that in article 87. Article 59 of the same text contained a typical provision concerning the balancing of interests, whereby conflicts between the interests of the coastal State and any other State were to be resolved on the basis of equity and in the light of all the relevant circumstances and of the respective importance of the interests involved to the parties concerned and to the international community as a whole, leaving

<sup>1</sup> For text of the article, see 1685th meeting, para. 1.

<sup>2</sup> United Nations, "Draft Convention on the Law of the Sea (Informal text)", A/CONF.62/WP.10/Rev.3 (and Corr.1 and 3).

much to the discretion of the States and international tribunals. There also existed *per se* rules where the balancing of abstract interests led to concrete obligations, such as the obligation not to erect installations in recognized sea-lanes, whether they presented a hazard to navigation or not. Given the wide variety of forms in which the concept of the balancing of interests was expressed, he doubted whether it would be possible to formulate very general rules on the question.

3. Since the balancing of interests was a very difficult and sometimes rather arbitrary undertaking, aids thereto might be expected to be furthest developed in the sphere of internal law. Even there, it was very difficult to balance interests because of the inevitable implication that some uses took precedence over others. The rules of international law might be expected to deal rather with three different types of international obligations: first, the obligation of States to ensure the balance of interests by the effective exercise of their national jurisdictions; second, the obligation of States to deal equally with interests within and beyond their own borders; and third, the obligation to co-operate in various forms. In all cases, the first step was the balancing of interests within the framework of internal law.

4. Draft article 1, as it stood, could be regarded as covering all types of activity, including economic and monetary activities which, in practice, often caused loss or injury beyond the territory of the State in which they were undertaken. If such activities were intended to be covered by the topic, their predominantly quantitative aspect would give rise to enormous difficulties in determining the exact nature of the rules. On the other hand, if those activities were not to be taken into account, the Commission would practically be forced to limit itself to consideration of activities in the field of the environment.

5. The words "independently of these articles" would seem to refer to other sources of international law. He wondered what those sources might be. Moreover, the use of the word "obligations" raised some doubts, because some of the obligations in the field in question were of a different kind from other obligations considered by the Commission, in particular those relating to State responsibility. There might, furthermore, be other obligations for which the outcome was not prescribed at all and to which it would be difficult to apply the rules of State responsibility.

6. Lastly, it might be useful to have some clarification of the expression "legally protected interests".

7. Mr. QUENTIN-BAXTER (Special Rapporteur) referring to observations made by members of the Commission, said that, since the mid-twentieth century, emphasis had been placed very largely on the subjective element of State responsibility. The proposition, originally attributed to the dicta in the *Trail Smelter* case (see A/CN.4/346 and Add.1 and 2,

paras. 22 *et seq.*) and the *Corfu Channel* case (*ibid.*, para. 37), that all harm was wrongful, was so rigid in its application as to be quite unacceptable, since its inhibiting affect on the freedom of State action would be enormous. The modern attitude was that, except in clear cases of an international violation of sovereignty, the most that could be expected of States was the exercise of a duty of care. States could not be held responsible simply because harm was generated within their territory. It was at that point that the monster of strict liability—a concept which had dominated doctrinal discussion of the question of State responsibility—raised its head. In that respect, he tended to be critical of legal development. For example, in the case of the United Nations Environment Programme, something was surely amiss when, at the direction of States, considerable resources and efforts were expended in drawing up guidelines on the environment which were then adopted by the Governing Body of UNEP and by the Economic and Social Council, only to be rejected in the General Assembly by the very same States which had called for their elaboration. Lawyers sometimes suggested that such events were due to the primitive nature and conduct of States, which at times thought of the common interest and at other times insisted on their separate right to do whatever they wished, without regard to the consequences. However, another reason might be simply the parting of the ways between economists and social scientists, on the one hand, and lawyers, on the other, as a result of the preoccupation with the question of causality. In his report, he had not urged that causality, as such, should be adopted as a basic generating force.

8. The whole topic with which he was concerned was dominated by a perfectly real concept of the duty of care. However, there was a very wide measure of agreement among legal writers of all persuasions that activities of which a State had knowledge, or which fell within its regulatory capacity, could properly be attributed to that State. There was virtually no tendency, either in literature or in State practice, to seek to escape from obligations of that kind, merely because the cause of harm lay within private hands. There was also a very wide measure of agreement that the care taken should be proportionate to the known dangers of an enterprise. The question of strict liability became relevant, for the time being, only in two contexts. First, in the construction of regimes, where there was no real objection to it because the obligation to compensate was a substitute for the duty of prevention. For example, in the case of the 1971 Convention on International Liability for Damage caused by Space Objects,<sup>3</sup> it was clear that science had no way of improving preventive measures. It was equally clear that the preventive measures were inadequate. Consequently, the gap was filled by the obligation to compensate.

<sup>3</sup> General Assembly resolution 2777 (XXVI), annex.

9. In the *Trail Smelter* arbitration, it had been found that the Government of Canada could avoid harm completely by taking appropriate preventive measures and that consequently there was no need to include the element of compensation within the regime itself. However, if something happened for which Canada could not be held responsible, or if, as a result of the sheer limitations of science, the regime proved to be less rigorous than was required in order to eliminate all harm, the Government of Canada would nevertheless compensate. That represented the operation of the concept of strict liability in circumstances which were totally unobjectionable or which, if they were objectionable, were so for quite different reasons than that with which theorists tended to be concerned, namely, that the role played by compensation might be too large and that played by prevention too small. He would be most unwilling to propose the construction of a set of rules that dealt solely with the question of compensation, which was a subject that could be dealt with safely only in a larger context.

10. Another and more difficult area in which the element of causality arose was that of unforeseen accident, or situations in which responsibility was precluded under the articles on State responsibility. However, that was a subsidiary question, quite distinct from the main question to be dealt with, and it could be deferred until a proper place had been found for it within the larger framework. At that time, Governments could be asked for their views on the question.

11. A much more important question was that of the objective factor in State responsibility. Once it had been accepted that not all harm was wrongful, it must be decided how much harm was wrongful. Again, that question, although not falling within the confines of the current topic, could not be answered without reference to it. If a scale of harm was to be established, a point of wrongfulness must be fixed somewhere on it. Where that point was fixed must be agreed by the States concerned, but to fix it at all involved a balancing of interests.

12. Relevant State practice and court decisions showed quite clearly that a balancing of interests must be undertaken in situations involving competing uses. Although such situations were quite common as far as shared resources were concerned, matters became more difficult when the question arose in respect of the legitimate exercise of conflicting rights of two States. Naturally, such situations were always governed by a particular rule of wrongfulness, and where that rule itself required a balancing of interests, State practice clearly showed that efforts must be made to find solutions that reduced possible harm and interference to a minimum and provided for the measures of compensation or reparation necessary to complete the balance. Without the possibility of such a balancing process—which it was the purpose of the future draft articles to ensure—it seemed unlikely that the majority of the rules concerning harm, as articulated in the

Declaration of the United Nations Conference on the Human Environment,<sup>4</sup> would ever have much practical effect.

13. It was necessary to develop the notion that the duties to negotiate, to take account of the representations of other affected parties and to disclose information which might affect the interests of other States were only a beginning. States also had a duty to protect others against harm generated within their own territory and to ensure that broad rules involving a balance-of-interests test were made to work. The alternative would be a deadlock, which would probably not be resolved unless the obligations of States extended beyond simply fixing a point of wrongfulness. It was also necessary to ascertain where a balance of interests existed. The basic principle on which he had proceeded, therefore, was that the draft articles should cover the area in which harm and non-wrongfulness co-existed and should ensure that those rules of primary obligation that had not been reduced to cut and dried formulas were actually applied. Admittedly, there was no limit to the discretion afforded to States in deciding how the rules were to be applied. They often decided to allow the problem to be solved at the level of domestic or private international law, the principles of which were much more developed than those of international law. At the level of international law, such an arrangement could be regarded as a response to a duty.

14. The construction of the proposed draft article was based on the concept that it was necessary to go beyond the mere fixing of a point of wrongfulness, if the freedom of action of States was not to be unduly limited and if those who might be harmed by such action were not to be unduly penalized. In any event, such a point could never be fixed unless States were obligated to undertake wider negotiations based on a balancing of interests. Most conventional regimes did not purport to fix a point of wrongfulness in customary international law, but substituted a definite rule for an indefinite rule and, in so doing, took into account the various interests concerned.

15. Referring to observations made by Mr. Riphagen and Mr. Ushakov (1685th meeting), he said that the governing phrase in subparagraph (b) of the draft article was “independently of these articles”. It might be preferable to use the expression “independently of the rules described in these draft articles”. The rules to which the draft article referred were those based on the general duty of States to give effect to the law and to ensure that damage occurring in their own territory did not harm other States. Moreover, while the legally protected interests referred to in that subparagraph always constituted rights, as had been made clear in the *Lake Lanoux* arbitration (see A/CN.4/346 and Add.1 and 2, para. 61), they did not constitute the right

<sup>4</sup> See *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 1, chap I.

to have the harmful activity prohibited. The rule dealt with in the draft article would permit the activity to continue subject to certain conditions.

16. The draft articles as a whole would be of an auxiliary nature. He could not accept that any situation could exist in which the draft articles alone would apply. In all cases a governing rule must already exist, but must be of such generality that it could not possibly be applied unless the States concerned attempted in good faith to apply it and could be provided with some guidance as to the measures required.

17. Referring to the observation made by Mr. Riphagen concerning economic activities, he recalled that a working agreement had been reached in the Commission that the rules to be drawn up should be of a general nature, although most, if not all, of relevant State practice would be found in the area of the environment or that of ultra-hazardous activities. He had followed those guidelines in preparing his report.

18. Responding to observations made by Mr. Ushakov, he said that he was indeed dealing with the acts, and in particular, the omissions of States. However, it was unusual to find any direct reference to acts of a State in articles defining scope, which tended rather to describe the area to be dealt with. The activities referred to in the draft article meant anything which was manmade within the State concerned and for which it could be held responsible.

19. Finally, the article made it clear that the draft articles would be concerned only with the question of loss or injury; they would not be concerned with whether an activity was wrongful or not. Indeed, States were often content to settle matters involving loss or injury without attempting to establish the wrongfulness of the act concerned.

20. Mr. SUCHARITKUL said that the scope of international liability for injurious consequences arising out of the activities of the State was being increasingly extended as scientific and technological knowledge progressed. In that connexion, the question had been raised whether the concept of injurious consequences should be understood to refer only to physical injury to persons or whether it should also cover loss and damage to property and to the environment in general. While he noted that the Special Rapporteur took the view that injurious consequences included damage caused to the environment by pollution, he was inclined to agree that the law had not developed to the stage where pecuniary loss and damage could be regarded as an injurious consequence for the purpose of attributing liability to a State. It would be difficult, at the present point, to lay down precise rules to govern the matter.

21. It was now recognized that international liability was not the same thing as State responsibility. The former differed from the latter in that, while the State was the party liable, it was liable not only to another

State but also, in the words of draft article 1, to "its nationals".

22. An allied question concerned the attribution of liability. Liability had to be legally grounded in given criteria, and the Special Rapporteur had been very clear in his choice of those criteria. While he (Mr. Sucharitul) endorsed the Special Rapporteur's general approach, he also agreed that the criterion of causation could not be discarded. It might not be the sole basis on which to ground the international liability of the State, but it would at least serve to attribute liability to the State, since, if the consequences were too remote from the act for which the State could be held liable, the chain of causation would be severed. He also agreed, however, that there was no ready-made law whereby a State could be held liable for all consequences arising out of its acts, although, strictly speaking, there was no reason why it should not be.

23. Another criterion, in addition to that of causation, was the duty of care. He agreed that, once injurious consequences had been established, there was no need to inquire further into the wrongfulness of the act or the omission. The Special Rapporteur had rightly observed that the standard of care was increasing, although it had not yet reached the level of strict or absolute liability. It should also be borne in mind that there were differing degrees of care, depending on the circumstances.

24. He further agreed that the Commission could afford to wait a few years before determining the question of compensation and remedies. In practice, States were sometimes prepared to make good loss and damage by the payment of a sum of money which they were not prepared to admit was made in compensation. The States which accepted what were therefore termed *ex gratia* payments did so in the knowledge that such payments were intended as compensation. In that way, yesterday's *ex gratia* payment became tomorrow's obligation.

25. The lack of any prohibition in law was a relative matter, since the law was constantly developing and even so-called conventional arrangements could be regarded as customary law in the making.

26. Another consideration of fundamental importance, particularly for the developing countries, was the balancing of interests. Some of the activities carried on by certain national and transnational corporations in the highly industrialized countries had given rise to injurious consequences, as a result of which those countries had introduced very strict regulations. It was because of such regulations that the countries in question, or their nationals, had decided to set up factories in the developing countries. Since the latter had still not enacted the necessary laws for their protection, it was often difficult to establish liability.

27. Lastly, with regard to draft article 1, he noted that the Special Rapporteur had explained that the word "jurisdiction" in subparagraph (a) was to be

understood in the sense of control: in other words, the State, being in control, would be liable. In subparagraph (b), he took it that the word “obligations” referred to the duty of care. There might, however, also be some liability which was more or less strict or absolute if the intent was to protect the legitimate interests of countries that were still developing and were likely to be adversely affected.

28. Mr. USHAKOV said the Special Rapporteur was wrong to try to establish the existence of primary rules because, once that was done, the Commission would no longer be within the realm of the topic under consideration; it would, instead, be within the realm of the responsibility of States for internationally wrongful acts, for such responsibility was entailed when a State breached an obligation established by a primary rule. If States owed a duty of care to other States, had an obligation to protect those States from injurious acts or could invoke the concept of an abuse of a right, there would be a corresponding number of primary rules to cover those situations, and the subject-matter under consideration would be out of the Commission’s hands.

29. The obligation to repair damage sustained by other States also derived from a primary rule that was embodied in certain treaties on specific subject-matters. That obligation arose not from the conduct of a State—or, in other words, from the breach of that obligation—but from the establishment of damage. In his view, it was not possible to lay down general rules concerning compensation for injuries caused to States as a result of activities that were not prohibited by international law, and that were undertaken by States or by persons under their sovereignty. All that should be taken into account in international relations were the ultra-hazardous activities undertaken by States or by individuals under the jurisdiction of States, which should then control the activities of such individuals. An example could be found in the case of ultra-hazardous nuclear activities. States were now attempting to elaborate treaties on activities of that kind, particularly the carriage of fissionable materials. Thus, the activities of vessels that carried such materials could be attributed to the States whose flags they flew, and those States considered it necessary to conclude agreements on such carriage. There could, however, be no general rule stating that, because they were ultra-hazardous, certain activities undertaken by States or by persons under their control must be conducted in such a way as to prevent damage, failing which an obligation of compensation would arise. The reason for the difficulty in laying down such a rule was the dependence on specific material situations, not on legal factors. At present, the obligation to provide compensation existed only if it was set out in a treaty between States.

30. It was impossible to derive any general legal rule from the *Trail Smelter* case, to which the Special Rapporteur had referred at length in his report. That case had been a special one, and it could not be inferred from it that all transboundary harm caused by

smoke emissions must be repaired. In the *Trail Smelter* case, it had been because of local geographical conditions and, in particular, weather conditions, that smoke from the territory of one State had concentrated in the territory of a neighbouring State. Moreover, the court which had settled the case had not done so on the basis of any generally applicable rule.

31. Referring to the words “actual or potential loss or injury” in draft article 1, subparagraph (a), he said that, in principle, any activity undertaken in the territory of a State could give rise to damage to another State. More generally still, any activity could have an impact in any place. In the present case, however, there was no question of taking into account all activities, regardless of their nature; the Commission must confine itself to the ultra-hazardous activities undertaken by a State or by persons that State had a duty to control.

32. He also pointed out that the introductory phrase of article 1 and the first phrase of subparagraph (b), which were to be read in succession, did not form a coherent proposition.

33. With regard to subparagraph (b), he said that, when obligations existed, their counterparts were rights, not “legally protected interests”. However, when obligations existed, the situation was governed by the draft articles on State responsibility for internationally wrongful acts. It was only in the case of certain activities, such as those conducted in outer space, that it might be necessary to compensate for damage, irrespective of the conduct of the author State and of the fact that the activities were not prohibited. It seemed preferable for States to conclude specific agreements to cater for activities of that kind.

34. The question of environmental protection was another that fell outside the Commission’s field of study, for the liability resulting from a breach of the primary rules which the international community was striving to elaborate in that area came under the heading of the topic of State responsibility. Even if it could be said that there were general customary rules relating to environmental protection, such rules would be primary rules and their breach would entail State responsibility for internationally wrongful acts.

35. In conclusion, he said that although the Commission might try to indicate the areas in which States could attempt to conclude agreements on international liability not arising out of internationally wrongful acts, it would be extremely difficult, if not impossible, to lay down general rules that would be applicable to specific situations.

36. Mr. ŠAHOVIĆ said that the Special Rapporteur’s report, his statement and the Commission’s discussions all showed the complexity of the topic under consideration. In his report, the Special Rapporteur had drawn attention to many problems which the members of the Commission would have to solve, but on which they did not yet seem to have any definite

opinions. Since he himself had been unable to study the report well enough in advance, he needed more time to think about it. He was nevertheless pleased to note that the Special Rapporteur's views had been put into concrete form in draft article 1.

37. At the current meeting, the Special Rapporteur had described the historical backdrop against which his proposals must be considered. Although there was little doubt that the members of the Commission agreed on the need to deal with the topic, the essential requirement was to be able to derive from existing law a number of general rules that could be embodied in draft articles. From an historical point of view, the topic did, of course, raise many problems, but it was on the way of dealing with those problems that the members of the Commission had to adopt a stance. Although he shared the Special Rapporteur's view concerning the possibility of laying down general rules, he was not sure which approach to adopt. In his opinion, the principle that a State had a duty to take account of the interests of other States when activities that might be harmful to those States were undertaken in its territory was paramount. It was, of course, open to question whether that principle derived from treaty practice or whether it was part of general international law and already constituted a rule of customary law. That principle had been invoked not only in the *Trail Smelter* case, the *Corfu Channel* case and the Declaration of the United Nations Conference on the Human Environment, but also in the Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water (Moscow, 1963),<sup>5</sup> of which it formed the basis. Although that principle obviously underlay the topic being considered by the Commission, it was not clear to what extent the Commission could expand upon it with a view to elaborating draft articles.

38. Many members of the Commission seemed to be of the opinion that it would be difficult to lay down a general rule and that it would be better to provide for specific regimes relating to various areas. He was willing to try to formulate a general regime through the progressive development of international law, but he was not sure how far the Commission could go in that direction.

39. In his view, the international liability with which the Commission was now dealing definitely derived from primary rules. The further the Commission went in its study of the topic, the more problems it would encounter in relation to the topic of State responsibility for internationally wrongful acts. In view of the difficulty of drawing a line of demarcation between the two topics, as the Commission must now do, it was debatable whether it had really been wise in deciding to deal with them separately.

40. Turning to article 1, he pointed out that it would be advisable for it to be preceded by definitions. It

would be helpful to know exactly what the Special Rapporteur meant by terms such as "activities" or "potential injury".

41. With regard to subparagraph (a), he said that the draft articles should apply not only to activities that gave rise to loss or injury "to another State or its nationals", but also to areas not within the sovereignty of States, or, in other words, to the common heritage of mankind. Subparagraph (b), which referred to the obligations of a State within whose territory or jurisdiction activities were undertaken, might be made into a separate article, because it was important to define clearly the scope of the draft articles and the present case would not be the first in which a draft contained a safeguard clause of that kind.

*The meeting rose at 1.10 p.m.*

## 1687th MEETING

*Thursday, 9 July 1981, at 10.10 a.m.*

*Chairman:* Mr. Doudou THIAM

*Present:* Mr. Aldrich, Mr. Barboza, Mr. Bedjaoui, Mr. Boutros Ghali, Mr. Calle y Calle, Mr. Dadzie, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

### **International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/346 and Add.1 and 2)**

[Item 5 of the agenda]

DRAFT ARTICLE SUBMITTED BY THE  
SPECIAL RAPPORTEUR (continued)

#### ARTICLE 1 (Scope of these articles)<sup>1</sup> (continued)

1. Mr. YANKOV said that the topic before the Commission involved questions to which there were no clear-cut answers. It was also complex, and it related to what might be termed the twilight zone of international law. Consequently, it was important to establish a link between it and other topics.

2. He endorsed the Special Rapporteur's statement in paragraph 18 of his report (A/CN.4/346 and Add.1 and 2) that "the new topic is not a competitor in the field of secondary rules, but a catalyst in the field of primary rules". That statement gave some idea of the complexity of the problem, particularly since, as was pointed out in paragraph 19 of the same document, the

<sup>5</sup> United Nations, *Treaty Series*, vol. 480, p. 43.

<sup>1</sup> For text, see 1685th meeting, para. 1.

“topic is itself confined to situations in which the rules of State responsibility for wrongful acts have not been engaged”. The question, therefore, was to determine where the dividing line lay between harm and what the Special Rapporteur had called non-wrongfulness. Which acts not prohibited by international law gave rise to international liability? How was the freedom of States within their own boundaries to be balanced against the obligation of non-interference within the borders of other States? That question arose in a particularly acute form in certain areas such as the law of the sea where the traditional freedom of the high seas had to be reconciled, in the newly emerging regime, with the need to protect the marine environment and other aspects of the common heritage of mankind.

3. So far as protection of the human environment was concerned, the number of international instruments that regulated the activities of States increased every year. Since 1980, three important new conventions closely concerned with marine pollution and safety of life at sea had come or were about to come into force: the Protocol of 1978 Relating to the International Convention for the Safety of Life at Sea, of 1974;<sup>2</sup> the International Convention for the Prevention of Pollution from Ships, of 1973,<sup>3</sup> modified by the Protocol of 1978;<sup>4</sup> and the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, of 1978<sup>5</sup> (one of whose objectives was to increase safety of navigation).

4. There had also been a marked increase during the past decade in the number of international standards and regulations relating to the design, construction, manning and navigation of ships that had been developed to prevent maritime accidents that caused pollution. IMCO's Maritime Safety Committee had been involved in the development of such standards and regulations, and its Marine Environment Protection Committee had been concerned with improving cargo handling with a view to avoiding discharge of polluting agents during routine ship operations. If, then, the Special Rapporteur was thinking in terms of applying the draft articles to the area of the marine environment, he should bear in mind that by the time the articles were submitted to Governments for consideration there would be a large body of rules and regulations a breach of which would give rise to international responsibility.

5. On the duty of care, he agreed that, where there was a legally defined duty, non-observance thereof

constituted a violation of the law which would give rise to liability. It was a difficult matter, and he had serious doubts whether the duty of care as defined by the Special Rapporteur could be regarded as a promising area for treatment under the rules.

6. While he agreed with the Special Rapporteur that the topic was mainly of a procedural character, he considered that the articles would be far more effective if they included provision for the settlement of disputes. Whether or not such provision was embodied in the articles on scope was a secondary matter; what was essential, since the subject fell into a fringe area, was that the provision should be made. In that connection, the Special Rapporteur might wish to consult, for guidance, the Draft Convention on the Law of the Sea<sup>6</sup> and, specifically, articles 246 (Marine scientific research in the exclusive economic zone and on the continental shelf), 279 (Obligation to settle disputes by peaceful means), 280 (Settlement of disputes by means chosen by the parties), 287 (Choice of procedure), 297 (Limitations . . .) and 298 (Optional exceptions) and Annex V (Conciliation).

7. Lastly, with regard to the scope of the articles, and more specifically to draft article 1, he considered that the main purpose should be to identify the substantive elements inherent in the nature of those injurious acts not prohibited by international law which gave rise to the liability of the State. Even if the Special Rapporteur decided against a set of clear definitions, the main ingredients of such an act should at least be identified, with a view to facilitating the Commission in its task. He would have difficulty in pronouncing on the merits of draft article 1 without some idea of the basic notions involved. It might therefore be advisable, particularly since the subject as a whole required much closer study and consideration, to discuss draft article 1 when a few more details were available.

8. Mr. VEROSTA said that the Special Rapporteur had raised most of the questions which required an answer, and had rightly focused attention on the *Trail Smelter* case (see A/CN.4/346 and Add.1 and 2, paras. 22 *et seq.*), which covered virtually all the elements the Commission needed to consider.

9. The complexity of the topic was immediately illustrated by its title, for the English word “liability” was rendered in French and Spanish, respectively, by “*responsabilité*” and “*responsabilidad*”. That was a difference of which the Commission must be aware. Furthermore, article 1 referred to the “activities” of the State, whereas Part 1 of the draft articles on State responsibility spoke of an “act of the State”.<sup>7</sup> The relationship between those two expressions would have to be clarified in the commentary. Again, the injurious consequences considered in article 1 were those which harmed “legally protected interests”, meaning, undoub-

<sup>2</sup> IMCO, *International Conference on Tanker Safety and Pollution Prevention, 1978, Final Act of the Conference*, publication No. 78.09. (London, 1978), p. 7.

<sup>3</sup> United Nations, *Juridical Yearbook, 1973* (United Nations publication, Sales No. E.75.V.1), p. 81.

<sup>4</sup> IMCO, *op. cit.*, p. 37.

<sup>5</sup> IMCO, *International Conference on Training and Certification of Seafarers, 1978, Final Act of the Conference*, publication No. 78.15.E (London, 1978), p. 5.

<sup>6</sup> See 1686th meeting, footnote 2.

<sup>7</sup> See *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

tedly, interests protected under international law. That being so, there must be incumbent on the State under international law an obligation to stop or to regulate activities detrimental to such interests. Consequently, if the State within whose territory or jurisdiction the harmful activities in question were undertaken failed to halt or to control them, it could be assumed to have disregarded a duty; that omission would then constitute an act of State which created international responsibility, pursuant to Part I of the draft on state responsibility.

10. The Commission was in the process of formulating a number of rules of international customary law, and the procedure followed in the *Trail Smelter* case would be particularly relevant in determining what elements the draft articles, which would be primarily procedural, should contain. As he saw the Commission's task in future years, it would not be to formulate additional explanatory norms of international customary law, since such norms were already embodied in any number of bilateral treaties and multilateral conventions, but rather to make a comparison between a few cases and then to abstract certain procedural rules which would form the basis for the duties of States. The process would culminate in the adoption by the international community as a whole of explanatory rules of customary international law, with a view to their application in a variety of fields such as pollution, the sea-bed and nuclear power.

11. Mr. BARBOZA said it appeared to him from the report by the Special Rapporteur that draft articles might be formulated in three different areas: the area of the environment, the area of hazardous activities, and the area defined in article 35 (Reservation as to compensation for damage) of Part I of the draft articles on State responsibility. As the Special Rapporteur had stressed, the topic under consideration was concerned with the formulation of primary rules, which established obligations, and it was from that point of view that those three areas should be approached.

12. With regard to the first area, that of the environment, the Special Rapporteur had rightly pointed out that there was a point of intersection of harm and wrong, and that on the near side of the point of wrongfulness certain harmful acts were not considered harmful. Thus, certain activities undertaken by coastal States must have substantial injurious consequences for them to be taken into account under the law; otherwise, freedom prevailed. On the far side of the point of wrongfulness, two situations could arise, depending on whether or not there existed an international rule embodying a prohibition. If such a rule existed, its breach would, as Mr. Verosta had said, give rise to a situation coming under the heading of the topic of State responsibility. On the near side of the point of wrongfulness, damage was considered negligible; it was just a nuisance to be endured for the sake of good neighbourliness. Such a situation did not come within the scope of the topic under consideration since,

according to the first part of the title of the topic, "injurious consequences" must be involved.

13. In the case of damage having an effect in law, there was a breach of an obligation; such situations again fell outside the topic under consideration, since the second part of the title referred to "acts not prohibited by international law". The situation would be the same even if no relevant rules of international law existed and the Commission created some, since activities that were now considered lawful would no longer be so under those new rules. Should that logical approach fail to convince, yet another reason could be adduced for excluding environmental law from the regulatory exercise envisaged by the Commission: environmental law imposed duties, such as the duty to hold prior consultations and the duty to provide information, and could even lead to the prohibition of a scheduled activity, so that it was not content with absolute liability that gave rise only to an obligation to compensate.

14. With regard to the second area, he said that most legal systems recognized the concept of strict liability for hazardous activities the execution of which might cause serious accidents. Even if all due care was taken, technology was powerless to prevent such accidents. Nevertheless, hazardous activities were not prohibited, because they benefited society. Those who benefited directly from them must, however, assume certain responsibilities towards possible innocent victims. At the international level, that system was characterized by the fact that the damage caused was the consequence of conduct; while neither the damage nor the conduct was prohibited, there was an obligation of compensation. With respect to the environment, however, damage was prohibited; a certain point of wrongfulness must not be exceeded and harm must not be done to others. Of the activities of that kind that were carried out in international life, the Special Rapporteur had mentioned at least three categories that entailed such responsibility: activities relating to the launching of space objects, the peaceful use of nuclear energy, and the carriage of oil by sea. The agreements that had been concluded on activities of that kind seemed to establish a sort of absolute liability. Indeed, it was precisely for activities of that kind that States seemed to have preferred to conclude specific multilateral conventions. That approach seemed better than to attempt to devise rules covering all types of hazardous activity. As the Special Rapporteur had indicated in his report, it would be extremely difficult to draw up, in the abstract, a balance sheet of all the interests to be taken into account in order to determine the point of intersection below which certain hazardous activities could be authorized.

15. With regard to the third area, which was covered by article 35 of Part I of the draft articles on State responsibility, he said that the cases to which that provision applied were marginal ones. According to article 35,

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.

The articles to which article 35 referred provided for the preclusion of wrongfulness in cases of consent, *force majeure* and fortuitous event, distress, and state of necessity. It was precisely because the duty of reparation or compensation was rather poorly defined by international law in cases of that kind that the wording of article 35 was vague; it did not provide for any obligation of reparation or compensation. Although the third area it covered was not extensive, it would be helpful if it could be stated as a general principle that an innocent victim must be compensated; that would be tantamount to recognizing the existence of damage that entailed responsibility.

16. He was of the opinion that the duty of care was related to the prohibitions which were required to protect the environment. Thresholds should be set above which failure to perform that duty would give rise to wrongfulness. With regard to the balance of interests, he observed that an attempt at an in-depth evaluation of the interests involved had been made (apparently without much success) in a convention concerning watercourses. Certain uses of water had been considered as more important than others: well-established uses had been given priority over new uses, and uses for vital human needs had been given priority over less essential uses, such as recreational ones. In any event, it would probably be better for interests to be balanced by the parties concerned rather than, in a very general manner, by the Commission.

17. He would not make any comments on article 1 as proposed by the Special Rapporteur, since he was unable to compare it to other draft articles and so gain a more general idea of the articles as a whole.

18. Mr. NJENGA said that the Special Rapporteur had been right to consider the *Trail Smelter* case in considerable detail. The facts were not exceptional; the activity in question had been neither extraordinary nor ultra-hazardous, and the manner of its performance had not been in any way negligent, bearing in mind the technology available at the time. The case thus embodied all the elements that had to be dealt with when defining the general principles of the subject under discussion. Moreover, it offered a firm anchor for the development of the subject and for ascertaining what its scope should be in terms not only of the environment, but of all other aspects of inter-State relations.

19. He could not accept the proposition that, when carrying out activities within its own jurisdiction, a State did not owe a duty of care to other States that might be affected. That was not consistent with the authorities or with State practice. Indeed, to allow every State to do whatever it liked within its own boundaries, irrespective of the consequences, would be to revert to the law of the jungle. The fact that certain

ultra-hazardous activities had been created by conventions did not go to disprove that a duty of care attached to activities conducted within national territory. On the contrary, it showed that in certain specific instances conventions were needed to regulate such ultra-hazardous activities or activities which affected matters of common interest, such as the protection of the marine environment.

20. Professor Eagleton had been quoted in the report as saying: "A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction" (A/CN.4/346 and Add.1 and 2, para. 35). Although he would not himself state the case in such absolute terms, he did believe that the *Trail Smelter* case had adequately clarified the concept of duty of care. It had been held in that case, for instance, that the economic loss suffered was too remote for the United States to merit compensation therefore. In other words, there was no question of absolute liability.

21. The Special Rapporteur had also considered the relevance and application of the draft articles to the new area of the marine environment, and in that connection Mr. Yankov had referred to a number of conventions. Those conventions were not, however, to be construed as disavowals of the concept of duty of care, but rather as departures from that concept in specific fields.

22. The need for a balancing of interests was to be seen not only where protection of the environment was concerned, but also in the case of the economic zone. Exploitation of that zone must take account of the legitimate interests of other States. The duty of care owed in such cases was not restricted to ultra-hazardous or to extraordinary activities. In his view, the Special Rapporteur had adopted the right approach in that connection, particularly in regard to strict liability.

23. With regard to the proposed draft article, he considered that there was much room for improvement. He would have been happier if the reference to "potential" loss or injury, which was extremely vague, had been omitted. Perhaps the Special Rapporteur would explain why he had included it. He agreed, however, that the article should be extended to cover the concept of the common heritage of mankind, including the marine environment and the environment in general. While he understood the purpose of subparagraph (b), he did not think much would be lost if it were omitted. What it was supposed to cover could be covered by individual conventions. He also agreed that no final decision as to scope could be taken until a few more articles were available and it was thus possible to see the picture in its proper perspective.

24. Sir Francis VALLAT congratulated the Special Rapporteur on his excellent report and oral presentation of the topic.

25. The fact that the topic lacked very clear-cut boundaries was not a good reason for refusing to deal

with its substance. The Commission should take care not to become lost in a maze of abstract analysis. He particularly wished to stress the irrelevance of the so-called distinction between primary and secondary rules, and believed that whether any rules developed within the scope of the topic were regarded as primary or secondary was of little importance. Some members of the Commission were not entirely convinced that even the draft articles contained in Part 1 of the draft on State responsibility had been kept entirely within the proper scope of secondary rules. However, if the Commission had considered itself bound by the need to remain within that scope it would never have succeeded in completing the draft articles in their current form. By the same token, any attempt to apply strict analysis to the topic under consideration would doom the Commission's efforts from the outset.

26. He could not agree with the view that because any breach of a duty existing under international law must constitute an internationally wrongful act and was, therefore, subject to the rules contained in Part 1 of the draft it necessarily fell outside the scope of the present topic.

27. In approaching that topic, greater inspiration might be derived from the history of development of the common law than from civil law. The main original forms of action in common law were trespass to the person, trespass to land and trespass to chattels. However, as the needs of the community developed, it had been realized that there were other causes of damage or injury which the party responsible should be called upon to make good. That development had given rise to what had come to be known as "actions on the special case", which were related primarily not to the act performed, but to the damage or injury caused to the claimant. The burden then rested on the person injured to show that the injury was due to a failure on the part of the person causing the injury. Thus had begun the development of the huge body of law relating to negligence, which had come to be regarded as the essence of the kind of behaviour entailing liability. That type of empirical, pragmatic approach to the development of law could provide a lesson for the Commission in dealing with the topic under consideration. If the judges and legal authorities of the time had regarded themselves as bound by the restrictions of a law which depended on the prohibition of the performance of particular kinds of act, the development of both general and international law would have suffered. The adoption of a purely doctrinal approach would simply tie the hands of the Commission.

28. The title of the topic itself gave some guidance as to what should be excluded from its scope. The concept of acts not prohibited by international law and internationally wrongful acts were not mutually exclusive. The concept of internationally wrongful acts covered all cases in which international responsibility was entailed; it was not limited to acts that were *per se* wrongful, such as the invasion of the sovereign

territory of one State by another, or the breach of a treaty. Broadly speaking, the Commission was concerned not with treaty law, but with customary international law, a fact which in itself considerably narrowed the scope of the topic.

29. Two types of situations which should be included in the scope of the topic were, first, those where injury or harm might have resulted in circumstances where no fault could properly be attributed to the State concerned, since it had quite lawfully undertaken an activity which nevertheless entailed serious risks, and, second, cases where a State might be regarded as liable to pay compensation on the ground that the acts for which it was responsible, though not in themselves prohibited, had resulted in harm attributable to negligence on its part. He agreed with the view expressed by Mr. Njenga that, in the modern world, the law could no longer be regarded as excluding liability for harm caused by one State to another as a result of negligence. The duty to take care must exist in any closely interdependent community. That was, admittedly, a difficult field, but one which fell well within the scope of the topic.

30. Such an empirical approach inevitably left the bounds of the topic vague. However, if the Commission was able to deal with only part of the areas to which he had referred, it would have achieved a breakthrough in customary international law. The mere fact that there could be a difference of views concerning the existence of the duty of care illustrated the need for a close examination of the topic from that point of view. In that regard, it was necessary to conduct a more thorough examination of State practice and jurisprudence. Although the *Trail Smelter* arbitration was undoubtedly an extremely valuable source of inspiration, there were surely many other arbitrations that would shed light on the duty of States to take care.

31. The draft article prepared by the Special Rapporteur was not a typical scope article, in that it was concerned more with the modalities of liability than with the definition of the subject matter to be dealt with. At the current stage, he would prefer to see what progress could be made on the kinds of subject matter identified in the Commission, possibly using the draft article simply as a guideline, rather than attempting to prepare a specific draft article.

#### Co-operation with other bodies (*continued*)\*

[Item 11 of the agenda]

#### STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

32. The CHAIRMAN invited Mr. Harremoës, Observer for the European Committee on Legal Co-operation, to address the Commission.

\* Resumed from the 1680th meeting.

33. Mr. HARREMOES (Observer for the European Committee on Legal Co-operation) said that the Council of Europe followed very closely the development of the varied and important questions with which the Commission dealt, although the heavy burden of work imposed by the Commission of Ministers sometimes prevented developments in Geneva and in New York from receiving the attention they merited. The work of the Commission could not fail to influence the scope and nature of activities pursued in regional organizations such as the Council of Europe.
34. Referring to the law-making activities of the Council of Europe over the past year, he said that the European Agreement on Transfer of Responsibility for Refugees had been opened for signature by member States on 16 October 1980. It had been signed by Belgium, Denmark, the Federal Republic of Germany, Greece, Luxembourg, Portugal, Switzerland and the United Kingdom and had been ratified by Sweden and Norway, thus entering into force. The main purpose of the Agreement was to facilitate the application of article 28 of the 1951 Geneva Convention relating to the Status of Refugees by regulating the transfer of responsibility for refugees between Council of Europe member States and specifying the circumstances in which responsibility for issuing a travel document was transferred when a refugee moved residence from one State to another. To that end, the Agreement endeavoured to strike a balance between the interests of the refugee and the interests of the first and second States concerned. It had been considered important to adopt a system which did not result in a person being neither readmissible to the first State in which he had originally obtained asylum nor regarded as established in the second State in which he was currently living. The provisions of the Agreement made it possible to determine in any given case which State was responsible for the refugee.
35. Under the terms of article 2 of the Agreement, responsibility could be transferred in four cases: after two years' actual and continuous stay in a second State with the consent of the authorities of that State; when the second State had allowed the refugee to remain in its territory on a permanent basis; when the second State had tolerated the presence of the refugee on its territory for a period exceeding the validity of the travel document issued to him; and when the refugee failed to request readmission to the first State before a certain date.
36. The Agreement expressly provided that from the date of its entry into force the provisions of bilateral agreements between contracting parties on the same subject would cease to be applicable. However, rights and benefits acquired, or in the course of being acquired, by refugees under such agreements would be preserved. Similarly, the preservation of any rights and benefits which had been, or might be, granted to refugees under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and other treaties, or under domestic law, would also be taken into consideration.
37. The new Agreement was a manifestation of the commitment of the Council of Europe to the legal protection of refugees. It was clearly inspired by the 1959 European Agreement on the abolition of visas for refugees and by a number of texts adopted by the Consultative Assembly of the Council of Europe.
38. The Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data had been opened for signature on 28 January 1981 and had been signed by Austria, Denmark, France, the Federal Republic of Germany, Luxembourg, Norway, Portugal, Sweden, Turkey and the United Kingdom. Data protection was a unique area, in which an entirely new corpus of law was being developed simultaneously at the national and international levels. In view of the challenges of the information revolution, European States had felt an urgent need for new legal rules that would strike a just balance between the requirements of society and the rights and interests of individuals. The Council of Europe considered both human rights and computer technology to be universal in character. It had therefore been a logical step to entrust the drawing-up of such new rules to his organization. The Committee had begun its efforts in the 1970s, concentrating on the formulation of principles laid down in two resolutions of the Committee of Ministers and dealing respectively with private and public data banks. Those principles had been a valuable source of inspiration to a number of member States, two of which, namely, Portugal and Spain, had even included data protection as a fundamental right in their new Constitutions.
39. The new Convention contained three categories of rules. First, it confirmed as rules of international law binding upon the contracting States those national principles which had been recommended in 1973 and 1974 for voluntary adoption by States. Second, it contained a solution to the problem of the international data protection applicable to transborder data flows. Third, it helped data subjects in one country to defend their rights with regard to information concerning them which was being automatically processed in another country. One of the main aims of the Convention was to avoid the creation in Europe of so-called data havens, where information could be stored without any legal protection for the data subjects.
40. There had also been a new development in the relations between the EEC and the Council of Europe. In 1979, the Council of the European Communities had authorized the Commission of the Communities to negotiate accession to three European agreements in the public health sector, since the subject-matter of those agreements had become the concern of the Communities and was no longer within the jurisdiction of the individual member States. While technically the ten member States were still the contracting

parties to those agreements, the real holder of sovereignty in the matter, namely, the Community, was not legally bound by them. During its negotiations with the Commission of the Communities, the Council of Europe had first proposed an amending protocol to be ratified by all contracting parties, like those adopted on two previous occasions. The Commission had suggested a protocol which would enter into force and become applicable after ratification by only three contracting parties. Since neither of those proposals had been acceptable to the other party, the secretariat of the Council of Europe had proposed that the Council's Committee of Ministers should adopt amending protocols to the three agreements and then open those protocols for acceptance by contracting parties. Under that proposal, which was to be submitted to the Committee of Ministers, the protocols would enter into force two years after being opened for acceptance, unless a contracting party had registered an objection. They would enter into force in respect of all contracting parties even if they had not been expressly accepted by them. That formula did not preclude ratification and subsequent deposit of an instrument of acceptance. It had been proposed as an informal and expeditious solution which preserved the rights of all the contracting parties and was being increasingly used in respect of formal regulations under, and minor amendments to, conventions. Such a procedure was also believed to be in full conformity with the Vienna Convention on the Law of Treaties.

41. The Council of Europe was continuing its activities in the legal sector under the Second medium-term plan 1981-1986. In the area of criminal law, work was continuing on a draft convention on the protection of art objects against theft, with a view to creating a European instrument more acceptable to Member States than the earlier UNESCO Convention on the subject. It was also felt that, among States having the same cultural traditions and socio-economic systems, it might be possible to give increased weight to preventive and repressive measures. The text had almost been finalized, with the exception of the difficult question of the legal position of the *bona fide* purchaser of a stolen object. The convention was expected to be approved and opened for signature towards the end of 1982.

42. Another convention would establish rules permitting the transfer of prisoners from one member State to another. It was proof of the interest of States outside the European region in that topic that work on the draft convention was being actively followed and supported by Canadian and American experts and that bilateral negotiations between those two States and several member States of the Council of Europe had been postponed pending the outcome of the negotiations in Strasbourg. That convention, too, was expected to be approved and opened for signature during 1982.

43. A convention concerning compensation to victims of crime was also envisaged. In 1976, the Committee of Ministers had adopted a resolution on the subject, recommending that States set up compensation schemes and, in doing so, apply the minimum guarantees laid down in that resolution. On the initiative of the Minister of Justice of the Federal Republic of Germany, an attempt was to be made to transform that resolution into a convention to become binding on member States. Work on the subject was due to start in 1982. However, given the current climate of budgetary austerity, member States might not be inclined to accept the additional financial burdens resulting from a new international treaty.

44. In the area of civil law, a draft convention on the protection of under-water cultural heritage was nearing completion. The text would supplement the 1969 European Convention on the Protection of the Archaeological Heritage. It was expected to be completed in 1982, and had the full support of the Council of Europe's Parliamentary Assembly. The convention would obligate each member State to take all necessary measures to protect its own under-water cultural heritage and to participate in the European effort to protect the heritage of member States as a whole.

45. Also in the process of elaboration was a convention on the retention of ownership clauses in commercial contracts. It constituted an example of the close and structured co-operation between the European Communities and the Council of Europe, in that the Council had taken up the subject which, according to the tacit understanding between the two organizations, would normally have been reserved for the Communities as being a vital aspect of the functioning of the economic system set up under the Treaty of Rome. However, the authorities in Brussels had considered that the subject had wider implications and that it was desirable to extend the geographical area in which legislative uniformity should be achieved. The drafting of the convention was a venture to which the Council attached both legal and political importance.

46. Experts were currently reviewing the final draft of a controversial convention dealing with the protection of animals used in laboratories for experimental purposes, a subject which aroused considerable public interest and emotion. It would be necessary to organize wide consultations, *inter alia* with the Parliamentary Assembly of the Council of Europe, before the text was finalized, with a view to striking a balance between the various interests involved and ensuring the speedy ratification and entry into force of the convention. It was likely that work would subsequently be started on a new convention on the protection of animals in national transport, which would lay down minimum European rules to be incorporated into national law.

47. The CHAIRMAN thanked the Observer for the European Committee on Legal Co-operation for describing that body's activities. Europe made a substantial contribution to the work of the Commission, whose task it was to effect the synthesis of the world's legal systems, for, historically, Europe was the point at which those systems met. The Commission would, therefore, unquestionably draw inspiration from the work of the Committee.

*The meeting rose at 1 p.m.*

## 1688th MEETING

*Friday, 10 July 1981, at 10.20 a.m.*

*Chairman:* Mr. Doudou THIAM

*Present:* Mr. Aldrich, Mr. Barboza, Mr. Bedjaoui, Mr. Boutros Ghali, Mr. Calle y Calle, Mr. Dadzie, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Ushakov, Mr. Francis Vallat, Mr. Verosta, Mr. Yankov.

### Resignation of a member of the Commission

1. The CHAIRMAN said that, in a letter addressed to him, dated 19 June 1981, Mr. Tsuruoka had submitted his resignation from the Commission. At a private meeting on 7 July 1981, the Commission had taken note with regret of that resignation. In a letter dated 10 July, the Chairman had informed Mr. Tsuruoka and the Secretary-General of the United Nations of the Commission's decision.

2. At its private meeting on 7 July 1981, the Commission had elected Mr. Díaz González Chairman of the Drafting Committee, to replace Mr. Tsuruoka.

### Succession of States in respect of matters other than treaties (*continued*)\* (A/CN.4/338 and Add.1-4, A/CN.4/345 and Add.1-3)

[Item 2 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:  
SECOND READING (*continued*)

ARTICLE 20 (Newly independent State),

ARTICLE 21 (Uniting of States),

ARTICLE 22 (Separation of part or parts of the territory of a State), *and*

ARTICLE 23 (Dissolution of a State)

\* Resumed from the 1675th meeting.

3. The CHAIRMAN invited the Commission to consider articles 20 to 23, which read:

#### *Article 20. Newly independent State*

1. When the successor State is a newly independent State, no State debt of the predecessor State shall pass to the newly independent State, unless an agreement between the newly independent State and the predecessor State provides otherwise in view of the link between the State debt of the predecessor State connected with its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State.

2. The agreement referred to in paragraph 1 should not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor should its implementation endanger the fundamental economic equilibria of the newly independent State.

#### *Article 21. Uniting of States*

1. When two or more States unite and so form a successor State, the State debt of the predecessor States shall pass to the successor State.

2. Without prejudice to the provision of paragraph 1, the successor State may, in accordance with its internal law, attribute the whole or any part of the State debt of the predecessor States to its component parts.

#### *Article 22. 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, an equitable proportion of the State debt of the predecessor State shall pass to the successor State, taking into account all relevant circumstances.

2. Paragraph 1 applies when part of the territory of a State separates from that State and unites with another State.

#### *Article 23. Dissolution of a State*

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 otherwise agree, an equitable proportion of the State debt of the predecessor State shall pass to each successor State, taking into account all relevant circumstances.

4. Mr. BEDJAOU (Special Rapporteur) reminded members that article 20 dealt with succession of States in the event of decolonization. It had been the subject of conflicting written and oral comments. Some considered that the article was inadequate, and that it should stipulate more categorically for the non-transferability of any debt whatsoever to the newly independent State. Others, on the other hand, felt that it did not give sufficient weight to the need to assign to the newly independent State certain debts entered into for the benefit of the former territory.

5. That divided view of the same article would seem to confirm that its terms achieved a certain balance and did indeed constitute a compromise formula. He therefore trusted that the Commission would not modify its content.

6. Article 20 first laid down, in paragraph 1, the principle that debts did not pass to the newly

independent State, which should satisfy those who considered that such States had suffered enough from colonization and should not have to assume debts entered into by the colonizing State. On the other hand, it preserved the possibility of debts passing under an agreement between the predecessor State and the successor State, subject to the proviso that only those debts which had benefited the territory acquired by the newly independent State would pass to that State. Paragraph 2 then stipulated that the agreement must not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, and that its implementation must not endanger the fundamental economic equilibria of the successor State.

7. While he considered the wording adopted in first reading entirely satisfactory, he did feel that the phrase suggested by a representative to the Sixth Committee and quoted in paragraph 207 of his own thirteenth report (A/CN.4/345 and Add.1-3) could be added at the end of paragraph 2 to make it clear that the agreement must not jeopardize the normal development of the newly independent State by excessive indebtedness. He was prepared to accept that addition, but would not personally insist on it.

8. He had not been convinced by the arguments adduced in written or oral comments by those who considered that article 20 as adopted in first reading went too far. The persons concerned seemed, in particular, to confuse State debts which passed to the successor State and local or localized debts. Article 20 in no way precluded the assignment of the latter category of debts to the successor State. It should, however, be noted that debts initially contracted by the predecessor State bore no relation to the local debt, which latter could have been directly entered into by an enterprise or a local authority in the territory and for which the territory would of course continue to be responsible, as it would for State debts from which the territory had benefited.

9. Article 21, given the content of paragraph 2, raised the same problems as article 12.<sup>1</sup> The question was whether the matter dealt with in the article still came within the context of State succession since, presumably, succession had already occurred and the apportionment of the debt by the successor State among its component parts was therefore a matter for the internal law of that State.

10. Paragraph 2 of article 21 had been designed to protect the creditors of the State and to identify their debtor for them. However, some people considered that that objective had not been attained, inasmuch as paragraph 2 apparently authorized the successor State to opt for a change of debtor, and so could create enormous confusion among creditors. Although he had proposed in paragraph 213 of his report that the paragraph should be deleted, he was still hesitant about

the matter. Paragraph 1 laid down the principle of the passing of State debts from the predecessor States to the successor State, and paragraph 2 provided for a second legal transaction whereby the debts could be apportioned in accordance with the internal law of the successor State. Since he realized that that could be regarded both as a complication and as a protection for creditors, he would leave it to the Commission to decide whether to retain or to delete paragraph 2.

11. In regard to articles 22 and 23, which related respectively to the case of separation and to that of dissolution, he recommended that the Commission should be guided by the same consideration as always, namely that the passing of the debt or its apportionment should be effected in equitable proportions between the predecessor State and the successor State, in the case of article 22, and between the successor States, in the case of article 23. Obviously, such a solution was possible only if due account was taken of all the relevant circumstances in determining what was equitable.

12. The general structure of articles 21 to 23 had not been the subject of any criticism in the written or oral comments that had been formulated. It had merely been noted that the wording adopted by the Commission might give rise to an interpretation of the provisions that was contrary to the Commission's intent: by providing expressly for the possibility of an agreement between the predecessor State and the successor State (art. 22) or between the successor States (art. 23), in derogation of the general principle of devolution laid down in both articles, the impression might be given that such an agreement could infringe the rule concerning the equitable apportionment of debts. That was naturally not what the Commission intended, although, in the case of a separation, it was conceivable that the predecessor State might agree to continue to assume responsibility for all State debts, in return for a consideration from the successor State. Such a transaction, of course, presupposed an agreement between the States which, seen in isolation, might appear to be inequitable, but which in fact achieved genuine equity if the modalities of succession as a whole were borne in mind.

13. There had been some speculation that it might be clearer to delete all reference to the possibility of an agreement, since an agreement was in any event essential in the matter of State succession, and express reference to a possible agreement was therefore not altogether necessary. His own view was that articles 22 and 23 were perfectly clear. He could agree to the deletion of the reference to the possibility of an agreement, and would leave it to the Drafting Committee to decide whether any change was needed.

14. Mr. NJENGA, referring to draft article 20, said that paragraph 2 would clearly be improved by the addition of the provision to the effect that the implementation of the agreement referred to in paragraph 1 should not endanger, by excessive indebt-

<sup>1</sup> For text, see 1661st meeting, para. 95.

edness, the normal development of the newly independent State.

15. Referring to draft article 21, he agreed that paragraph 2 could be deleted without any detrimental effects, since it dealt with a matter which fell entirely within the sphere of the internal law of the newly independent State. Moreover, it could conceivably jeopardize the rights of the creditor, which should not have to identify the part of a new State to be held responsible for a debt owed to it.

16. Referring to draft articles 22 and 23, he said that the expressions “unless the predecessor State and the successor State otherwise agree” and “unless the successor States otherwise agree” seemed to lack clarity and could be interpreted as meaning that the States concerned might agree on an inequitable apportionment of the State debt of the predecessor State passing to the successor State. Consequently, the two clauses in question could be deleted.

17. Mr. USHAKOV reminded the Commission that he had always been in favour of an abbreviated form of wording for article 20, reading:

“When the successor State is a newly independent State, no State debt of the predecessor State shall pass to the newly independent State”.

He had never insisted on the adoption of that wording, however, since the other members of the Commission, and particularly those from the developed countries, had always been in favour of a reference in the article to the possibility of an agreement between the predecessor State and the successor State. In his view, however, such a reference added nothing, since it went without saying that an agreement could always be concluded if the newly independent State so wished.

18. As for article 21, he had always been opposed to paragraph 2, which was a source of difficulties that boded ill for creditors. Under the terms of draft article 12, which was symmetrical with article 21, the apportionment of State property after State succession was a purely internal matter for the successor State, which was free to apportion that property without third parties being in any way concerned. In the case of State debts, however, the component part to which the successor State attributed a debt might not be a subject of international law if it was, for instance, a province or a town. Consequently, the creditor would no longer be able to turn to his debtor to secure payment, even though it was in fact up to the successor State itself to settle all matters pertaining to the State debt that had passed to it. Paragraph 2 of article 21, therefore, could give rise to considerable difficulty, despite the inclusion of the clause “Without prejudice to the provision of paragraph 1”.

19. Lastly, article 23 raised a question of form: it would be preferable if the main clause were drafted to read: “. . . the State debt of the predecessor State shall pass to successor States in equitable proportions . . .”.

20. Mr. CALLE Y CALLE, referring to draft article 20, said that the fact that fewer comments had been made on the draft article in the Sixth Committee in 1980 than in 1979 was an indication that the wording proposed in 1980 was fairly acceptable. Referring to paragraph 2, he said that he could accept the current wording, which stated a sound principle, consistent with the goal of establishing a new and equitable international economic order. In his view, the provision contained in paragraph 2 should be retained, particularly since a similar provision, relating to the passing of State property, had been included in draft article 11.<sup>2</sup> Although some few colonies had enjoyed financial autonomy, so that the identification of the origin and nature of State debts had been a simple matter, that situation was not the general rule. On the other hand, there had been many cases where predecessor States had attempted to transfer a heavy debt burden to newly independent States.

21. He favoured the retention of the current wording of draft articles 22 and 23, including the retention, in the interest of clarity, of the explicit references to the possibility of an alternative agreement between the States concerned.

22. Mr. ALDRICH said that he understood paragraph 2 of draft article 20 to be a precatory provision designed to provide assurances for the newly independent State. However, he did not see how the reference to the permanent sovereignty of every people over its wealth and natural resources was relevant to the question of State debts. The reference could be deleted, since it served no useful purpose.

23. He agreed with the observations made by Mr. Ushakov in respect of article 21, paragraph 2, and article 23. However, those matters could be dealt with in the Drafting Committee.

24. Sir Francis VALLAT, referring to the observations made by Mr. Aldrich, noted that the wording of draft article 20 was the result of a compromise which had been very carefully worked out in the Commission. Consequently, although no one might regard the result as very satisfactory, the Commission should be careful not to act too hastily in adding to or subtracting from it.

25. Mr. BEDJAOUI (Special Rapporteur) observed that all members of the Commission considered article 20 as a compromise and agreed that no substantive change should be made to it. Two remarks had, however, been made regarding paragraph 2.

26. Mr. Njenga had proposed that account should be taken of the wishes expressed in the Sixth Committee of the General Assembly by supplementing the paragraph by a reference to the need not to add to the financial burden of the successor State by subjecting it to the passing of an excessive debt. The form of wording he had proposed in his report (A/CN.4/345

<sup>2</sup> *Idem*, para. 59.

and Add.1-3, para. 207) had therefore been supported by one member of the Commission, and it would be for the Drafting Committee to refine that wording, if need be.

27. It had also been proposed that the reference to the principle of the permanent sovereignty of every people over its wealth and natural resources should be deleted. He was unable to accept that proposal, which would result in a serious distortion of the text adopted in first reading. It could, of course, be argued that the reference in question had no real connection with the debt problem; in fact, there were grounds for fearing that, solely by reason of their respective strengths, the former administering Power might impose on the newly independent State an unconscionable agreement. In that case, the effect of paragraph 2 of article 20 would be to divest such an agreement of any validity. He considered that the scope of application of the concept of autonomy of will must be restricted in the case of State succession. Since the United Nations spoke more readily of the permanent sovereignty of every people over its natural resources than it did of the sovereignty of the State, it followed logically that the people could require the State to account for its management of natural resources. Hence, the Commission was faced with a progressive development of international law. Viewed in that way, the question of sovereignty over natural resources had an obvious connection with succession to State debts, since it would be fairly easy for the administering Power to impose an unfavourable agreement on the newly independent State.

28. He therefore requested that the Commission should retain the text of article 20, paragraph 2, as adopted in first reading. Should the Commission decide otherwise, he would reaffirm his initial position, which had also been expressed by Mr. Ushakov, and ask for the article as a whole to be amended so that it simply laid down the rule of the absolute non-transferability of any debt whatsoever. He would remind the Commission that he had only agreed to omit that principle out of a spirit of compromise and in return for the reference, in paragraph 2, to the principle of the permanent sovereignty of peoples over their natural resources, which was now part of *jus cogens*.

29. With regard to article 21, he noted with satisfaction that two members had pointed out that paragraph 2 did not settle all the problems. That paragraph had initially been designed to protect the interests of creditors, but it was proving to be a double-edged weapon, as Mr. Ushakov and Mr. Aldrich had observed. The Commission might therefore wish to ask the Drafting Committee to re-examine the paragraph and simply to delete it if, in the Committee's opinion, there was no possibility of drafting a provision that would dispel all misgivings.

30. Two comments had also been made regarding articles 22 and 23. Mr. Njenga had asked that closer attention should be paid to the proposal made at the

Sixth Committee to delete the reference to the agreement between the predecessor State and the successor States, so as to avoid giving the impression that the article authorized a derogation from the equitable agreement principle. In considering that suggestion, the Drafting Committee should bear in mind that an agreement that was inequitable for one of the parties could form part of relations which, globally speaking, were equitable.

31. Mr. Aldrich and Mr. Ushakov had raised some pertinent points concerning the actual wording of the article which would, it seemed, be met by Mr. Ushakov's proposed new text.

32. The CHAIRMAN suggested that articles 20, 21, 22 and 23 should be referred to the Drafting Committee.

*It was so decided.*<sup>3</sup>

ARTICLE G (Scope of the articles in the present part (State archives)) and

ARTICLE A (State archives)

33. The CHAIRMAN invited the Special Rapporteur to introduce the part of the draft articles entitled "State archives and, in particular, articles G and A (A/CN.4/345 and Add.1-3, para. 223), which read:

*Article G. Scope of the articles in the present Part*

The articles in the present Part apply to the effects of a succession of States in respect of State archives.

*Article A. State archives*

For the purposes of the present articles, "State archives" means the collection of documents of all kinds which, at the date of the succession of States, belonged to the predecessor State according to its internal law and had been preserved by it as State archives.

34. Mr. BEDJAOUI (Special Rapporteur) said that the first question to be settled concerned the point at which the articles on State archives should appear in the draft. Since State archives formed a category of State property but had features peculiar to themselves that gave a special character to the disputes they engendered, the part relating to them should come immediately after the part relating to State property. The question which then arose was whether the special rules on State archives were the only ones that could be applied or whether, if need be, reference could also be had, in order to settle a dispute involving archives, to the rules governing State property. If that was so, the articles that dealt with State archives should obviously not conflict with those relating to State property. In any event, a link must, sooner or later, be established between the articles on State archives and those on State property.

<sup>3</sup> For consideration of the texts proposed by the Drafting Committee, see 1692nd meeting, paras. 112, 113, 114 and 115.

35. In addition to articles A to F, adopted by the Commission in first reading,<sup>4</sup> he was proposing five general articles, articles G to K (A/CN.4/345 and Add.1–3, paras. 223, 249, 251, 225 and 256), to precede the substantive articles that had already been adopted and, in a sense, pave the way for the rules laid down in those provisions.

36. Draft article G, which defined the scope of the articles on State archives, was based on articles 4<sup>5</sup> and 15<sup>6</sup>, which defined the scope of the articles in the part concerning State property and the articles in the part concerning State debts, respectively. All three articles, therefore, fulfilled the same role, but article G required the establishment of a link with the part concerning State property. That could be achieved by adding a complementary provision reading:

“The application of the articles in the present Part to the effects of a succession of States in respect of State archives shall be without prejudice to, and shall not preclude, the application to such matters, when necessary, of the articles in the Part relating to State property” (A/CN.4/345 and Add.1–3, para. 223).

37. Article A, which defined the expression “State archives”, determined the entire structure of the articles that followed. The definition, treated by the Commission as strictly provisional when it had been adopted in first reading, had been the subject of numerous oral and written comments on the part of Governments, some of which lacked clarity and were unlikely to assist the Commission in improving the text of the article.

38. In the Sixth Committee in 1979, some representatives had questioned the meaning of the word “documents”. In the view of the Commission, that word, and still more so the expression “documents of all kinds”, was to be given a wide meaning. Other representatives had expressed the hope that State archives would be defined by reference to international criteria, so that the definition would not be fettered by the internal law of States. The question had also arisen whether the expression “documents of all kinds” covered works of art, in which connection it had been remarked that, in Africa, certain documents took the form of works of art. On that point, it should be noted that the definition under consideration in no way excluded works of art that were treated as archives under the internal law of a State. Yet other representatives had taken the view that the proposed definition would give rise to confusion, and that a distinction must be made between archives needed for the day-to-day administration of the State and collections of documents of cultural value. Lastly, some representatives had felt that an enumerative definition would be preferable to a vague one. The comments to which the

definition had given rise in the Sixth Committee in 1980 had been more or less the same as in 1979. It had been proposed that the definition should be radically amended and amplified to cover all documents belonging to a State, of whatever kind and whatever age.

39. Of the written comments of Governments as summarized in his report (A/CN.4/345 and Add.1–3, 235 *et seq.*), those submitted by the Austrian Government (A/CN.4/338/Add.3) deserved special mention: according to that Government, the rules relating to State archives were necessarily residual, since the agreement between the predecessor State and successor State was absolutely decisive. While he endorsed that viewpoint, he could not go along with the Austrian Government’s conclusion that, except for the provision on newly independent States, the articles on State archives should be deleted because they would add little to the draft as a whole.

40. Analysing the text of article A as adopted by the Commission in first reading, he said that the definition of State archives contained two cumulative conditions: first, the fact that the archives belonged to the predecessor State must be determined by reference to the internal law of that State, and, second, the archives must have been preserved by the predecessor State as State archives. Given the absence of an appropriate rule of international law—and the representatives who had been in favour of an international definition of State archives had not suggested any such rule—it seemed impossible to avoid a reference to internal law. Moreover, the expression “State property” had likewise been defined in article 5,<sup>7</sup> by reference to the internal law of the predecessor State, and it was advisable to maintain the similarity between article 5 and article A in that regard.

41. He was, however, hesitant about retaining the second condition. When including that condition, the Commission had attempted to avoid a situation whereby the predecessor State could exclude the bulk of public papers of recent origin (“living” archives) from the application of the draft articles simply because they were not designated under its internal law as State archives. In some countries, living archives were not treated as State archives until a certain time had elapsed. However, the condition might ultimately produce the opposite of what was intended, since it would in fact make it possible to exclude living archives from succession by delaying the moment at which they would be treated as State archives. Hence, it might be better to delete it.

42. There was another reason for deleting it. A predecessor State might entrust cultural or historical archives of great value to another State or foreign institution on protracted deposit or for the purposes of a fairly lengthy travelling exhibition. In the event of a succession of States, could the archives be said to have been preserved by the predecessor State when they

<sup>4</sup> See 1658th meeting, footnote 3.

<sup>5</sup> For text, see 1660th meeting, para. 17.

<sup>6</sup> *Idem*, 1671st meeting, para. 1.

<sup>7</sup> *Idem*, 1660th meeting, para. 17.

were no longer within its territory? In archival terminology, the notion of conservation did not involve any idea of situation, at any rate in French, but there was no guarantee that article A would be interpreted in that sense. Lastly, deleting the second condition would ensure parallelism between the definition of State archives and the definition in article 5 of State property.

43. The Commission should guard against any enumeration in article A of the various archives covered by the definition, since such an enumeration could not be complete and the numerous examples given by the Commission in the commentary to the article rendered it unnecessary. At most, the members of the Commission might wish to reflect once again on the suitability of the expression "collection of documents of all kinds", which suggested more a collection, or grouping, of documents than all a State's documents. The expression might exclude from succession individual documents that were not interconnected. Perhaps it would be better to delete the words "the collection of".

44. He saw no need to draw a distinction in article A between administrative archives and cultural or historical archives, since the definition should remain very general in scope.

45. The position regarding works of art depended on the definition given to State archives under each system of internal law. There might be countries where a message had been transmitted by means of works of art, such as illuminations or valuable ancient manuscripts, which were then treated as State archives under the internal law. Where that was not the case, works of art were not excluded from succession, since they then came under the heading of State property.

46. Mr. USHAKOV said he considered that the part of the draft relating to State archives should come after the part relating to State property.

47. With regard to article G, it would perhaps be advisable, in order to provide a link between the parts of the draft relating, respectively, to State archives and State property, to add at the end of the article the words "as component parts of State property". There would then no longer be any reason for fearing that the definition of State archives was too narrow: if certain archives were not treated as State archives under the internal law of a State, the rules relating to State property would govern.

48. Consequently, he considered that the definition in article A was satisfactory and that it would be better not to try to improve it, for fear of making it obscure. As he understood it, the word "*ensemble*", in the French text, patently referred to all documents and did not convey any idea of a collection. The text of article A could, however, be brought more nearly into line with that of article 5. To that end, the words "belonged to the predecessor State according to its internal law"

should be replaced by "were, according to the internal law of the predecessor State, owned by that State".

49. Mr. NJENGA, referring to article A, said that, to his mind, the word "collection" implied a set of documents, systematically compiled and numbered and housed in the national archives building. It was clear from the Special Rapporteur's report and oral introduction, that the definition laid down in article A was meant to cover a much broader concept, so as to include, for instance, *objets d'art* or writings on old laws. In his view, some other form of wording should therefore be found.

50. The same criticism applied to the reference to preservation. In his country, as in many others, the "living" archives required for day-to-day administration—such as documents of title to land, maps in contemporary use and marriage and birth certificates—were held in special registries, and not in the State archives. Such documents would not be covered if the phrase "preserved by it as State archives" was retained. The reference to preservation should therefore be deleted, or the word "preserved" should be replaced by some other word such as "considered".

51. Newly independent States sometimes had great difficulty in securing living archives, which tended to disappear either because in the eyes of the previous administration they were sensitive, or because some official decided to keep them, say, for the purposes of research, or again simply because they were destroyed. He therefore suggested that the Drafting Committee should take a closer look at the article to ensure that the Commission's intent was quite clear.

52. Mr. YANKOV agreed that the draft articles on State archives should be placed immediately after those on State property. That would also help to dispel certain difficulties of definition so far as *objets d'art* were concerned.

53. He also agreed that the Drafting Committee should consider modifying article G so as to link archives with State property in some way.

54. He had some difficulty with the word "collection" in article A. As he understood it, a collection was something compact, an integral entity whose elements were interrelated in terms either of time or of some other criterion. In his view, therefore, nothing would be lost if the word "collection" was deleted, particularly since the article included a reference to internal law.

55. He also considered that the phrase "preserved by it as State archives" required amendment. In some countries, a special department was responsible for State archives. In his own country Bulgaria, that department was a relatively autonomous body with a very clearly defined sphere of competence. It did not hold documents that were in current use. To avoid difficulties of interpretation and conflict of laws, therefore, the expression in question could either be omitted or replaced by some other wording. Otherwise, he

could accept the text of the article as proposed by the Special Rapporteur.

56. Mr. ŠAHOVIĆ said he trusted that, when the Drafting Committee came to examine articles G and A, it would not overlook the reasons which had resulted in the form of wording adopted by the Commission in first reading. It was particularly important to avoid defining State archives so broadly that the special nature of such archives was no longer apparent.

57. Mr. VEROSTA said that he had nothing against the idea of specifying, in article G, that State archives were State property; he feared, however, that such a clarification and the reference to other articles might give rise to difficulties of application.

58. With regard to article A, he approved the wording proposed by Mr. Ushakov, but stressed the need to retain the condition set forth in the concluding phrase.

59. Mr. BEDJAOUI (Special Rapporteur), summing up the discussion, noted that the members of the Commission agreed that the articles relating to State archives should come immediately after those on State property.

60. Mr. Ushakov's proposed addition to article G seemed to him to be better and simpler than the wording he had himself proposed. Unlike Mr. Verosta, he considered it essential to establish a link between State archives and State property.

61. With regard to article A, he still thought that the word "*ensemble*" should be omitted, since it conveyed the idea of a collection. Indeed, it had been translated by "collection" in the English version of the article. As for the second condition laid down in article A, it seemed clear from the discussion that it should be deleted. In some countries, the notion of State archives was extremely restrictive, for it applied only to an ancient collection, preserved in an autonomous institution, and in special premises. If the condition was retained, it could give the impression that only archives of that kind would be the subject of a succession of States and that the living archives to be found in other institutions were excluded. Moreover, the concept of preservation could also be interpreted restrictively.

62. The Drafting Committee should not have any difficulty in preserving an appropriate degree of parallelism between article A and article 5.

63. Sir Francis VALLAT agreed that the articles on archives should come after those on State property.

64. In his view, it was very important that the Commission should not find itself in the position where, in respect of the same document, there was a conflict between the application of the articles on State property generally and those on State archives; he feared that some of the suggestions made would have exactly that effect. The purpose of the articles on State

archives was to deal with such archives in a special way because of their special character. There was now a risk that that purpose, together with the special character of State archives, would be lost entirely.

65. In his view, it would have been more useful to discuss the question of the definition of State archives after, rather than before, the substance of the other articles had been settled.

66. Mr. BEDJAOUI (Special Rapporteur) said that there was no reason why the Commission should not refer articles G and A to the Drafting Committee, but reserve the right to revert to them after it had considered other articles on State archives.

67. The CHAIRMAN suggested that articles G and A should be referred to the Drafting Committee.

*It was so decided.*<sup>8</sup>

*The meeting rose at 1.10 p.m.*

<sup>8</sup> For consideration of the texts proposed by the Drafting Committee, see 1694th meeting, paras. 29–30 and paras. 32–33, respectively.

## 1689th MEETING

*Monday, 13 July 1981, at 3.10 p.m.*

*Chairman:* Mr. Doudou THIAM

*Present:* Mr. Aldrich, Mr. Barboza, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

### **Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/338 and Add.1–4, A/CN.4/345 and Add.1–3)**

[Item 2 of the agenda]

#### **DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)**

ARTICLE H (Rights of the successor State to State archives passing to it),

ARTICLE I (Date of the passing of State archives),

ARTICLE J (Passing of State archives without compensation), *and*

ARTICLE K (Absence of effect of a succession of States on third party State archives)

1. The CHAIRMAN invited the Special Rapporteur to introduce articles H, I, J and K (A/CN.4/345 and Add.1–3, paras. 249, 251, 255 and 256), which read:

**Article H. Rights of the successor State to State archives passing to it**

A succession of States entails the extinction of the rights of the predecessor State and the arising of the rights of the successor State to such of the State archives as pass to the successor State in accordance with the provisions of the articles in the present Part.

**Article I. Date of the passing of State archives**

Unless otherwise agreed or decided, the date of the passing of State archives is that of the succession of States.

**Article J. Passing of State archives without compensation**

Subject to the provisions of the articles in the present Part and unless otherwise agreed or decided, the passing of State archives to the successor State shall take place without compensation.

**Article K. Absence of effect of a succession of States on third party State archives**

A succession of States shall not as such affect State archives which, at the date of the succession of States, are situated in the territory of the predecessor State and which, at that date, are owned by a third State according to the internal law of the predecessor State.

2. Mr. BEDJAOUI (Special Rapporteur) said that articles, H, I, J and K were closely akin to the corresponding draft articles on State property.

3. Article H, which was modelled on article 6,<sup>1</sup> relating to the rights of the successor State to State property passing to it, laid down the principle that, with regard to such State archives as passed to the successor State, a succession of States entailed the extinction of the rights of the predecessor State to those archives and the arising of corresponding rights for the successor State, a principle that applied even if the physical transfer did not take place immediately after the date of the succession.

4. One question was whether a successor State which received copies of archives possessed rights over them, and whether a clause should be added to article H to safeguard any such rights.

5. Article I was the counterpart of article 7,<sup>2</sup> relating to the date of the passing of State property. The date of the passing of State archives, like that of the passing of State property, was that of the succession of States, unless the date was otherwise agreed by the States concerned. The principle derived from State practice, which furnished many examples of treaties that provided for the "immediate" transfer of State archives or for their transfer "without delay". Sometimes time-limits had to be set for the transfer of State archives, for the purposes of drawing up an inventory or taking steps for them to be reproduced, but in principle, the passing of State archives took place at the date of the succession of States. Consequently, when there was a delay in the transfer of State archives

to the successor State and a further succession of States affecting the predecessor State occurred, it was important to know that the archives in question were excluded from the second succession.

6. Article J, which corresponded to article 8,<sup>3</sup> laid down the principle of the passing of State archives without payment or compensation. The principle was well established by State practice and was implicitly confirmed in subsequent articles, which provided that the cost of making copies of archives should be borne by the requesting State.

7. Article K was the counterpart of article 9,<sup>4</sup> which related to the absence of effect of a succession of States on third party State property. In terms of State archives, it covered two eventualities in particular. The first was that in which the archives of a third State were for some reason housed within the predecessor State prior to the date of succession (it was clear in such a case that the archives should not be affected by the succession). The second eventuality concerned a further succession of States. In that case, the successor State in the first succession was regarded as a third State in the second succession; those of its archives situated within the territory of the predecessor State which it had not recovered by that time should not be affected by the second succession.

8. Sir Francis VALLAT said that he had some doubts about the proposal made by the Special Rapporteur in paragraph 250 of his thirteenth report (A/CN.4/345 and Add.1-3) to include in article H the words "Subject to the rights held by the State which obtains a copy of such State archives". Article H dealt with the extinction of the rights of the predecessor State to the State archives that passed to the successor State, but the proposed additional wording dealt with a collateral or separate right that might be held by a State which obtained a copy of the archives. His understanding was that the passing of State property would not, in principle, extinguish any collateral rights enjoyed by third parties, and that State property passed to the successor State subject to any rights to that property vested in third parties. To include in article H the additional wording proposed by the Special Rapporteur might, however, suggest that the rights of third parties could be extinguished.

9. His doubts might have been caused partly by the first sentence of paragraph 250 of the report, in which the Special Rapporteur had stated that he was drawing attention to a problem that had no equivalent with respect to State property, which was, by definition, irreproducible. There was, however, nothing at all in the definition of State that excluded the possibility that such property might be reproduced. Indeed, if account was taken of the thousands of reproductions of the bust of Nefertiti that existed throughout the world, it

<sup>1</sup> For the text, see 1660th meeting, para. 64.

<sup>2</sup> *Idem*, para. 70.

<sup>3</sup> *Idem*, para. 77.

<sup>4</sup> *Idem*, 1661st meeting, para. 1.

would be seen that it was quite incorrect to say that State property could not be reproduced.

10. Mr. VEROSTA said he too thought it better not to complicate article H by inserting a reference to copyright.

11. Mr. ALDRICH said that he had the same reservations with regard to article K as he had with regard to article 9 (1661st meeting); neither of those provisions really needed to be included in the draft. If article 9 was eventually deleted, then article K should also be deleted. He nevertheless recognized that if article 9 was retained, article K should be retained as well.

12. Mr. REUTER said that, like Sir Francis Vallat and Mr. Verosta, he thought it would be better not to amend article H as suggested by the Special Rapporteur. The Commission might none the less provide in a final article that:

“Nothing in the present draft articles shall prejudice questions of artistic, literary, intellectual or other property to which the present articles might give rise.”

13. Mr. BEDJAOU (Special Rapporteur), referring to Article H, said that Mr. Reuter's suggestion that matters relating to copyright should be dealt with in a separate article could be referred to the Drafting Committee for consideration.

14. Article K would, of course, have to be deleted if the Commission decided to delete article 9, which was its counterpart; otherwise, it would have to be retained.

15. The CHAIRMAN suggested that articles H, I, J and K should be referred to the Drafting Committee.

*It was so decided.*<sup>5</sup>

#### ARTICLE B (Newly independent State)

16. The CHAIRMAN invited the Commission to consider article B, which read:

##### *Article B. Newly independent State*

###### 1. When the successor State is a newly independent State:

(a) archives, having belonged to the territory to which the succession of States relates and become State archives of the predecessor State during the period of dependence, shall pass to the newly independent State;

(b) 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 newly independent 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 newly independent 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 newly independent 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 newly independent State or its boundaries, or which are necessary to clarify the meaning of documents of State archives which pass to the newly independent State pursuant to other provisions of the present article.

4. Paragraphs 1 to 3 apply when a newly independent State is formed from two or more dependent territories.

5. Paragraphs 1 to 3 apply when a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations.

6. Agreements concluded between the predecessor State and the newly independent State 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.

17. Mr. BEDJAOU (Special Rapporteur) said that article B, which the Commission had adopted on first reading, had not given rise to any major objections or reservations in the Sixth Committee. It had been noted that the article was of great importance for newly independent States, since archives were often a significant part of their cultural heritage. Some representatives had pointed out that the destiny of many newly independent States had long been linked to that of an administering Power and that the archives of their common history constituted a common heritage that should be shared by the predecessor State and the newly independent State in the best way possible. Others had emphasized that the six paragraphs of article B did not merely reconcile the interests of the predecessor State and the newly independent State, but also preserved the cultural and historical heritage of peoples.

18. With regard to paragraph 1, one representative had taken the view that the words “archives, having belonged to the territory” were ambiguous. Another had questioned whether archives of such institutions as local missionary bodies or banks established on the territory prior to colonization should be included in that category. There had been cases, for instance, in which missions had formed very large and valuable archival collections as a result of detailed historic or geographical research. Sometimes, such archives had been offered to the newly independent States by the institutions concerned. He doubted that archives of that kind were covered by paragraph 1, and considered that it would be difficult to apply the provisions relating to State archives to archives which were, by definition, private. Some suggestions in that connection might none the less be made by the Commission or the Drafting Committee.

19. As to paragraph 6, which provided that agreements concluded between the predecessor State and the newly independent State should not infringe the right of the peoples to those States to development, to information about their history and to their cultural

<sup>5</sup> For consideration of the texts proposed by the Drafting Committee, see 1694th meeting, paras. 29–31.

heritage, he considered that it laid down a peremptory rule and, unlike some representatives on the Sixth Committee, he thought it entirely appropriate.

20. The provisions of paragraph 3 had been considered to be consistent with the principle of equity and capable of facilitating application of the rule *uti possidetis juris*, concerning the immutability of the frontiers inherited from the colonial era. In his opinion, the expression in that paragraph "documents from the State archives" involved some redundancy, and it would probably suffice to refer either to documents or to State archives.

21. Governments had not made any criticisms of article B in their written comments, and he therefore proposed that the wording of the article should not be altered.

22. Mr. NJENGA said that, on the whole, article B was well drafted and could be referred to the Drafting Committee. Nevertheless, if the Commission decided to maintain the two conditions set forth in subparagraph 1 (a)—namely, that archives must have belonged to the territory to which the succession of States related and must have become State archives of the predecessor State during the period of dependence—some State archives that should rightfully pass to the newly independent State might, in fact, be prevented from passing to it. Thus, if both of those conditions had to be met, State archives which had been considered as such before the country in question had been colonized but, on colonization of the country, had been considered by the colonizing Power, in accordance with its internal law, as no longer forming part of State archives, might not pass to the newly independent State.

23. He therefore suggested that, in order to make the categories of State archives to which the succession of States related as broad as possible, the word "and" in subparagraph 1 (a) should be replaced by "or".

24. He fully endorsed paragraph 3, which laid down the mandatory requirement that the predecessor State should provide the newly independent State with the best available evidence of documents from the State archives of the predecessor State which bore upon the boundaries of the newly independent State. That provision would be of crucial importance to African countries. The principle it embodied had been incorporated in the Charter of the OAS,<sup>6</sup> but many boundaries still remained to be demarcated in Africa, not because of disregard for that principle but because of a lack of information about where those boundaries actually lay.

25. Mr. CALLE Y CALLE said that, as generally agreed in the Sixth Committee, article B was in principle satisfactory, particularly since it gave the predecessor State and the newly independent successor

State full freedom to agree on the passing of State archives that were of common interest to both of them.

26. The purpose of paragraph 3, seemed to be to facilitate the application of the rule *uti possidetis juris*. In some cases, however, steps were taken to prevent newly independent States from gaining access to the State archives to which they were entitled. He therefore suggested that the words "shall provide the newly independent State with the best available evidence of documents from the State archives of the predecessor State" should be replaced by the words "shall facilitate immediate access by the newly independent State to the State archives of the predecessor State".

27. As to paragraph 6, he was of the opinion that the reference to "the right of the peoples of those States to development", which was, by implication, a reference to economic development, should be placed after the reference to the right of the peoples of those States "to information about their history and to their cultural heritage".

28. Mr. REUTER said that the phrase in article B, subparagraph 1 (a), "archives, having belonged to the territory to which the succession of States relates and become State archives of the predecessor State during the period of dependence" was vague and did not seem suitable for the cases which the Special Rapporteur sought to cover. It would perhaps be better to say "archives, having been formed in the territory, during the period of dependence, and having subsequently become State archives of the predecessor State".

29. Paragraph 3 did not call for any change, on the understanding that it did not refer to any theory regarding the territorial boundaries of newly independent States. He wished, however, to revert to a problem which the paragraph did not take into account, namely, of archives that remained the property of the predecessor State but were of major interest in establishing the successor State's titles to territory. The difficulties of such a situation were inevitable. It was not conceivable that all the legal documentation relating to the territorial sovereignty of the successor State should be transferred to that State: a part of it always remained the heritage of the predecessor State. Such archives should none the less be subject to a special regime. It was not enough for the successor-State to have a right to the best available evidence of such archives: it should occupy a privileged position vis-à-vis other States. The successor State might find itself in the event of an international dispute in a position in which its means of defence were in the possession of the predecessor State. In such a case, the successor State should have the privilege of agreeing to the disclosure and publication of such archives; otherwise, it would be placed at a disadvantage vis-à-vis third States.

30. He fully endorsed the rule laid down in paragraph 6, but did not think it was properly enunciated. It gave the impression that there was a rule of

<sup>6</sup> United Nations, *Treaty Series*, vol. 479, p. 39.

international law whereby the peoples of newly independent States had a right over all the items that constituted their cultural heritage, wherever they were located. If such was the intention of the Commission, it would follow, for example, that the Greeks could claim back the friezes from the Parthenon housed in the British Museum. Personally, he was prepared to accept such a rule, but he had the impression that it was not yet recognized in international law. If that was indeed the rule the Commission wished to lay down, it should express the rule in clear terms. If, however, the Commission preferred to make it clear that, unfortunately, such a rule did not exist for the time being—and that, moreover, it would have no place in a set of articles that dealt with State archives, rather than the subject of the cultural heritage—it should modify the wording. In any case, it was impossible for the Commission to lay down a rule of *jus cogens* or to affirm that agreements that did not comply with the terms of paragraph 6 would be contrary to a rule of *jus cogens* that was recognized in international practice and derived from customary law. It would be better to provide that the agreements concluded between the predecessor State and the newly independent State should promote the right of the peoples of those States to development, to information about their history and to the reconstitution of their cultural heritage, and it could be made clear in the commentary that many members hoped, as did he himself, that one day there would be an international rule on the restitution of State archives.

31. Lastly, he assumed that the right to development referred to in article B, paragraph 6, was a right to cultural development and not to economic development, which was totally alien to the provision in that paragraph.

32. Mr. USHAKOV said that, in principle, he was prepared to accept any article relating to newly independent States that was satisfactory to those members of the Commission who came from third world countries, but he was surprised that the latter were content with provisions that placed newly independent States in a position of inferiority as compared with States to which part of the territory of a State was transferred.

33. In that connection he pointed out that, under the terms of article B, the archives that would pass to the newly independent State were simply those that had belonged to the territory to which the succession of States related and become State archives of the predecessor State during the period of dependence, together with archives which, for a proper and normal administration of the territory, should be in that territory. That was the substance of subparagraphs 1 (a) and (b) of the article. However, under subparagraphs 2 (a) and (b) of article C,<sup>7</sup> relating to the transfer of part of the territory of a State, the State

archives that passed to the successor State were, apart from those which had to be at its disposal for the purposes of normal administration, all other archives relating exclusively or principally to the territory transferred.

34. Again, article B, paragraph 2, provided that reproduction of archives should be determined by agreement between the predecessor State and the newly independent State, whereas article C, paragraph 4, laid down a definite rule for the reproduction of archives. There too, the newly independent State was at a disadvantage compared with the State to which part of the territory of a State was transferred.

35. It was probably because the article relating to newly independent States had been drafted before the article relating to the transfer of part of the territory of a State that the provisions of the former were more restrictive. It would now be advisable to revert to article B and adapt its provisions to the less restrictive terms of article C.

36. Article B, paragraph 2, dealt with the method of determining the passing or reproduction of parts of State archives of the predecessor State other than those which passed to the successor State in accordance with paragraph 1, and that were of interest to the territory to which the succession of States related. Since paragraph 6 of the article specified the rights which such agreements should not infringe, he wondered whether the rules of paragraph 2 or those of paragraph 6, concerning the modalities of such agreements, would prevail. In his view, the two provisions were somewhat contradictory.

37. Mr. BEDJAOUI (Special Rapporteur), summing up the discussion on article B, noted Mr. Njenga's suggestion that, instead of two cumulative conditions, subparagraph 1 (a), should lay down only one; otherwise, archives of considerable use to the newly independent State might not be covered by the succession because they had belonged to the territory which was the subject of the succession but had not become State archives of the predecessor State during the period of dependence. Archives belonging to the territory before colonization might, for instance, subsequently have been dispersed throughout the world. He did not, however, think it was possible to lay down a principle that such archives should pass to the newly independent State; the predecessor State could not enter into an undertaking to ensure that archives which had been disseminated throughout other States during or prior to the period of dependence were returned to the newly independent State. The Drafting Committee might consider Mr. Reuter's interesting proposal, although his proposed wording would not resolve the problem of archives that had been dispersed throughout the world.

38. Referring to Mr. Ushakov's general comments, he said that he was grateful to him for having pointed out that the provisions of article B were more restrictive than those of article C. However, the

<sup>7</sup> See 1658th meeting, footnote 3.

difference was caused not by the order in which the articles has been adopted but by a matter of substance. Article C dealt with a special kind of succession, transfer of part of the territory of a State—a typical example being an adjustment of boundaries, which was usually made between advanced States. The rules laid down in article C, therefore, should be taken to refer not to the transfer of large amounts of archives, but to a few administrative documents; only in very exceptional cases would a treasure trove, for example, be found on a territory that was the subject of a transfer. In the case covered by article B, however, it was necessary to take account of reality: predecessor States were reluctant to deliver up to newly independent States archives which related to their *imperium* and their *dominium*, whether such archives had been formed during the colonial period or even prior to it, and which were therefore part of the cultural and historic heritage of the territories that were the subject of a succession. In view of that particular fact, the provisions of article B were not too ambitious. He would be delighted, however, if the Commission tried to enlarge the scope of the article so as to help the newly independent States not only to recover those items of their cultural heritage that were in the possession of the predecessor State, but also to reconstitute that heritage in its entirety, on a world-wide basis.

39. Paragraph 3 of article B dealt with the question of boundaries and, in particular, with documents of a political nature relating to the sovereignty of the colonial Power over the territory that was the subject of the succession—for instance, multilateral treaties such as the General Act of the Conference of Berlin (1885), which had led to the dismemberment of Africa. Such documents, which remained in the possession of the colonial Powers of the time and to which the newly independent States did not have access, were sorely needed by the latter when they were grappling with boundary problems. He did not, however, think it would be desirable to favour a newly independent State in the way Mr. Reuter had suggested. A newly independent State that wished to secure from the former administering Power evidence relating to its titles to territory or boundaries generally had to enlist the other successor States of that administering Power in the steps that it took, for they might consider such steps prejudicial to their interests. Paragraph 3 was satisfactory because it enjoined the predecessor State to provide all the successor States with the best available evidence.

40. With regard to Mr. Calle y Calle's comments, the effect of his suggested amendments to paragraph 3 would be to restrict its scope. The requirement that the predecessor State should provide the newly independent State with the best available evidence, as laid down in paragraph 3, meant that the former had to anticipate the wishes of the latter. The concept of the right to development, as set forth in paragraph 6,

related not to economic development but to the social, cultural, political and other aspects of development.

41. Mr. Reuter's proposed new wording of paragraph 6 implied recognition of a rule of restitution which he (the Special Rapporteur) was not ready to accept. Admittedly, newly independent States were entitled to obtain items belonging to their cultural and historic heritage, but the obligation to return such items to them was not incumbent on the former administering Power alone, since it could not undertake to return to the newly independent State archives that were not in its possession. For example, a former colonial Power other than Great Britain could not be asked to return to Greece the friezes from the Parthenon that were housed at the British Museum. Problems of that kind were a matter not of State succession, but of returning to their countries of origin works of art that had been dispersed throughout the world; the Director-General of UNESCO had launched an appeal to that end in 1978.

42. The CHAIRMAN suggested that article B should be referred to the Drafting Committee.

*It was so decided.*<sup>8</sup>

#### Co-operation with other bodies (continued)\*

[Item 11 of the agenda]

#### STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

43. The CHAIRMAN invited Mr. Aja Espil, observer for the Inter-American Juridical Committee, to speak before the Commission.

44. Mr. AJA ESPIL (Observer for the Inter-American Juridical Committee) said that the annual exchange of observers, documentation and programmes of work between the Inter-American Juridical Committee and the Commission enabled each body to keep abreast of the work of the other. In that connection, it was hoped that the Commission's observer at the next session of the Committee would be able to deliver a lecture to the annual course in international law organized by the Committee. The report by the previous Chairman of the Commission, Mr. Pinto, had provided an excellent insight into the work of the Commission.

45. He expressed the hope that the present Chairman would be able to attend the Committee's next session or, if he were unable to do so, that he would appoint another member of the Commission for that purpose.

46. Over the past ten years, the work of the Inter-American Juridical Committee had focused on strengthening the effectiveness of the OAS. Conse-

<sup>8</sup> For consideration of the text proposed by the Drafting Committee, see 1694th meeting, paras. 40–48.

\* Resumed from the 1687th meeting.

quently, the Committee's reports and drafts were designed to establish the future conditions necessary to facilitate the operation of the machinery for international co-operation.

47. While it was true that, over the past decade, international law had been enriched by further codification and progressive development, by the conclusion of important multilateral conventions and by the decisions of international courts, the problems of the Inter-American community appeared to be unchanged, although they presented themselves in a different form. The special and continuing concerns of the Committee, as a regional juridical body, included the safeguarding of fundamental human rights and the international problems affecting the development of States. At recent sessions, the Committee had studied more particularly the question of torture and the legal aspects of the transfer of technology.

48. In accordance with a resolution adopted by the General Assembly of the OAS in 1978, the Committee had embarked on a study with a view to preparing a draft convention defining torture as an international crime. In doing so, the Committee had considered once again the distinction between an international crime and an international delict, a subject which had been discussed some years earlier by the Commission in connection with the topic of State responsibility. The majority of the members of the Committee had been of the view that the General Assembly had assigned to it an imperative mandate to declare torture to be an international crime and that, consequently, rather than take issue with that assertion, it must confine itself to translating it into legal terms. Other members had expressed the view that, given the eminently technical and juridical nature of its mandate, the Committee was required, in all cases, to deliver an opinion on matters within its competence.

49. Another question discussed in the course of the debate on torture was whether it was possible to attribute to a State an act committed by a public official acting in excess of his authority or contrary to his instructions. While some members considered that such acts could not be attributed to the State, others maintained that, in the event, State responsibility would be illusory, since it was exceptional for a public official to receive instructions to commit an unlawful act. The main thrust of the draft convention was based on a new element, namely, international control of State obligations, by virtue of which the individual would be protected even against his own State authorities.

50. The controversial question of whether individuals could be subjects of international law had arisen during the discussion of the draft. The touchstone of the international legal personality of the individual lay not only in the granting of rights, but in ensuring their observance. Once an individual had access to the procedure established by the Statute of the Inter-American Commission on Human Rights and of the Inter-American Court of Human Rights, he could be

said to have acquired the character of a subject of international law. Articles 9 and 14 of the draft convention on torture established the appropriate machinery. The wording of the draft was in fact so far-reaching in scope that mistreatment of a child by its mother or of one spouse by another could be regarded as international crimes.

51. In a number of topics before the Inter-American Juridical Committee, socio-economic considerations often became superimposed on exclusively juridical considerations. That had been the case in respect of the Committee's work on the legal aspects of the transfer of technology, a question referred to it in 1977 by the General Assembly of the OAS. The transfer of technology from the developed to the least developed countries was a question of the utmost importance to advocates of a new international economic order. The Committee had focused its attention on two main topics: first, the system for international protection of industrial property and the review work undertaken by WIPO, and second, the draft international code of conduct on the transfer of technology currently being negotiated within the United Nations. The work done by the Inter-American Juridical Committee on transfer of technology fell within the field of comparative law, rather than public international law. The results of consultations concerning the harmonization of legislation had not always been gratifying. Experience showed that co-operation was achieved not by a straightforward juxtaposition of different points of view, but by selecting areas of common interest. The report submitted by the Committee to the OAS General Assembly in 1980 had included recommendations concerning prevention of restrictive practices in the transfer of technology, a common phenomenon in Latin America. The interpenetration of two disciplines always called for considerable efforts at harmonization. Accordingly, the Committee had attempted to devise a legal regime which made international economic relations subject to rules that reflected the principles of more equitable distribution.

52. The fact that four members of the Committee were eminent specialists in private international law had enabled the Committee to take up a number of problems concerning the two main legal systems existing in that sphere on the American continent. The rules of private international law were laid down basically in the internal law of each State, but unification of such rules through conventions designed to resolve conflicts of laws was a constant aim of the regional system.

53. The first Meeting of experts on private international law, held in Washington, D.C., in April 1980, which had been attended by a number of members of the Committee, as well as by a number of distinguished scholars, had produced two documents, one concerning the bases of international jurisdiction for the extra-territorial effectiveness of foreign judgments, and the other a draft additional protocol to the

1975 Inter-American Convention on the taking of evidence abroad. Those preliminary drafts had been considered by the Committee at its latest session in 1980, at which it had made amendments designed to strengthen international co-operation in judicial proceedings. The Committee had also sought ways of harmonizing the common law and Roman law systems. The 1975 Inter-American Convention embodied the principle of the civil law systems that only the jurisdictional organs of the requested State were competent to execute letters rogatory. The common law system was quite different, and an attempt had been made to resolve the conflict by means of an additional protocol authorizing a commissioner duly appointed by the judicial authority of a State to take evidence abroad, but without making use of coercive measures.

54. In conclusion, he thanked the members of the Commission and the Secretariat for the courtesy extended to him during his visit. The learned presentations and analyses of the Special Rapporteurs would enable him to take to the next session of the Committee new contributions to doctrine and background information which would be invaluable for its future work.

55. Mr. CALLE Y CALLE, speaking on behalf of the members of the Commission from countries within the Inter-American system, expressed appreciation to Mr. Aja Espil for his brilliant report on the work on the Inter-American Juridical Committee. Mr. Aja Espil was not only an outstanding diplomat, but also a distinguished jurist who did honour to the great Argentine legal tradition.

56. It was of the utmost importance for the Commission to be provided with an insight into the work carried out by the Committee. In some respects, the topics dealt with by the Committee coincided with matters taken up in the OAS General Assembly, such as the question of torture and the transfer of technology. With regard to torture, his own view was that any physical abuse of children by their parents or of one spouse by the other constituted a crime against humanity.

57. Questions such as the legal aspects of the transfer of technology and the protection of industrial property were of crucial importance for the growth of the developing countries and the establishment of a new international economic order. The time had come for harmonization of the various relevant national legislation.

58. He expressed the hope that the Chairman of the Commission would be able to continue the fruitful co-operation between the Inter-American Juridical Committee and the Commission by attending the next session of the Committee, in order to observe its work at first hand.

59. Mr. BEDJAQUI, speaking on behalf of the African members of the Commission, expressed his appreciation and admiration for the work carried out by the Inter-American Juridical Committee.

60. The exchanges between the Commission and Committee were particularly fruitful and should be strengthened, since Latin American legal science was fed by various currents of thought that often enabled it to come forward with original solutions to universal problems. For example, certain contributions made by Latin American law had assisted the African countries in resolving their own problems, particularly those relating to boundaries. The Committee's work was also of special interest because of the original methods that it followed.

61. He commended the courage with which the members of the Committee had considered the highly sensitive issue of human rights, and thanked the Committee for the efforts it had made to eradicate torture, which was a disgrace to mankind. He also thanked the Committee for its work on the transfer of technology, which was one of the keys to development, for science transcended frontiers and was the heritage of all mankind.

62. Mr. SUCHARITKUL, speaking on behalf of the Asian members of the Commission, expressed his sincere appreciation to Mr. Aja Espil for his comprehensive report on the work of the Inter-American Juridical Committee.

63. He recalled that in 1965 he had attended the meeting of the Inter-American Council of Jurists, as it then was called, as the observer for the Asian-African Legal Consultative Committee. One of the main questions being discussed at that time had been the application of minimum standards for the treatment of aliens. As a representative of Asia, he had been unable to understand why opposition had been expressed in some quarters to the application of such standards, something which demonstrated the usefulness of exchanges of views between regions.

64. He had been most interested to learn of the advanced stage reached by the Inter-American Juridical Committee on various aspects of public international law, including the elaboration of practical machinery for the protection of the rights of individuals.

65. Sir Francis VALLAT, speaking on behalf of members of the Commission from Western European and other countries, expressed his warm appreciation to Mr. Aja Espil for his brilliant report on the report on the work of the Inter-American Juridical Committee.

66. Mr. USHAKOV thanked the Inter-American Juridical Committee's observer, who was an eminent Latin American jurist, for his statement and expressed the hope that the Commission would maintain continued and fruitful ties with the Committee.

67. The CHAIRMAN expressed the appreciation of the Commission to the observer for the Inter-American Juridical Committee for his statement, from which the Commission would derive great benefit.

*The meeting rose at 6.05 p.m.*

## 1690th MEETING

Tuesday, 14 July 1981, at 10.10 a.m.

Chairman: Mr. Doudou THIAM

*Present:* Mr. Aldrich, Mr. Barboza, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Sahović, Mr. Sucharitul, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

### Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/338 and Add.1-4, A/CN.4/345 and Add. 1-3)

[Item 2 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:  
SECOND READING (*concluded*)

ARTICLE C (Transfer of part of the territory of a State),

ARTICLE D (Uniting of States),

ARTICLE E (Separation of part or parts of the territory of a State), *and*

ARTICLE F (Dissolution of a State)

1. The CHAIRMAN invited the Commission to consider articles C, D, E and F, which 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 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 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.

#### *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 provisions 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 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 peoples of 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.

2. Mr. BEDJAOUI (Special Rapporteur) said that the comments made in the Sixth Committee in 1980 had been concerned with the question of agreement, which, as was apparent from article C, paragraph 1, was fundamental in the matter.

3. The representative of Trinidad and Tobago had said that the agreement must be based on the principle of equity and take into account all the special circumstances of the case. He had also asked that all the rules which the Commission wished to see respected in connection with the conclusion of the agreements in question should be spelt out in the body of the articles. Another representative had pointed out that almost all treaties in the matter of State succession embodied an agreement applicable to archives; from that, he had concluded that the rule laid down by positive law was that there must be an agreement between the successor State and the predecessor State, and that the Commission should do no more than state that rule in article C, paragraph 1, since to go any further would be to depart from State practice. It had also been stated that the predecessor State should enter into an obligation of result and accept its responsibility towards the successor State for recovering, for the latter's benefit, all archives situated outside the territory. Another representative had, however, taken the view that the obligation should be one of means only, requiring the State merely to do everything in its power to recover those archives.

4. In his view, what mattered was that the agreement between the predecessor State and the successor State should be based on the principle of equity and should take account of all the special circumstances of the case. The Commission could not restrict the content of article C to the terms of paragraph 1, omitting the remainder of the text, since the result would be an article that lacked substance, did not lay down any

valid rule and would be of no benefit to States when it proved impossible to reach an agreement.

5. The comments on article D could be broken down into two main groups. In the first place, it had been said that paragraphs 1 and 2 would be contradictory. That was the main thrust of the written comments of the Swedish Government (A/CN.4/338), according to which paragraph 1 laid down a rule of international law on the passing of archives, whereas paragraph 2 provided that the internal law of the successor State should govern the allocation of archives subsequent to their passing.

6. His own opinion was that the contradiction was only apparent, since prior to the uniting of States the predecessor States were free to decide on the allocation of archives under agreements between themselves—although such agreements would only be valid *inter se*—whereas the purpose of article D was to indicate which was the successor State. The final wording of the article would, however, depend on the decision taken by the Commission regarding draft article 12.<sup>1</sup>

7. Some contradiction had also been noted between the wording of the article and the commentary thereto. He trusted that the Commission would ensure that the commentary followed the final text of the article as closely as possible.

8. Only minor points had been raised in the Sixth Committee regarding articles E and F (see A/CN.4/345 and Add.1–3, paras. 292–295).

9. However, the Swedish Government had proposed, in its written comments, that the Commission should bring articles E and F into line with article B;<sup>2</sup> that it should not restrict the freedom of States to conclude all such agreements as they deemed desirable; that, in articles E and F, it should delete paragraph 4, which restricted States' freedom of choice on the ground of the right of peoples to development, to information about their history and to their cultural heritage; and, lastly, that it should delete from paragraph 2 of each of those articles the phrase reading: "in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives", which, again, restricted the contractual freedom of the predecessor State and the successor State or States.

10. He did not think that it would be advisable to delete paragraph 4 nor to foreshorten paragraph 2 of articles E and F, since the agreements concluded between the predecessor State and the successor States should conform to certain principles—principles which the Commission had, moreover, formulated in very general terms. The paragraphs in question simply laid down for States general guidelines, which they should have no difficulty in following. The constraints thus

<sup>1</sup> For text, see 1661st meeting, para. 95.

<sup>2</sup> *Idem*, 1689th meeting, para. 16.

imposed by the draft articles could not be burdensome for States acting in good faith and for the common good, and the Commission should not therefore act on the Swedish Government's comments on that point. It could, however, consider in the Drafting Committee the possibilities of bringing articles E and F into line with article C.

11. Mr. USHAKOV said that, as the conclusion of an agreement between the predecessor State and the successor State was always a difficult matter, article C, paragraph 2, provided a valid basis for dealing with the passing of archives.

12. Article D, paragraph 2, was in fact unnecessary, since once the State had come into possession of the archives it could decide on their allocation by reference to its internal law. The Commission should, however, bring the wording of the article into line with the wording, as finally adopted, of draft article 12.

13. Article E called for more careful consideration, since it juxtaposed the concepts of the passing and the reproduction of State archives but contained a paragraph—paragraph 5—that dealt exclusively with the question of reproduction. It would therefore seem advisable to bring article E, paragraph 2, into line with article F, paragraph 2, which was better drafted, by deleting the provisions relating to reproduction.

14. The phrase in article F, paragraph 2, to the effect that each of the successor States should be able to “benefit as widely and equitably as possible” from those parts of the State archives that had passed to other successor States lacked clarity and would therefore be ineffective. He would favour its deletion, so as to preserve the application of the basic principles laid down in paragraph 4.

15. Mr. REUTER expressed his unreserved support for the Special Rapporteur's views.

16. He said that he, too, considered it preferable to leave article D, paragraph 2, as it stood, and that it was justified not to mention in the article the agreements that might have been concluded between the predecessor States prior to their uniting, since once the States had united such agreements lost their international character to become part of the internal law of the new State, and were then beyond reach of international law. The wording of paragraph 2 was therefore entirely satisfactory, and only some obstacle of a constitutional nature could prevent the new State from enacting legislation to amend agreements concluded previously.

17. The Special Rapporteur had said that paragraph 4 of articles E and F perhaps laid down not so much a rule of *jus cogens* as an obligation upon States with regard to the conclusion of the agreements contemplated. It might perhaps be advisable to modify the wording of that paragraph somewhat and, consequently, that of article B, paragraph 6, too.

18. Lastly, he agreed with Mr. Ushakov that the part of article F, paragraph 2, was not entirely satisfactory, since archives could, of course, be allocated equitably, but not widely. The phrase in question seemed to contradict the principle of equity, but to accord with the rule of reproduction—which could be carried out widely. It would therefore be possible to recast the paragraph to take account of Mr. Ushakov's comments and to confine the concept of equity to the allocation of archives and the concept of wide benefit to their reproduction.

19. Mr. CALLE Y CALLE agreed with the observations made by Mr. Ushakov concerning the deletion from article E, paragraph 2, of the reference to the reproduction of parts of the State archives of the predecessor State.

20. With regard to the reference to the right of peoples to development, contained in paragraph 4 of draft articles E and F, he said that it might be advisable to insert an adjective such as “overall” in order to make it clear that the reference was to general, and not simply economic, development.

21. He drew attention to a number of drafting errors in the Spanish text of the draft article.

22. Mr. BEDJAoui (Special Rapporteur) said he supported Mr. Calle y Calle's proposal that the meaning of the concept of development, in articles B, E and F, should be made clearer by the addition of the word “overall” or “integral”.

23. With regard to articles E and F, he was aware of the difficulties mentioned by Mr. Ushakov, which were probably due to hasty drafting. He also recognized that the wording of paragraph 2 of both articles was virtually the same except for the reference to the question of reproduction in article E, but would ask the Commission to give the matter further consideration before deleting that reference.

24. It was true that paragraph 5 of article E dealt with reproduction, and required each State concerned to make reproductions available at the request and at the expense of the State concerned. That paragraph was, however, silent as to the reasons for the obligation thus created, whereas paragraph 2 made it clear that it was to ensure that each State benefited as widely and equitably as possible from parts of the State archives other than those covered by paragraph 1 of the article and concerning the territory to which the succession of States related. Paragraph 2 set forth the substantive conditions and, in a sense, was the precursor of paragraph 5, which only dealt with some of the purely technical aspects of reproduction.

25. He recognized, however, that the wording of article E, paragraph 2, was awkward and considered that the Commission should redraft it along the lines indicated by Mr. Reuter. However, the Commission should perhaps do so by including a reference to reproduction in article F, paragraph 2, rather than

deleting the present such reference from article E, paragraph 2.

26. Mr. USHAKOV said that article B, paragraph 2, of which article E, paragraph 2 was the counterpart, had originally been included in the draft articles to take account of difficulties stemming from the need to maintain the integrity of archival collections. Under the terms of that paragraph, the reproduction of archives could, in certain circumstances, take the place of their passing. To take account of that same requirement of integrity, the Commission had added paragraph 6 to article F. To his mind, it would be better to add a provision similar to article F, paragraph 6, at the end of article E than to group the two concepts of passing and reproduction in the same provision. The latter would, indeed, be a dangerous course, since the provision in question might be interpreted to mean that reproduction could, by virtue of an agreement between the parties concerned, be substituted for passing, whereas the original intent had been solely to preserve the unity of archives.

27. Mr. BEDJAOU (Special Rapporteur) explained that the reason why the problem of the unity of archives had been considered only in the case of article F, relating to dissolution, was that it was in the event of dissolution that the unity of archival collections was the most at risk. Paragraph 6 of article F in fact appealed to the goodwill of States; however, if they invoked the question of unity misguidedly, they might strip the preceding five paragraphs of all effect. Consequently, it would be dangerous to generalize the use of a provision that would allow for evasion of the rules which the Commission had laid down.

28. He agreed with Mr. Ushakov concerning paragraph 2 of articles E and F and proposed that the paragraph should be moved to the end of the article in both cases. In that way, paragraphs 1, 3, 4 and 5 would lay down specific rules, while the last part of paragraph 2 would contain a reminder that the principle of equity must be respected. It should be noted, however, that the field of archives was extremely complex; the Commission should therefore move very carefully towards any revision of article E, paragraph 2.

29. Mr. USHAKOV said that article F, paragraph 6, embodied a simple safeguard clause, not a rule, and there was therefore no reason why that clause should not apply to all that part of the draft which dealt with State archives.

30. The CHAIRMAN suggested that articles C, D, E and F should be referred to the Drafting Committee.

*It was so decided.*<sup>3</sup>

31. The CHAIRMAN thanked the Special Rapporteur for having made himself available despite his

<sup>3</sup> For consideration of the texts proposed by the Drafting Committee, see 1694th meeting, paras. 49–50, 51, 52–56, and 57–59, respectively.

heavy responsibilities and for having thus enabled the Commission to conclude its second reading of the draft articles on the succession of States in matters other than treaties.

**International liability for injurious consequences arising out of acts not prohibited by international law (concluded)\* (A/CN.4/346 and Add.1 and 2)**

[Item 5 of the agenda]

**DRAFT ARTICLE SUBMITTED BY THE SPECIAL RAPPORTEUR (concluded)**

**ARTICLE 1 (Scope of these articles)<sup>4</sup> (concluded)**

32. Mr. TABIBI congratulated the Special Rapporteur on his report and analysis of a difficult topic. He recalled that the Special Rapporteur had stated (1685th meeting) that he had found Part 1 of the draft articles on State responsibility<sup>5</sup> to be of assistance. In reality, those draft articles might create difficulties for the Special Rapporteur and the Commission, since the dividing line between the two topics was extremely fine.

33. Whatever rules were prepared by the Commission should be preventive, rather than concerned mainly with the question of remedies. If the Commission succeeded in that goal, it would have performed a great service to mankind and to international law in general. The rules should also be of a general, pragmatic nature.

34. It would be helpful if the Special Rapporteur's third report could be supplemented by a compilation of materials relating to the area in question, similar to that prepared by the Secretariat in connection with succession of States in respect of matters other than treaties. There were a large number of conventions that were relevant to the topic. Also worthy of further study were the Principles of the Declaration of the United Nations Conference on the Human Environment,<sup>6</sup> although he had himself criticized them as having been drafted by economists rather than jurists and as containing contradictions, and although they had not been approved by the General Assembly. It was important to consider those Principles in their totality.

35. Finally, he agreed with the view that, in order to provide the Commission with guidelines for its future work on the topic, the draft articles should begin with a set of general definitions, rather than with the existing draft article 1.

36. Mr. ALDRICH said he had no doubt that the topic under consideration was a valid one, which warranted the Commission's attention. Just as domestic legal systems must have a rule relating to the

\* Resumed from the 1687th meeting.

<sup>4</sup> For text, see 1685th meeting, para. 1.

<sup>5</sup> See *Yearbook* . . . 1980, vol. II (Part Two), pp. 30 *et seq.*

<sup>6</sup> See 1686th meeting, footnote 4.

duty of care and to negligence, so a similar rule must exist in international law, if the latter was to be responsive to the needs of States.

37. In that connection, he pointed out that the difficulties involved in the relationship between the topic of State responsibility for internationally wrongful acts and the topic under consideration were more apparent than real because, in determining what was wrongful, whether under customary law or in efforts to codify the law of State responsibility, States often based their decisions on a balance-of-interest test and frequently came to the conclusion that a particular action was wrongful because they considered that reparation must be made for it. It would therefore be helpful if the Commission accepted an analysis that permitted it to decide that compensation must be provided even if the wrongful act did not have to be stopped.

38. He had greater difficulty with draft article 1 than with the Special Rapporteur's second report, for reasons relating to the scope of the topic and to the Commission's ability to produce general rules that would act as catalysts to help precipitate out of State interactions sets of specific rules applicable to limited areas, such as space activities or ocean pollution. He was not sure that the general rules that the Commission would be able to formulate would, in fact, serve as very effective catalysts for the elaboration of sets of rules in other areas, because such rules would be produced only when States came to believe that problems in particular areas were urgent and important and needed to be tackled. Indeed, he doubted that the Commission's work on the topic under consideration would significantly hasten the day when specific rules would be elaborated on the question of land-based air pollution, for example, or in other specific areas of the law of liability and negligence. The Commission was, in fact, running a considerable risk in trying to formulate general rules, because such rules would fit in some circumstances, but not in all. Thus, his major doubt about the success of the Commission's undertaking was that it might not be able, on the basis of a relatively narrow set of precedents, to enunciate rules that would suffice for unforeseeable problems of a specific nature that might be encountered in future. Perhaps because of his common-law background, he would feel more comfortable with the idea of trying to distil general rules only when the Commission had a wider range of specific cases on which to base an analysis.

39. One matter of particular concern to him was that, once an area of the law had been developed in specific terms, the general principles which the Commission would elaborate in its draft would not, as the Special Rapporteur had pointed out, really serve any useful purpose with respect to that area. That concern arose as a result of article 1, subparagraph (b), which stated that the articles would apply to such other specialized regimes. He supposed that what the Special Rapporteur

in fact had in mind was that the articles should apply to the other areas of the law which had developed through custom and to which no specialized regime yet applied. Some revision of subparagraph (b) would therefore be useful.

40. In his view, the most serious problem was that of the potential application of general rules to other areas that could not be foreseen. He thought he understood why the Commission had instructed the Special Rapporteur not to concentrate only in the very broad area of the environment, but he would have been more comfortable with an approach limited to that area because he was not at all certain that the principles which the Commission might elaborate on the basis of the *Trail Smelter* arbitration (see A/CN.4/346 and Add.1 and 2, paras. 22 *et seq.*), or an even more far-reaching set of precedents, would really suffice to govern the world's economy and the actions of States (or their failure to act) in economic matters, or to regulate negligence on the part of States in matters relating to the enforcement of anti-trust laws, or to tolerance of terrorism, currency-counterfeiting or unlawful conduct in time of war. It might therefore be necessary further to define the outer boundaries of the topic under consideration, to prevent the rules that would be laid down from being held up to ridicule on the grounds that they obviously did not apply to one specific area or another.

41. Another problem he had with article 1 was caused by the inclusion of the words "potential loss or injury" in subparagraph (a). He had no difficulty in seeing what those words meant in relation to space activities and liability therefor, but he thought that many rules dealing with negligence and liability would not be very applicable to potential loss. That was another reason why article 1 would, in a sense, have to be considered as a tentative proposal until the Commission had made further progress in elaborating general rules.

42. Mr. VEROSTA said that it was quite clear, in the light of the statements made by Mr. Tabibi and Mr. Aldrich, that the Commission would need more material in order to go on with its work on the topic under consideration. The problem was particularly acute in a number of areas, and the Commission would be unable to formulate general rules until it had received further information on those areas.

43. In the modern-day world, States were, for example, continually encountering new problems that involved negligence and the duty of care and arose out of technological developments. When trying to solve such new problems, States were usually reluctant to be tied down by rules, but they had, in the past, agreed to submit to arbitration—as in the *Trail Smelter* case—which would serve as an excellent precedent for the formulation of rules of customary law applicable to different areas within the scope of the topic under consideration. The Commission should therefore confine itself to the formulation of some very general

principles and, perhaps, some procedural rules which might constitute a minimum international standard applicable in those different areas.

44. Although he had considerable difficulties with article 1, on the scope of the articles, he was sure that the Drafting Committee would be able to produce a text that showed clearly the Commission's intentions.

45. Mr. USHAKOV said that he would like to revert to the question of the distinction between primary and secondary rules. In fact, all legal rules were the same, in that they governed the conduct of individuals and communities. It was only for practical reasons that the Commission had made a distinction between primary rules, which laid down an obligation, and secondary rules, which indicated the consequence of conduct not in conformity with such an obligation. But legal rules knew no hierarchy. If the Commission had decided to draw such a distinction, it was because the secondary rules of responsibility came into play only when there was a wrongful act involving a violation of an obligation laid down in a primary rule. The distinction should therefore be maintained purely as a matter of convenience.

46. Mr. QUENTIN-BAXTER (Special Rapporteur) said that, in order to dispel any doubts the members of the Commission might have, he wished to make it clear that he was very happy with the general guidelines they had given him. He was not at all inclined to urge them to accept article 1, which was, in its present form, much too cryptic and, as Mr. Šahović and others had pointed out, needed a good many supporting texts. He was, in fact, quite content to regard that article as a cryptogram which he had to try to explain, but which had been intended mainly as a guide to help the members of the Commission focus their thoughts on the topic.

47. The preliminary report which he had submitted at the preceding session<sup>7</sup> had, it might be recalled, ended *diminuendo*, stating that a possible course of action would be to confine the topic to the area in which activities undertaken in one State caused physical harm in the territory of another State or in areas which belonged to all States. Although that would be a perfectly reasonable way of proceeding, he could not place arbitrary limitations on a topic which was defined, in its title, in altogether general terms. It had been stated that it would be better to begin by exploring, in general terms, the significance of the topic, and several members of the Commission who had made detailed analyses of the elements of the title of the topic had found that those elements would provide adequate guidelines concerning the breadth of the study, at least at the outset.

48. He had therefore followed that approach and had not attempted, in his second report, to marshal the mass of international practice reflected in international

conventions dealing with particular subjects. What seemed to have been required of him, and what he had tried to do, was to go beyond that practice and look at general principles of law. Now, however, he entirely agreed that a counterpart was required and that it would soon be time for him to look at the topic from another angle, taking the mass of State practice and trying to see what it meant.

49. With regard to the comments made by members of the Commission, he said that he fully agreed with the observations just made by Mr. Ushakov concerning primary and secondary rules. He himself assigned no absolute value to the distinction between those two types of rules, which were only measures of approximation that made it easier to grasp abstract ideas. He was, however, faced with the fact that the Commission had based its consideration of the topic of State responsibility for internationally wrongful acts on that distinction. Indeed, Mr. Ushakov and others had said that there were only two kinds of obligations, namely, those that arose out of wrongfulness and those that were primary obligations. By definition, the rules relating to the topic under consideration did not arise out of wrongfulness. Under the terms of the rules on State responsibility for internationally wrongful acts, they therefore had to arise out of primary obligations. That was not a magic formula that would solve any problem of substance. It was merely a method of proceeding which was not inconsistent with methods the Commission had used in the past.

50. It was, of course, also true that the rules relating to the topic under consideration were, in a quite different sense, secondary rules. They had to be, because anyone who was requested to deal with a topic of unlimited generality, theoretically affecting the whole range of international law other than that contained in secondary rules, would obviously not begin to lay down substantive obligations in the rules he was formulating. All that could be done in such a case was to formulate general rules of a predominantly procedural nature, which might facilitate the ascertainment and application of particular primary rules.

51. That led him to the basic question of what the rules being formulated were intended to do. Clearly, they were not concerned with cases in which something was prohibited. They were concerned, rather, with cases in which something was conditionally authorized—or, in other words, not with a prohibition on freedom of action, but rather with freedom of action within limits that took account of the interests of other subjects of international law.

52. The first question that arose was whether there was need at all to deal with situations in which relations between States could not be controlled wholly by rules of prohibition. He had argued—and he did not think that a detailed survey of State practice and conventions was necessary to support his assertion—that life in the modern-day world was much too

<sup>7</sup> Yearbook . . . 1980, vol. II (Part One), document A/CN.4/334 and Add.1 and 2.

complicated to allow States simply to regulate their relations in terms of what could and could not be done. In his view, States had to adjust their activities so that, in terms of Principle 21 of the Declaration of the United Nations Conference on the Human Environment, they preserved their freedom to use their own resources as they wished while taking care not to diminish the capacity of other States to do the same.

53. If that proposition was considered from the point of view of a set of rules and of a relationship to State responsibility, it would have to be said that there were areas where primary rules other than those to be produced for the topic under consideration required States to proceed with caution. That was the area with which he was dealing, and Mr. Yankov (1687th meeting) had referred to it as a "twilight zone," while others had called it a "grey area." The fact that he himself did not think of it as a twilight zone was beside the point, because the main question was whether that area was needed at all or whether relations between States could be dealt with simply in terms of a cutting-off line where everything stopped. He found that those who were inclined to question the existence of the grey area did so from diametrically opposed starting points: some believed that all harm of a substantial nature was wrongful and that, therefore, the development of the topic under consideration could only, as it were, water down the liability of States for causing harm; others began from the opposite assumption, that merely to cause harm or to allow an activity to cause harm invoked no rule of law at all and that it had to be shown in some other way that the activity in question was wrongful.

54. In his view, neither of those extreme positions was correct. It was not the case that customary international law allowed a State to conduct its activities as carefully as possible and then have no further regard for the consequences of those activities in the territory of other States. Nor was it the case that all transboundary harm was wrongful. His basic assumption was, therefore, that there was an area in which the activities of States must be regulated not simply in terms of prohibitions, but in terms of the establishment of conditions that would allow such activities to be carried on. The aim, as enunciated by a number of representatives in the Sixth Committee, was that maximum freedom of action should be preserved for sovereign States within their own borders and in relation to the activities they carried on outside their borders, while attempts should be made to minimize the harm caused beyond those boundaries and to provide reparation when harm nevertheless occurred.

55. One lesson that had been brought home to him by Mr. Barboza (1687th meeting) was that he had placed insufficient emphasis on the question of thresholds. Insignificant harm obviously did not entail legal responsibility of any kind. There were degrees of harm that simply had to be tolerated, and sometimes the thresholds could be very high indeed. It was a matter of

obvious concern to countries that had endured chronic pollution of a particular kind ever since the Industrial Revolution and were only gradually gaining awareness of its dangerous consequences that emphasis should be placed on common measures of improvement, not upon liabilities in respect of individual events that occurred. When dealing with a subject such as chronic pollution or looking at the relationship between developed countries, which had, as rightly pointed out, caused most of the world's pollution, and developing countries, which had to carry on economic activities for their own survival, the question of thresholds took on tremendous importance. Before legal account could even be taken of harm, a threshold must be set, and that was something with which he would have to deal much more carefully in a possible third report.

56. When he spoke of the scale on which there was a point of intersection between harm and wrong, leaving wrongfulness on one side and taking account of an area in which acts not prohibited by international law must be regulated, he was not referring to a threshold, because nothing at all appeared on his scale if the requirements of the threshold had not been met. Once those requirements had been met, however, there were two possible situations: one in which the activity was wrongful and must stop, and the other in which the activity was conditionally authorized, although wrongfulness might exist as a result of a failure to observe the conditions under which the activity could be carried out.

57. That was his basic approach and, according to it, he was doing exactly what anyone must do who was trying to draw up an absolutely general set of rules. Like Mr. Ago, he had had to postulate that there were other relatively clear-cut primary obligations which brought the obligations of his own set of rules into play. Without those other primary obligations, his topic indeed did not exist. If it was not wrongful to cause transboundary harm or if the causing of such harm could always be dealt with in terms of clear-cut rules relating to the violation of sovereignty, his topic did not exist. However, if such means were inadequate to respond to the needs of the present-day community of nations, then he believed, in principle, that his topic did exist.

58. Turning to article 1, he said he wished to explain that, when he had referred in subparagraph (a) to "activities undertaken within the territory", his basic idea had simply been that the Commission was dealing with man-made situations, not with situations in which the harm suffered was purely a consequence of nature.

59. When he had used the word "jurisdiction", he should perhaps have used the word "control", but his intention had been to show that the jurisdiction of States was based primarily on their territorial limits but also on their control over their own nationals, their own ships, and their own expeditions in areas that were the common heritage of all mankind.

60. The words “beyond the territory of that State” had been used to denote the fact that what was at issue were transboundary problems.

61. The use of the words “actual or potential loss of injury” had caused the members of the Commission great difficulties, but he regarded those words only as a marker, as something that had to be taken into account at some point in the future. If the Commission were to take the case of the Three Mile Island nuclear power station, which was, fortunately, located well within the territory of the United States, and to suppose that that installation was located much closer to an international border, causing real or imaginary anxieties and containing dangers that could spread across that border, it would be better able to understand what was meant by actual or potential loss or injury.

62. The reference at the end of subparagraph (a) to “another State and its nationals” was merely intended to indicate that the articles would not deal with relations between a State and its own nationals.

63. At the beginning of subparagraph (b), the rather inadequate words “independently of these articles” had caused a great deal of trouble to many members of the Commission, but, basically, those words were a safety net. He was not by any means suggesting that, in a set of general articles, an attempt was being made to guide the world. He was only saying that, where there were obligations and those obligations had not been reduced to rules of thumb, there was a duty to make those obligations real in particular cases.

64. When he had referred to “legally protected interests” in subparagraph (b), he had, of course, been referring to rights—not to the right to have an activity stopped but, rather, to the right to carry on an activity with due care for the rights of others. A pre-existing rule that was best applied on a basis of give and take, rather than on the basis of the cut-off point of prohibition, was thus necessary to the operation of the rules being formulated.

65. It was, of course, true, as the Commission had recognized at the preceding session, that the area of transboundary harm was perhaps the only one in which such rules could be best formulated. Without rules, there could be no obligations, but the set of articles being elaborated might not actually provide basic rules. Often, in customary law, basic rules would not have emerged in a shape that would enable them to be automatically applied. For example, several members of the Commission had said that what was being discussed was an area in which matters were proceeding towards rules of prohibition but had not quite reached that point, and they had referred to the example of cases in which nuclear test activities of various kinds might simply be prohibited. The more common situation was, however, the one in which the elaboration of a regime would supply a great many detailed rules. For example, with regard to the law of international watercourses, there might, as Mr. Reuter

had pointed out, be rules that stated exactly how much contamination or interference with flow would be tolerated. At that point, detailed rules of wrongfulness would take the place of the topic under consideration, as Mr. Aldrich had rightly noted.

66. The basic assumption was therefore that there were broad rules of customary international law that had to be applied with some appreciation of particular circumstances. He was not sure that it could be said that those rules existed in the area of the physical environment, but not elsewhere. There simply was no clear cut-off point between physical factors and economic factors, as had been made clear in the *Fisheries* case<sup>8</sup> and the *Continental Shelf* cases.<sup>9</sup> When drawing up a regime to govern a particular activity, it was not the practice of States to say that harm must stop. Their practice was, rather, to say that a given industry must go on operating, and that there was only a limited amount of extra burden that could be placed on that industry and yet have it survive. The viability of the industry was thus as much a factor as the nature of the harm it was causing.

67. It therefore seemed to him that there were real possibilities that the rules being formulated might have applications outside the immediate field from which examples were being drawn, but by no stretch of the imagination could those rules be used simply to inhibit competition or to impose a rule of causality. There must always be another obligation under reference, namely, care to ensure that the rights of others in relation to that obligation were observed.

68. In conclusion, he said that he would now be quite prepared to try to adopt a convergent approach to the topic under consideration by taking the mass of State practice in the conventional field and trying to see what rules could be extrapolated from that practice. Indeed, he would be quite content to work on the basis of the concept that some activities must carry with them a duty of reparation even if no fault could be proved, and that other activities must be undertaken with regard to a State's duty of protection or care to consider the interests of other States.

69. Sir Francis VALLAT said that the Special Rapporteur should bear in mind the fact that, as in other cases, the Commission should not be a prisoner of the title of the topic it was considering. He might also consider the possibility of sending a questionnaire to Governments in order to marshal material on the topic.

70. Mr. USHAKOV said that every individual had natural duties, in addition to the obligations imposed on him by law. The duty of care was a natural duty; it

<sup>8</sup> Fisheries case, Judgment of 18 December 1951: *I.C.J. Reports 1951*, p. 116.

<sup>9</sup> North Sea Continental Shelf, Judgment: *I.C.J. Reports 1969*, p. 3.

did not have any legal character. All human activities required a measure of prudence towards others. In his view, it was essential for the Commission to be aware of that distinction between natural duties and legal obligations.

71. The CHAIRMAN, noting that there were no further comments, declared that the consideration of the Special Rapporteur's second report had been concluded.

*The meeting rose at 1.05 p.m.*

## 1691st MEETING

*Wednesday, 15 July 1981, at 10.05 a.m.*

*Chairman:* Mr. Doudou THIAM

*Present:* Mr. Aldrich, Mr. Barboza, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Diaz González, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, 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.4/347 and Add.1 and 2)

[Item 8 of the agenda]

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 1 (Scope of the present articles),

ARTICLE 2 (Couriers and bags not within the scope of the present articles),

ARTICLE 3 (Use of terms),

ARTICLE 4 (Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags),

ARTICLE 5 (Duty to respect international law and the laws and regulations of the receiving and the transit State), and

ARTICLE 6 (Non-discrimination and reciprocity)

1. The CHAIRMAN invited the Special Rapporteur to introduce draft articles 1 to 6 (see A/CN.4/347 and Add.1 and 2, paras. 49, 211, 217, 225 and 231), which read:

#### *Article 1. Scope of the present articles*

1. The present articles shall apply to communications of States for all official purposes with their diplomatic missions, consular posts, special missions, or other missions or delegations, wherever situated, or with other States or international organizations, and also to official communications of these

missions and delegations with the sending State or with each other, by employing diplomatic couriers and diplomatic bags.

2. The present articles shall apply also to communications of States for all official purposes with their diplomatic missions, consular posts, special missions, or other missions or delegations, wherever situated, and with other States or international organizations and also to official communications of these missions and delegations with the sending State or with each other, by employing consular couriers and bags, and couriers and bags of the special missions, or other missions or delegations.

#### *Article 2. Couriers and bags not within the scope of the present articles*

1. The present articles shall not apply to couriers and bags used for all official purposes by international organizations.

2. The fact that the present articles do not apply to couriers and bags used for all official purposes by international organizations shall not affect:

(a) the legal status of such couriers and bags;

(b) the application to such couriers and bags of any rules set forth in the present articles with regard to the facilities, privileges and immunities which would be accorded under international law independently of the present articles.

#### *Article 3. Use of terms*

1. For the purposes of the present articles:

(1) "diplomatic courier" means a person duly authorized by the competent authorities of the sending State and provided with an official document to that effect indicating his status and the number of packages constituting the diplomatic bag, who is entrusted with the custody, transportation and delivery of the diplomatic bag or with the transmission of an official oral message to the diplomatic mission, consular post, special mission or other missions or delegations of the sending State, wherever situated, as well as to other States and international organizations, and is accorded by the receiving State or the transit State facilities, privileges, and immunities in the performance of his official functions;

(2) "diplomatic courier *ad hoc*" means an official of the sending State entrusted with the function of diplomatic courier for special occasion only, who shall cease to enjoy the facilities, privileges and immunities accorded by the receiving or the transit State to a diplomatic courier, when he has delivered to the consignee the diplomatic bag in his charge;

(3) "diplomatic bag" means all packages containing official correspondence, documents or articles exclusively for official use which bear visible external marks of their character, used for communications between the sending State and its diplomatic missions, consular posts, special missions or other missions or delegations, wherever situated, as well as with other States or international organizations, dispatched through diplomatic courier or the captain of a ship or a commercial aircraft or sent by post, overland shipment or air freight and which is accorded by the receiving or the transit State facilities, privileges and immunities in the performance of its official function;

(4) "sending State" means a State dispatching diplomatic bag, with or without a courier, to its diplomatic mission, consular post, special mission or other missions or delegations, wherever situated, or to other States or international organizations;

(5) "receiving State" means a State on whose territory:

(a) a diplomatic mission, consular post, special mission or permanent mission is situated, or

(b) a meeting of an organ or of a conference is held;

(6) "host State" means a State on whose territory:

- (a) an organization has its seat or an office, or
- (b) a meeting of an organ or a conference is held;

(7) "transit State" means a State through whose territory and with whose consent the diplomatic courier and/or the diplomatic bag passes *en route* to the receiving State;

(8) "third State" means any State other than the sending State, the receiving State and the transit State;

(9) "diplomatic mission" means a permanent mission within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(10) "consular post" means any consulate-general, consulate, vice-consulate or consular agency within the meaning of the Vienna Convention of Consular Relations of 24 April 1963;

(11) "special mission" means a temporary mission, representing the State which is sent by one State to another with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a special task;

(12) "mission" means, as the case may be, the permanent mission or the permanent observer mission;

(13) "permanent mission" means a mission of permanent character, representing the State, sent by a State member of an international organization to that organization;

(14) "permanent observer mission" means a mission of permanent character, representing a State, sent to an international organization by a State not a member of that organization;

(15) "delegation" means, as the case may be, the delegation to an organ or the delegation to a conference;

(16) "delegation to an organ" means the delegation sent by a State to participate on its behalf in the proceedings of the organ;

(17) "observer delegation" means, as the case may be, the observer delegation to an organ or the observer delegation to a conference;

(18) "observer delegation to an organ" means the delegation sent by a State to participate on its behalf as an observer in the proceedings of the organ;

(19) "delegation to a conference" means the delegation sent by a State to participate on its behalf in the proceedings of the conference;

(20) "observer delegation to a conference" means the delegation sent by a State to participate on its behalf as an observer in the proceedings of the conference;

(21) "international organization" means an intergovernmental organization;

(22) "organ" means:

(a) any principal or subsidiary organ of an international organization, or

(b) any commission, committee or sub-group of any such organ, in which States are members;

(23) "conference" means a conference of States.

2. The provisions of paragraph 1, subparagraphs (1), (2) and (3), on the terms "diplomatic courier", "diplomatic courier *ad hoc*" and "diplomatic bag" may apply also to consular courier and consular courier *ad hoc*, to couriers and *ad hoc* couriers of special missions and other missions or delegations, as well as to consular bag and the bags of special missions and other missions and delegations of the sending State.

3. The provisions of paragraphs 1 and 2 of the present article regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or the internal law of any State.

*Article 4. Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags*

1. The receiving State shall permit and protect free communications on the part of the sending State for all official purposes with its diplomatic missions, consular posts and other missions or delegations as well as between those missions, consular posts and delegations, wherever situated, or with other States or international organizations, as provided for in article 1.

2. The transit State shall facilitate free communication through its territory effected through diplomatic couriers and diplomatic bags referred to in paragraph 1 of the present article.

*Article 5. Duty to respect international law and the laws and regulations of the receiving and the transit State*

1. Without prejudice to his privileges and immunities, it is the duty of the diplomatic courier to respect the rules of international law and the laws and regulations of the receiving State and the transit State.

2. The diplomatic courier also has a duty not to interfere in the internal affairs of the receiving and the transit State.

3. The temporary accommodation of the diplomatic courier must not be used in any manner incompatible with his functions as laid down in the present articles, by the relevant provisions of the Vienna Convention on Diplomatic Relations or by other rules of general international law or by any special agreements in force between the sending State and the receiving or the transit State.

*Article 6. Non-discrimination and reciprocity*

1. In the application of the provisions of the present articles, no discrimination shall be made as between States with regard to the treatment of diplomatic couriers and diplomatic bags.

2. However, discrimination shall not be regarded as taking place:

(a) where the receiving State applies any of the provisions of the present articles restrictively because of a restrictive application of that provision to its diplomatic couriers and diplomatic bags in the sending State;

(b) where States modify among themselves, by custom or agreement, the extent of facilities, privileges and immunities for their diplomatic couriers and diplomatic bags, provided that it is not incompatible with the object and purpose of the present articles and does not affect the enjoyment of the rights or the performance of the obligations of third States.

2. Mr. YANKOV (Special Rapporteur) said that in preparing his second report (A/CN.4/347 and Add.1 and 2) he had been guided by the Commission's instructions on the topic and by the recommendation in General Assembly resolution 35/163, subparagraph 4 (f). He had therefore proceeded with the formulation of a set of draft articles based on a comprehensive approach to the subject that would lead to a coherent and uniform regime governing the status of the diplomatic courier and diplomatic bag, as well as all other kinds of couriers and bags used by States. The regime would be based on the common legal ground provided by the four multilateral conventions in the field of diplomatic law concluded under the auspices of the United Nations since 1961.

3. The main issues dealt with in his second report were the scope of the draft articles; the problems involved in defining the terms "diplomatic courier", "diplomatic courier *ad hoc*" and "diplomatic bag";

and the tentative formulation of general principles relating to the legal protection of the diplomatic courier, to his obligations under international law and under the laws and regulations of receiving and transit States, and to non-discrimination and reciprocity in the treatment of the diplomatic courier and the diplomatic bag.

4. At the present stage, he had placed particular stress on surveying the legislative background of the question of the diplomatic courier and the diplomatic bag, in order to give the Commission an idea of the basic elements of the topic and enable it to identify any existing gaps and determine how much common basis there was for uniform and coherent treatment of diplomatic and other couriers and bags. He had emphasized the multilateral conventions on diplomatic law concluded under the auspices of the United Nations; that made it clear that, in preparing his second report, he had used an inductive method involving an analysis of the diplomatic courier and diplomatic bag as they had evolved through codification.

5. The question of the scope of the draft articles was significant because the rules being formulated would apply not only to the diplomatic courier and diplomatic bag but possibly to all other kinds of couriers and bags used by States for official communications. He had therefore determined the extent to which it could be said, in fact and in law, that the same rules applied to both diplomatic and all other kinds of official couriers and bags. In doing so, he had decided on an approach which did not require the introduction of new concepts, for that might cause States apprehension, but was based on assimilation. That involved examining the 1961 Vienna Convention on Diplomatic Relations,<sup>1</sup> identifying the essential elements of that convention with regard to the status of the diplomatic courier and the diplomatic bag and ascertaining how far they were mirrored in the other three multilateral conventions dealing with the couriers and bags in question. It thus became possible to determine whether or not they formed a common legal basis for the uniform treatment of all kinds of couriers and bags.

6. In considering the scope of the draft articles, his first objective had been the elaboration of a set of general and specific rules governing the status and functions of couriers in the service of all kinds of missions of sending States in relation to various kinds of bags. His second objective had been to devise a formula for applying the regime governing the diplomatic courier and the diplomatic bag to all types of couriers and bags used by States for official communications. The assimilation of the latter to the former would require a common denominator, derived by comparative analysis from the relevant provisions

of the multilateral conventions and other international agreements on diplomatic law.

7. In paragraphs 20 to 41 of his second report he had reviewed the multilateral conventions which could serve as the legal basis for a uniform regime governing the status of the courier and the bag. Article 27 of the 1961 Vienna Convention contained the most relevant provisions, since it spelt out the scope of application of the principle of freedom of communication for all official purposes; it covered not only missions of sending States, "wherever situated", but also the diplomatic courier *ad hoc*, and it referred to the possibility that a diplomatic bag might be entrusted to the captain of a commercial aircraft. The adoption of article 27 of that convention had represented a significant contribution to the codification and progressive development of diplomatic law. It had ensured general recognition of the principle of free communication for all official purposes between sending States and their missions, between those missions themselves and between sending States and other States or international organizations. It thus constituted a comprehensive and uniform regime governing the legal status of the diplomatic courier and the diplomatic bag; since in addition it referred to the diplomatic courier *ad hoc* and the use of diplomatic bags entrusted to the captain of a commercial aircraft, it could be said to encompass all the various types of couriers and bags.

8. Article 35 of the 1963 Vienna Convention on Consular Relations<sup>2</sup> was modelled almost entirely on article 27 of the 1961 Vienna Convention. The status of the consular courier and the facilities, privileges and immunities accorded to him were the same as those accorded to the diplomatic courier. Paragraph 1 of article 35 of the 1963 Vienna Convention did, of course, provide that a consular post could employ diplomatic or consular couriers and diplomatic or consular bags. The status of the consular bag was the same as that of the diplomatic bag, except that paragraph 3 of article 35 provided that if the competent authorities of the receiving State had serious reason to believe that the bag contained something other than correspondence, documents or articles intended exclusively for official use, they could request that the bag be opened.

9. The departure from article 27 of the 1961 Convention represented by article 35, paragraph 3, of the 1963 Convention had perhaps been due to the fact that, when the 1963 Convention was adopted, State practice in regard to consular couriers and bags had not been very abundant. Article 28 of the 1969 Convention on Special Missions<sup>3</sup> was modelled entirely on article 27 of the 1961 Vienna Convention,

<sup>1</sup> See United Nations, *Treaty Series*, vol. 500, p. 95. Hereinafter called "1961 Vienna Convention".

<sup>2</sup> *Ibid.*, vol. 596, p. 261. Hereinafter called "1963 Vienna Convention".

<sup>3</sup> See General Assembly resolution 2530 (XXIV) of 8 December 1969, annex.

however, as were articles 27 and 57 of the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.<sup>4</sup>

10. Paragraphs 42 to 44 of his report dealt with the question of the applicability of an assimilation provision to all kinds of couriers and bags used by States for official purposes. The analytical survey of the relevant provisions of the four multilateral conventions revealed common legal ground for comprehensive and coherent treatment of all types of couriers and bags used by States for official communications. The provisions of those conventions had been widely applied in State practice and appeared in a large number of bilateral conventions on diplomatic law. The applicability of the rules relating to the status of the diplomatic courier and the diplomatic bag to the status of all other couriers and bags used by States was thus a reality of law and practice which needed only to be given expression in an appropriate provision.

11. One limitation on the scope of the draft articles, however, was that they would not apply to couriers and bags used by international organizations. The reasons for that were that the four multilateral conventions under consideration did not contain rules applicable to couriers and bags used by international organizations; and that, although existing agreements and conventions constituted a reliable basis for applying the rules relating to couriers and bags used by States to couriers and bags used by international organizations, the provisions of those agreements and conventions had not been incorporated into a single international convention. He was therefore of the opinion that the study of the topic under consideration should be confined to the legal status of couriers and bags used by States. His draft article 2 dealt with couriers and bags outside the scope of the draft articles.

12. Introducing draft article 1, on the scope of the draft articles, he said that paragraph 1 was designed to guarantee the implementation of the principle of freedom of communication through the diplomatic courier and the diplomatic bag, and provided for a broad network of means of official communication. Paragraph 2 was an explicit and descriptive assimilation provision which made the rules relating to the diplomatic courier and the diplomatic bag applicable to couriers and bags used by consular posts and other missions and delegations. Although that provision could have been drafted more concisely, he had submitted it in a somewhat elaborate form in order to make his intentions clear straightaway.

<sup>4</sup> See *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207. The convention is hereinafter called "1975 Vienna Convention".

13. In article 2, paragraph 1 stated that the articles would not apply to couriers and bags used by international organizations, and paragraph 2 was a safeguarding clause inspired by article 3 of the 1969 Vienna Convention on the Law of Treaties.<sup>5</sup>

14. A major problem to be solved was the definition of the terms "diplomatic courier", "diplomatic courier *ad hoc*" and "diplomatic bag". As he had pointed out in paragraph 55 of his report, they were closely related to the *sedes materiae* of the topic and had only been partially defined in existing multilateral conventions. In dealing with that problem, he had examined the *travaux préparatoires* and relevant provisions of the four multilateral conventions in the field of diplomatic law, as well as State practice in the matter. His objectives had been to identify the main features of the legal status of the diplomatic courier, the diplomatic courier *ad hoc* and the captain of an aircraft or ship entrusted with the transportation and delivery of a diplomatic bag, and to determine whether the definitions of those kinds of couriers had any common features, particularly with regard to official functions and credentials and the scope of facilities, privileges and immunities.

15. Paragraphs 58 to 122 of his report contained a detailed analysis of the provisions of the relevant multilateral conventions that concerned the definition of the terms "diplomatic courier" and "diplomatic courier *ad hoc*". Article 27 of the 1961 Vienna Convention had provided him with a very reliable basis for the definition of the term "diplomatic courier", given in paragraph 121 of his report. Paragraph 122 described the main elements that might be included in a definition of the term "diplomatic courier *ad hoc*".

16. In order to arrive at a definition of the term "diplomatic bag" (A/CN.4/347 and Add.1 and 2, paras. 123-186), he had once more analysed State practice and the *travaux préparatoires* and relevant provisions of the multilateral conventions and, in particular, article 27 of the 1961 Vienna Convention. In identifying the main elements of the legal status of the diplomatic bag and other bags used by the sending State for official communications, he had paid particular attention to the diplomatic bag not accompanied by diplomatic courier (*ibid.*, paras. 174-183). Paragraphs 187-210 concerned other terms used in the draft articles. All the terms were defined in article 3.

17. The third main issue dealt with in his second report was the formulation of general principles, which were enunciated in draft articles 4, 5 and 6. Those draft articles were only tentative in nature, and their purpose was to provoke an exchange of views in the Commission.

<sup>5</sup> *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.

18. The principle of freedom of communication, embodied in article 4, had been universally recognized in key provisions of the existing multilateral conventions as the foundation of modern diplomatic law.

19. With regard to article 5, the four multilateral conventions he had analysed contained no explicit provisions about the duty of diplomatic couriers to respect international law and the laws and regulations of the receiving or the transit State. However, article 41, paragraph 1, of the 1961 Vienna Convention contained the words "Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State". In paragraphs 222 to 224 of the report he had explained what was meant by the duty of a diplomatic courier to respect the laws and regulations of the receiving or the transit State and not to interfere in its internal affairs.

20. As indicated in paragraphs 226 to 230 of the report, the principle of non-discrimination and reciprocity embodied in article 6 was based mainly on article 47 of the 1961 Vienna Convention and article 49 of the Convention on Special Missions, and stemmed from the fundamental principle of the sovereign equality of States. The link between non-discrimination and reciprocity in the treatment of diplomatic agents in general and in the treatment of diplomatic couriers in particular would provide a solid basis for a viable set of rules governing the status of all types of couriers and bags.

21. The provisional adoption by the Commission of the draft articles which he had submitted might serve as a basis for further work on the articles of Part II of the topic, relating to the status of the courier, and Part III, relating to the status of the bag. He would welcome any criticism and suggestions from the Commission as a guide for his future work.

22. Mr. CALLE Y CALLE said that the office of diplomatic courier was an important institution and the task involved no less so. The status accorded to it guaranteed total inviolability of the person and the bag, and it was that inviolability which was responsible for the protection and privileges accorded to the courier.

23. In his second report, Mr. Yankov had analysed the development of the concept of the courier inductively. The overriding impression was that practice tended to establish uniformity of treatment for the various categories of courier, as was apparent from the many multilateral conventions and bilateral treaties that laid down the rules governing relations between States and their missions abroad. The global approach which the report advocated therefore seemed justified.

24. The notions of "official courier" and "official bag", which had already been proposed in the preliminary report, merely seemed to involve new names for an established fact. Probably, therefore, it would be best to keep to the usual terminology, particularly as the adjective "diplomatic" did not

restrict the scope of the Commission's study to the relations of States with their embassies but, on the contrary, extended it to all external relations of States, since diplomatic life encompassed relations between the State and its embassies, consulates, permanent missions, delegations to conferences, special missions, and so on.

25. The subject under consideration was directly connected with the hallowed principle of the freedom of States to communicate with their missions, for which the guarantee of secrecy and absolute protection was required. The contents of the bag should therefore enjoy total immunity. Article 35 of the 1963 Vienna Convention was anomalous in that respect. The 1975 diplomatic conference which had led to the conclusion of the 1975 Vienna Convention had refused to provide for the possibility of opening the bag.

26. He hoped that Mr. Yankov would be able to prepare a draft that would provide proper protection for couriers and for the institution of the diplomatic bag, the special nature of which was attested by the affixing of the sender's official seal and by the status of the addressee.

27. In the text of article 1, the words "or [and] with other States or international organizations" meant that the articles would apply not only to a State's communications with its missions abroad but also to its communications with other States or international organizations. He did not think that was the scope which the Commission had initially intended the draft articles to have.

28. Article 2 stipulated that the draft did not apply "to couriers and bags used for all official purposes by international organizations". He considered that the words "or any other subject or international law" should be added to that phrase in both paragraphs of the article so as to extend the protection of the safeguarding clause to subjects of international law that enjoyed special status—for example, the Palestine Liberation Organization, which was recognized by the General Assembly, took part in its sessions and was represented at the United Nations, and the United Nations Council for Namibia.

29. Mr. RIPHAGEN, referring to draft article 1, said that he had been surprised to find that the articles were to cover communications between States. It was his understanding that use of the diplomatic bag and diplomatic courier was confined to communications between States and their organs or between such organs themselves. Some clarification of that point would therefore be useful, particularly since, in the event of communications taking place between diplomatic missions of two States, the receiving State might find itself in the position of a transit State. Such a situation would create no problem if the transit State had the same obligations as a receiving State, but that might not always be the case.

30. Referring to draft article 3, he wondered whether it was advisable to include substantive rules in a definitions article. For example, in subparagraph 1 (1), the words “and is accorded by the receiving State or the transit State facilities, privileges, and immunities in the performance of his official functions” gave the impression that situations in which such facilities, privileges and immunities were not accorded would not be covered by the definition. Similar comments could be made about subparagraphs (2) and (3) and, to some extent, subparagraph (7). Also, the wording of subparagraph (7) appeared to have no precedent. Although the relevant multilateral conventions on diplomatic law contained provisions concerning a visa where such was necessary, the effect of those provisions was not the same as that of subparagraph 1 (7), which required the consent of the transit State.

31. A further point about subparagraph 1 (1) was that, while it was certainly possible to use the diplomatic courier for the transmission of official oral messages, in such circumstances the diplomatic courier would himself constitute the diplomatic bag, in which case the words referring to the transmission of an official oral message would appear to be inconsistent with some of the earlier wording of that subparagraph.

32. In subparagraph 1 (3), it seemed a little strange to apply the words “in the performance of its official function” to the diplomatic bag. Moreover, some clarification was needed as to whether the words “dispatched through diplomatic courier or the captain of a ship or a commercial aircraft or sent by post, overland shipment or air freight” were meant to refer to an unaccompanied diplomatic bag or to a bag carried by the captain of a ship or aircraft.

33. With regard to draft article 6, subparagraph 2 (b), wording similar to that had admittedly been used in the Convention on Special Missions, but he doubted whether it would have any point in regard to the present topic, since the agreements it contemplated were essentially bilateral, not multilateral; it was difficult therefore to imagine their affecting the enjoyment of the rights or the performance of the obligations of third States.

34. He observed, lastly, that the use of the words “may apply” in draft article 3, paragraph 2, called for clarification.

35. Mr. ALDRICH said that the Special Rapporteur’s oral presentation had done much to alleviate his uncertainty as to why the General Assembly and the Commission had considered the topic of such importance, given the body of law which already existed. However, while there were advantages in having one set of rules to cover all official communications, it might not be possible to achieve that result except by diminishing the protection accorded to such communications by existing law. Moreover, it remained to be seen whether Governments would agree that the privileges and immunities it currently

accorded to official communications with diplomatic missions should be extended to communications with consular posts and other missions.

36. He had reservations about the exclusion from the scope of the topic, under draft article 2, of couriers and bags used for official purposes by international organizations. While he realized that the inclusion of international organizations within the scope of the draft articles might present some difficulties, the extent of those difficulties should be ascertained before any firm decision was taken on the subject.

37. The use of the expression “third States” in draft article 6, subparagraph 2 (b) was not advisable, since it was a defined term; it would be preferable to use a term such as “other States”.

38. Mr. USHAKOV said that he wholeheartedly approved the contents of the report, which set forth clearly certain basic data. The Special Rapporteur had succeeded in showing that under contemporary international law the various types of courier used by the sending State and its missions abroad had identical status, and that a global approach could therefore be adopted in defining that status.

39. The report also showed that, with one exception, the consular bag, the legal status of the diplomatic courier was uniform. Under article 35 of the 1963 Vienna Convention, however, consular posts were authorized to use the diplomatic courier and bag. The Commission should therefore seek to prepare a draft that was applicable to all types of courier and bag.

40. The proposed article 1 was the logical consequence of the Special Rapporteur’s analysis. It suffered from a certain ambiguity, however, in that paragraph 1 provided that the draft would apply to “communications of States . . . employing diplomatic couriers and diplomatic bags”, while paragraph 2 stipulated that it also applied to communications with certain missions enumerated. That formulation seemed to indicate that the expression “diplomatic courier” did not cover all couriers and that different articles should be drafted for the various categories—which seemed to contradict the idea of a global approach. The notion of the diplomatic courier itself should therefore be defined at the beginning of the draft articles, so as to indicate clearly what its scope was.

*The meeting rose at 1 p.m.*

## 1692nd MEETING

*Thursday, 16 July 1981 at 10.05 a.m.*

*Chairman:* Mr. Doudou THIAM

*Present:* Mr. Aldrich, Mr. Barboza, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr.

Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

**Question of treaties concluded between States and international organizations or between two or more international organizations (concluded)\* (A/CN.4/339 and Add.1–7, A/CN.4/341 and Add.1, A/CN.4/327/Add.1 and 2)**

[Item 3 of the agenda]

**DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (concluded)**

**ARTICLE 2, SUBPARA. 1(c), AND ARTICLES 7, 9 AND 17 (concluded)**

1. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that, in response to the request made by the Commission at its 1682nd meeting, the Drafting Committee had considered a number of drafting suggestions made by a member of the Commission.

2. On the basis of those suggestions, the Committee had made a number of drafting changes (see A/CN.4/L.327/Add.1) to the four articles under consideration. In addition to ensuring greater conformity with the wording of articles adopted subsequently, the changes brought the texts concerned closer to the text of the corresponding articles of the Vienna Convention.<sup>1</sup>

3. In article 2, subparagraph 1 (c),<sup>2</sup> the words “between one or more States and one or more international organizations” had been deleted, as had the word “such” before the words “a treaty” in the latter part of the subparagraph.

4. In article 7, subparagraph 2 (b),<sup>3</sup> the expression “international conference” had been qualified by the addition of the words “of States in which international organizations participate”, as in article 9. In addition, the words “one or more” before the words “States” and “international organizations” had been deleted.

5. In subparagraph 2 (c) of the same article, the words “between one or more States and” had been replaced by “within”, in view of the adoption of the new article 5.

6. Finally, in subparagraphs 2 (d) and (e) of article 7, the words “one or more” before “States” had been replaced by “the accrediting”.

7. In article 9, paragraph 2,<sup>4</sup> the words “one or more” had been deleted.

8. In article 17, paragraph 1,<sup>5</sup> the words “or, as the case may be, the other contracting organizations and the contracting States” had been inserted before the words “so agree”.

*Article 2, subpara. 1 (c), and articles 7, 9 and 17, as amended, were adopted.*

**ARTICLE 2, SUBPARA. 1 (d), ARTICLE 5, AND ARTICLES 19 TO 26 (A/CN.4/L.327/Add.2)**

9. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the general considerations he had explained at the beginning of the discussion of the articles proposed by the Committee (see 1681st meeting, paras. 1–4) were also of relevance to the articles under consideration.

**ARTICLE 5<sup>6</sup> (Treaties constituting international organizations and treaties adopted within an international organization)**

10. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 5:

*Article 5. Treaties constituting international organizations and treaties adopted within an international organization*

*The present articles apply to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization, without prejudice to any relevant rules of the organization.*

11. The title and text of the draft article reproduced those of article 5 of the Vienna Convention, with the exception of the words “Convention applies”, which had been replaced by the words “articles apply”.

12. During the first reading of the draft, the Commission had not considered the inclusion of such a provision to be necessary in regard to treaties to which international organizations were parties. However, at the present stage in the Commission’s work, and for the sake of completeness, the Committee had concluded that it might be useful to insert such a provision, even though the eventualities to which the article referred might not, in practice, occur with any great frequency. The possibility should not be altogether excluded of an international organization being a party to a treaty which was the constituent instrument of another international organization, or the possibility of an international organization being a party to a treaty adopted within an international organization.

*Article 5 was adopted.*

**ARTICLE 2 (Use of terms), subpara. 1 (d) (“reservation”)**

\* Resumed from the 1682nd meeting.

<sup>1</sup> See 1644th meeting, footnote 3.

<sup>2</sup> For text, see 1681st meeting, para. 6.

<sup>3</sup> *Idem*, para. 21.

<sup>4</sup> *Idem*, para. 24.

<sup>5</sup> *Idem*, para. 54.

<sup>6</sup> See 1646th meeting, paras. 41–44.

13. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 2, subparagraph 1 (d):

*Article 2. Use of terms*

1. For the purposes of the present articles:

...

(d) "reservation" means a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving, or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization.

14. The Drafting Committee had decided to revert to the corresponding text of the Vienna Convention in connection with the meaning of the term "reservation" and had simply added, by means of the words "formally confirming", a reference to the act by which an international organization expressed its consent to be bound by a treaty.

15. The definition of the term "reservation" in subparagraph 1 (d) had been adopted by the Commission in 1974, before its examination of draft articles 11 and 19. The Commission had decided to adopt provisionally the wording found in the first draft, which had included the phrase "or consenting [by any agreed means] to be bound by a treaty". In doing so, it had seen the two-fold advantage of a text simpler than the corresponding text of the Vienna Convention and of leaving in abeyance the question whether the terms "ratification", "acceptance", "approval" and "accession" could also be used in connection with acts whereby an organization expressed its consent to be bound by a treaty. Nevertheless, the Commission had stressed that the wording so adopted had been provisional, and had put the words "by any agreed means" in square brackets so as to indicate its intention to review the adequacy of such an expression at a later stage.<sup>7</sup>

16. The Commission had adopted article 11 and article 2, subparagraph 1 (b bis), which established that an "act of formal confirmation", in the case of international organizations, was the equivalent of ratification in the case of States. Hence, the Committee had seen no reason for retaining the text adopted on first reading and had thought it preferable to return to a text which followed more closely that of the corresponding definition in the Vienna Convention.

*Article 2, subparagraph 1 (d), was adopted.*

17. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said the Drafting Committee proposed that the title of Section 2 of Part II should remain unchanged, namely: "Section 2. Reservations".

*The title of Section 2 was adopted.*

18. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that Section 2 had been reduced from nine articles to five.

19. The original content of Section 2 had resulted from the Commission's desire to find a compromise solution to the opposing viewpoints of those who wished to extend to international organizations the same freedom to formulate reservations as was recognized for States in article 19 of the Vienna Convention and those who held that the rule should be to deny such freedom to international organizations. Nevertheless, according to both of those viewpoints, exceptions would be allowed so as to introduce the necessary flexibility.

20. The solution adopted by the Commission had been to establish a dual regime: a regime of freedom of reservations, not only in respect of States but also in respect of international organizations, in the case of treaties concluded between international organizations themselves, and a "mixed" regime of freedom and restraint in the case of reservations formulated by international organizations to treaties concluded between States and international organizations. That solution had, in the Commission's view, required the provisional adoption of articles 19 and 19 bis. Furthermore, the Commission had deemed it appropriate to include on first reading article 19 ter, concerning the formulation of objections to reservations, which had no equivalent in the Vienna Convention but justified the dual system for the formulation of reservations adopted in articles 19 and 19 bis.

21. In drafting articles 19, 19 bis and 19 ter, the Commission, by the very description of the treaties involved, had also appeared to intend to restrict the application of those treaties to multilateral treaties only, a question which was not dealt with in clear-cut terms in the Vienna Convention. On the second reading of the draft articles, the prevailing view within the Commission had been that the system regarding the formulation of reservations by international organizations should be assimilated to that relating to States, as contained in the Vienna Convention. That position of principle made it unnecessary to distinguish between treaties to which both States and international organizations were parties and treaties concluded exclusively between international organizations. The texts adopted by the Drafting Committee therefore marked a return to the corresponding texts of the Vienna Convention, which were more straightforward. As a result, the formulation of reservations by States and international organizations was dealt with in one article, instead of the original two. As a further consequence of that position, article 19 ter appeared to be unnecessary and had therefore been deleted. That position had also made it easier to merge former articles 20 and 20 bis and

<sup>7</sup> See *Yearbook . . . 1974*, vol. II (Part One), p. 295, document A/9610/Rev.1, chap. IV, sect. B, art. 2, para. 1, paras. (3) and (4) of the commentary.

former articles 23 and 23 *bis* in a single article in each case.

#### ARTICLE 19<sup>8</sup> (Formulation of reservations)

22. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 19:

##### *Article 19. Formulation of reservations*

1. A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty or it is otherwise established that the negotiating States and negotiating organizations were agreed that the reservation is prohibited;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

2. An international organization may, when signing, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty or it is otherwise established that the negotiating organizations or, as the case may be, the negotiating States and negotiating organizations were agreed that the reservation is prohibited;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

23. The article set forth for States and international organizations, respectively, the rules laid down in article 19 of the Vienna Convention. The division into two paragraphs had been deemed necessary because of the reference to the act of formally confirming, which was applicable only to international organizations. In addition, the wording of subparagraphs 1 (a) and 2 (a) had been adjusted to reflect the type of treaty involved.

24. Mr. CALLE Y CALLE proposed that the word “o” between the words “*aceptar*” and “*aprobar*” in paragraphs 1 and 2 of the Spanish text of the draft article should be deleted, since it suggested that the two terms were alternatives, which was not the case. (The same observation also applied to article 2, subparagraph 1 (d).)

*The proposal was adopted.*

*Article 19, as amended in regard to the Spanish text, was adopted.*

#### ARTICLE 20<sup>9</sup> (Acceptance of and objection to reservations).

<sup>8</sup> For initial consideration of the text at the current session, see 1648th meeting, paras. 24 *et seq.*, 1649th meeting, 1650th meeting, paras. 1–37, and 1651st meeting, paras. 2–46.

<sup>9</sup> *Idem*, 1651st meeting, paras. 47 *et seq.*, and 1652nd meeting, paras. 1–26.

25. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 20:

##### *Article 20. Acceptance of and objection to reservations*

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the contracting organizations or, as the case may be, by the contracting organizations and contracting States unless the treaty so provides.

2. When it appears from the object and the purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance of a reservation by a contracting State or by a contracting organization constitutes the reserving State or organization a party to the treaty in relation to the accepting State or organization if or when the treaty is in force for the author of the reservation and for the State or organization which has accepted it;

(b) an objection by a contracting organization or by a contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting State or organization and the reserving State or organization unless a contrary intention is definitely expressed by the objecting State or organization;

(c) an act of a State or of an international organization expressing the consent of a State or of an organization to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State or one contracting organization or, as the case may be, one other contracting organization or one contracting State has accepted the reservation.

4. For the purposes of paragraphs 2 and 3 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

26. On the basis of the position of principle to which he had referred earlier, the Drafting Committee had found it possible to combine articles 20 and 20 *bis* in a single article modelled on the corresponding text of the Vienna Convention. The only differences in wording between the new text and that of article 20 of the Vienna Convention arose from the need to extend the rule to international organizations.

27. It would be noted that in paragraph 2 of the draft, unlike the corresponding paragraph of the Vienna Convention, no reference was made to “the limited number of the negotiating” entities. In omitting that reference, however, the Committee had simply followed a decision that had been taken by the Commission on first reading and was reflected in paragraph 2 of articles 20 and 20 *bis* of the original draft.

28. It would also be noted that, as in the case of the original articles 20 and 20 *bis*, the new text contained no paragraph corresponding to article 20, paragraph 3, of the Vienna Convention. However, it should be borne in mind that the Drafting Committee had proposed the inclusion of article 5 in the draft.

29. Paragraph 4 of the text was virtually identical to article 20, paragraph 5, of the Vienna Convention, in that it provided for acceptance of a reservation, when no objection to that reservation had been raised, only in the case of States, and no similar rule was established for international organizations. It would be recalled, however, that such a rule had been set forth in the text of articles 20 and 20 *bis* adopted on first reading. In proposing a new text that was silent on the point, the Drafting Committee had considered that it was faithfully interpreting the prevailing view within the Commission to the effect that inclusion of such a rule would create greater difficulties of application and interpretation than it would solve. The Committee had also taken the view that the absence of such an express rule would have no adverse effect on the development of a suitable practice for international organizations.

30. Mr. RIPHAGEN said that he was not convinced by the arguments of the Drafting Committee concerning the omission from article 20 of a paragraph corresponding to article 20, paragraph 3, of the Vienna Convention. The Commission had adopted article 5, and it would therefore be logical to include such a paragraph in article 20.

31. Again, he was not convinced by the explanations as to why paragraph 4 did not deal with the question of tacit acceptance of a reservation by an international organization. While he understood the difficulties involved, he believed that the paragraph should deal with that point.

32. Mr. REUTER (Special Rapporteur) said that the report of the Commission would reflect the matters taken into consideration by the Drafting Committee, as well as Mr. Riphagen's objection regarding the case in which the organization would necessarily have knowledge of reservations that had already been expressed at the time when it formulated its acceptance.

33. Reverting to article 5, he said that with its adoption the Drafting Committee, and indeed the Commission, had decided to reflect further on two remaining problems: that of the definition of an international organization—which the Commission would probably retain on final reading, since the intergovernmental nature of the organization was still the main element—and the problem which arose from the fact that there was no provision in the draft similar to article 20, paragraph 3, of the Vienna Convention, something which could only be dealt with on final reading, after any comments had been made by the Sixth Committee. The Drafting Committee had entered a reservation to that effect by adopting article 5, and a reference to it should be included in the Commission's report.

34. Mr. USHAKOV said that he withdrew his earlier proposals regarding articles 19 and 20 (see 1648th meeting, para. 40). He noted that the Drafting Committee and the Commission had decided to leave

open the question of reservations to bilateral agreements and had not taken a final decision on the question of the machinery for the acceptance of reservations by international organizations.

35. Mr. REUTER (Special Rapporteur) reminded the Commission that when it came to adopt its report it would have to decide whether to indicate that articles 19 and 20 as proposed by the Drafting Committee had been adopted by the majority of the Commission or by the Commission as a whole. The draft report that had already been prepared (A/CN.4/L.331/Add.3) spoke of "the majority of the Commission", but if Mr. Ushakov accepted articles 19 and 20, it would be possible, and more accurate, to state that the Commission had adopted those articles.

*Article 20 was adopted.*

ARTICLE 21<sup>10</sup> (Legal effects of reservations and of objections to reservations)

36. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 21:

*Article 21. Legal effects of reservations and of objections to reservations*

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State or international organization in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving State or organization.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a State or international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the author of the reservation and the objecting State or organization to the extent of the reservation.

37. Article 21, in its new form, represented a return to the text of article 21 of the Vienna Convention, the only drafting changes being those necessitated by the inclusion of references to international organizations.

*Article 21 was adopted.*

ARTICLE 22<sup>11</sup> (Withdrawal of reservations and of objections to reservations)

38. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 22:

<sup>10</sup> *Idem*, 1652nd meeting, paras. 27–29.

<sup>11</sup> *Idem*.

*Article 22. Withdrawal of reservations and of objections to reservations*

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting State or a contracting organization or, as the case may be, another contracting organization or a contracting State only when notice of it has been received by that State or that organization;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

39. The text of the article had been considerably simplified by the use of drafting techniques employed in previous articles. As a result, paragraphs 3 and 4 had been combined and the wording simplified throughout, thus achieving greater conformity with the text of article 22 of the Vienna Convention.

*Article 22 was adopted.*

ARTICLE 23<sup>12</sup> (Procedure regarding reservations)

40. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 23:

*Article 23. Procedure regarding reservations*

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and contracting organizations and other States and organizations entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, an act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by a treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

41. Article 23 embodied in a single text the rules originally contained in articles 23 and 23 *bis*. The text differed from article 23 of the Vienna Convention only in its references to international organizations and their act of formal confirmation.

*Article 23 was adopted.*

42. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed that the title of section 3 of Part II remain

unchanged, namely: "Section 3. Entry into force and provisional application of treaties".

*The title of Part II, Section 3, was adopted.*

ARTICLE 24<sup>13</sup> (Entry into force) and

ARTICLE 25<sup>14</sup> (Provisional application)

43. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following texts for articles 24 and 25:

*Article 24. Entry into force*

1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating organizations or, as the case may be, the negotiating States and negotiating organizations may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating organizations or, as the case may be, all the negotiating States and negotiating organizations.

3. When the consent of a State or of an international organization to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State or that organization on that date, unless the treaty otherwise provides.

4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

*Article 25. Provisional application*

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(a) the treaty itself so provides; or

(b) the negotiating organizations or, as the case may be, the negotiating States and negotiating organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating organizations or, as the case may be, the negotiating States and negotiating organizations have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or organization shall be terminated if that State or that organization notifies the other States and the organizations or, as the case may be, the other organizations and the States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

44. The text of the two articles had been prepared following the pattern, explained earlier, of aligning the regime of international organizations on that of States. Accordingly, article 24 replaced articles 24 and 24 *bis* of the original draft, and article 25 replaced articles 25 and 25 *bis*. Both texts corresponded more closely to articles 24 and 25 of the Vienna Convention, with the necessary drafting adjustments.

*Articles 24 and 25 were adopted.*

<sup>12</sup> *Idem.*

<sup>13</sup> *Idem*, paras. 30–31.

<sup>14</sup> *Idem.*

45. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that no changes had been made in the titles of Part III or of Section 1 thereof, which remained identical to the corresponding titles appearing in the Vienna Convention, namely: "Part III. Observance, application and interpretation of treaties", and "Section 1. Observance of treaties".

*The titles of Part III and of Part III, Section 1 were adopted.*

ARTICLE 26<sup>15</sup> (*Pacta sunt servanda*)

46. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed no change to article 26, which read:

*Article 26. Pacta sunt servanda*

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

*Article 26 was adopted.*

**Succession of States in respect of matters other than treaties (*continued*)\* (A/CN.4/338 and Add.1-4, A/CN.4/345 and Add.1-3, A/CN.4/L.328)**

[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE<sup>16</sup>

TITLE AND STRUCTURE OF THE DRAFT ARTICLES;  
TITLES OF PARTS AND SECTIONS

47. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said the Drafting Committee proposed that the title of the draft articles should read (A/CN.4/L.328):

*Draft articles on succession of States  
in respect of State property, archives and debts*

The Committee had adopted the Special Rapporteur's proposal that the title of the draft should be made more specific by an express reference to the three matters with which it dealt.

48. For reasons of style, the word "State" appeared only once in the title, but it covered all three matters—property, archives and debts.

*The title of the draft articles was adopted.*

49. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that, in keeping with the wishes of the Commission, the articles on State archives formed a separate part, entitled "State

archives", which now became Part III of the draft, following the part relating to "State property". The original Part III therefore became Part IV of the draft and was entitled "State debts". Part I of the draft, adopted on first reading with the title "Introduction", had been entitled "General Provisions", and Section 1 of Parts II, III and IV had been entitled "Introduction", while Section 2 had been given the title "Provisions concerning specific categories of succession of States".

*The structure of the draft articles and the titles of the Parts and sections were adopted.*

ARTICLE 1<sup>17</sup> (Scope of the present articles)

50. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 1 (A/CN.4/L.328):

*Article 1. Scope of the present articles*

The present articles apply to the effects of a succession of States in respect of State property, archives and debts

51. As a consequence of the change in the title of the draft, the expression "in respect of matters other than treaties", which appeared in the original text of the article, had been replaced by "in respect of State property, archives and debts".

*Article 1 was adopted.*

ARTICLE 2<sup>18</sup> (Use of terms)

52. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee had made no change to article 2 as adopted on first reading.<sup>19</sup>

*Article 2 was adopted.*

ARTICLE 3<sup>20</sup> (Cases of succession of States covered by the present articles)

53. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee had made no change to article 3 as adopted on first reading.<sup>21</sup>

*Article 3 was adopted.*

ARTICLE 3 *bis* (Temporal application of the present articles)

54. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee pro-

\* Resumed from the 1690th meeting.

<sup>15</sup> *Idem*, 1673rd meeting, paras. 1-3.

<sup>16</sup> For initial consideration of the draft articles at the current session, see 1658th to 1662nd, 1671st, 1672nd, 1675th and 1688th to 1690th meetings.

<sup>17</sup> For initial consideration of the text at the current session, see 1658th meeting, paras. 5 *et seq.*, and 1659th meeting, paras. 1-24.

<sup>18</sup> *Idem*, 1659th meeting, paras. 25-46.

<sup>19</sup> For text, see 1659th meeting, para. 25.

<sup>20</sup> For initial consideration of the text at the current session, see 1659th meeting, paras. 47 *et seq.*, and 1660th meeting, paras. 1-15.

<sup>21</sup> For text, see 1659th meeting, para. 47.

posed an article 3 *bis*, (A/CN.4/L.328), the text of which read:

*Article 3 bis. Temporal application of the present articles*

1. Without prejudice to the application of any of the rules set forth in the present articles to which the effects of a succession of States would be subject under international law independently of these articles, the articles apply only in respect of a succession of States which has occurred after the entry into force of the articles except as may be otherwise agreed.

2. A successor State may, at the time of expressing its consent to be bound by the present articles or at any time thereafter, make a declaration that it will apply the provisions of the articles in respect of its own succession of States which has occurred before the entry into force of the articles in relation to any other contracting State or State Party to the articles which makes a declaration accepting the declaration of the successor State. Upon entry into force of the articles as between the States making the declarations or upon the making of the declaration of acceptance, whichever occurs later, the provisions of the articles shall apply to the effects of the succession of States as from the date of that succession of States.

3. A successor State may at the time of signing or of expressing its consent to be bound by the present articles make a declaration that it will apply the provisions of the articles provisionally in respect of its own succession of States which has occurred before the entry into force of the articles in relation to any other signatory or contracting State which makes a declaration accepting the declaration of the successor State; upon the making of the declaration of acceptance, those provisions shall apply provisionally to the effects of the succession of States as between those two States as from the date of that succession of States.

4. Any declaration made in accordance with paragraph 2 or 3 shall be contained in a written notification communicated to the depositary, who shall inform the Parties and the States entitled to become Parties to the present articles of the communication to him of that notification and of its terms.

55. Article 3 *bis* was a new provision and reproduced, with the necessary adjustments, the text of article 7 of the 1978 Vienna Convention,<sup>22</sup> which had been the subject of lengthy and delicate negotiations at the Conference responsible for drafting the Convention. The Drafting Committee had decided that the inclusion of such an article in the Commission's draft was necessary for reasons akin to those that had warranted the inclusion of article 7 in the 1978 Convention—reasons relating more particularly to the opportunity for a successor State of applying the draft articles to its own succession of States which occurred before their entry into force of the Convention.

*Article 3 bis was adopted.*

ARTICLE 3 *ter* (Succession in respect of other matters)

56. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed an article 3 *ter* (A/CN.4/L.328), which read:

*Article 3 ter. Succession in respect of other matters*

Nothing in the present article shall be considered as prejudging in any respect any question relating to the effects of a succession of States in respect of matters other than those provided for in the present articles.

57. Article 3 *ter* was new. The Drafting Committee had decided it was necessary to have such an article in view of the decision not to deal in the draft with the effects of succession of States in respect of all matters other than treaties and to confine the Commission's work to the three matters listed in the title of the draft. The wording of the proposed article followed that of article 14 of the 1978 Vienna Convention.

*Article 3 ter was adopted.*

ARTICLE 4<sup>23</sup> (Scope of the articles in the present Part)

58. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee had made no change to article 4 as adopted on first reading.<sup>24</sup>

*Article 4 was adopted.*

ARTICLE 5<sup>25</sup> (State property)

59. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee had made no change to article 5 as adopted on first reading.<sup>26</sup>

*Article 5 was adopted.*

ARTICLE 6<sup>27</sup> (Effects of the passing of State property)

60. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 6 (A/CN.4/L.328).

*Article 6. Effects of the passing of State property*

A succession of States entails the extinction of the rights of the predecessor State and the arising of the rights of the successor State to such of the State property as passes to the successor State in accordance with the provisions of the articles in the present Part.

61. The Drafting Committee had decided to amend the original title of the article ("Rights of the successor State to State property passing to it"), since it did not properly reflect the content of the article. Also, the new title was more in keeping with that of article 9.

*Article 6 was adopted.*

<sup>23</sup> For initial consideration of the text by the Commission at the current session, see 1660th meeting, paras. 17–63.

<sup>24</sup> For text, see 1660th meeting, para. 17.

<sup>25</sup> For initial consideration of the text by the Commission at the current session, see 1660th meeting, paras. 17–63.

<sup>26</sup> For text, see 1660th meeting, para. 17.

<sup>27</sup> For initial consideration of the text by the Commission at the current session, see 1660th meeting, paras. 64–69.

<sup>22</sup> See 1658th meeting, footnote 2.

ARTICLE 7<sup>28</sup> (Date of the passing of State property)

62. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee had made no change to Article 7 as adopted on first reading.<sup>29</sup>

*Article 7 was adopted.*

ARTICLE 8<sup>30</sup> (Passing of State property without compensation)

63. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee had made no change to article 8 as adopted on first reading.<sup>31</sup>

*Article 8 was adopted.*

ARTICLE 9<sup>32</sup> (Absence of effect of a succession of States on the property of a third State)

64. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 9 (A/CN.4/L.328):

*Article 9. Absence of effect of a succession of States on the property of a third State*

A succession of States shall not as such affect property, rights and interests which, at the date of the succession of States, are situated in the territory of the predecessor State and which, at that date, are owned by a third State according to the internal law of the predecessor State.

65. The Drafting Committee had amended the title of article 9 in the English version by replacing the expression "third party State property" by "the property of a third State", so as to bring it into line with the French and Spanish versions, which were clearer.

66. Mr. ALDRICH said that, in view of the fact that the Commission had already adopted article 5, which defined State property as property which, at the date of the succession of States, was, according to the internal law of the predecessor State, owned by that State, there seemed to be little point in including article 9 in the draft. The only possible effect of the article was to suggest that the property, rights and interests of individuals might be prejudiced in some way. The article was unfortunate and should be deleted.

67. Mr. USHAKOV, supported by Mr. BEDJAOU (Special Rapporteur), said that article 9 did not have any direct connection as to succession of States as such. It was mainly concerned with protection of property which, under the internal law of the predecessor State, belonged to a third State. It would

<sup>28</sup> *Idem*, paras. 70-76.

<sup>29</sup> For text, see 1660th meeting, para. 70.

<sup>30</sup> For initial consideration of the text by the Commission at the current session, see 1660th meeting, paras. 77-78.

<sup>31</sup> For text, see 1660th meeting, para. 77.

<sup>32</sup> For initial consideration of the text by the Commission at the current session, see 1661st meeting, paras. 1-47.

apply, for instance, to consulate and embassy buildings which required protection in the event of State succession so as to safeguard the interests of third States.

*Article 9 was adopted.*

ARTICLE 10<sup>33</sup> (Transfer of part of the territory of a State)

68. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 10 (A/CN.4/L.328):

*Article 10. 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 property of the predecessor State to the successor State is to be settled by agreement between them.

2. In the absence of an agreement:

(a) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

(b) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State.

69. For the sake of simplification, the Drafting Committee had replaced the words "between the predecessor and successor States", at the end of paragraph 1 as adopted on first reading, by "between them".

70. Mr. REUTER proposed that the opening words of paragraph 2, reading "In the absence of an agreement", should be replaced by "In the absence of such an agreement", so as to leave no doubt that the agreement referred to related to the property and not to the transfer.

*Article 10, as amended, was adopted.*

ARTICLE 11<sup>34</sup> (Newly independent State)

71. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 11 (A/CN.4/L.328):

*Article 11. Newly independent State*

1. When the successor State is a newly independent State:

(a) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

(b) immovable property having belonged to the territory to which the succession of States relates, situated outside it and having become State property of the predecessor State during the period of dependence, shall pass to the successor State;

<sup>33</sup> *Idem*, paras. 48-58.

<sup>34</sup> *Idem*, paras. 59-94.

(c) immovable State property of the predecessor State other than that mentioned in subparagraph (b) and situated outside the territory to which the succession of States relates, to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of the dependent territory;

(d) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;

(e) movable property having belonged to the territory to which the succession of States relates and having become State property of the predecessor State during the period of dependence, shall pass to the successor State;

(f) movable State property of the predecessor State other than the property mentioned in subparagraphs (d) and (e), to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of the dependent territory.

2. When a newly independent State is formed from two or more dependent territories, the passing of the State property of the predecessor State or States to the newly independent State shall be determined in accordance with the provisions of paragraph 1.

3. When a dependent territory becomes part of the territory of a State, other than the State which was responsible for its international relations, the passing of the State property of the predecessor State to the successor State shall be determined in accordance with the provisions of paragraph 1.

4. Agreements concluded between the predecessor State and the newly independent State to determine succession to State property otherwise than by the application of paragraphs 1 to 3 shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources.

72. The text of the article, the title of which had not been changed, was broadly the same as that adopted on first reading. To make it more comprehensive, certain additions had been made to paragraph 1. Also, the order of the subparagraphs to paragraph 1 had been rearranged to achieve a more consistent presentation. In the original version of paragraph 1, subparagraphs (a), (b) and (c) had dealt with three cases of the passing of movable State property, and subparagraph (d) with one case of the passing of immovable State property. The Drafting Committee had decided that there was no convincing reason why the two situations provided for under subparagraphs (a) and (c) of the earlier draft should not also be provided for in the case of the passing of immovable property. Accordingly, the text which it was proposing contained two new subparagraphs, (b) and (c). Subparagraph (a) of the new text therefore corresponded to subparagraph (d) of the original text: subparagraphs (b) and (c) were new, but were based on subparagraphs (a) and (c) of the earlier text, and subparagraphs (d), (e) and (f) of the new text corresponded to subparagraphs (b), (a) and (c) of the original text.

73. In addition, the Drafting Committee had decided, for the sake of consistency, to replace the term “newly independent State”, in new subparagraph (e), by “successor State”, which was used throughout the rest of the article.

74. New subparagraphs (b) and (c), which concerned immovable property, made express reference to property that was situated outside the territory to which the succession of States related. That reference, which was not necessary in the case of movable property, was essential in the case of immovable property because of the terms of subparagraph (a).

75. Lastly, to bring the French version of subparagraphs (c) and (f) of paragraph 1 of the new text into line with the English, the expression “*dans la proportion correspondant a sa part contributive*” had been replaced by “*en proportion de la contribution du territoire dépendant*”.

*Article 11 was adopted.*

#### ARTICLE 12<sup>35</sup> (Uniting of States)

76. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 12 (A/CN.4/L.328):

##### *Article 12. Uniting of States*

1. When two or more States unite and so form a successor State, the State property of the predecessor States shall pass to the successor State.

2. Without prejudice to the provision of paragraph 1, the allocation of the State property of the predecessor States as belonging to the successor State or, as the case may be, to its component parts shall be governed by the internal law of the successor State.

*Article 12 was adopted.*

#### ARTICLE 13<sup>36</sup> (Separation of part or parts of the territory of a State)

77. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the only change made to the article was in paragraph 3, where, for the sake of accuracy and clarity, the words “as between the predecessor State and the successor State” had been added after the words “equitable compensation”. The proposed text of the article (A/CN.4/L.328) therefore read:

##### *Article 13. 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) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(b) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;

<sup>35</sup> *Idem*, paras. 95–98.

<sup>36</sup> For initial consideration of the text by the Commission at the current session, see 1662nd meeting.

(c) movable State property of the predecessor State other than that mentioned in subparagraph (b) shall pass to the successor State in an equitable proportion.

2. Paragraph 1 applies when part of the territory of a State separates from that State and unites with another State.

3. The provisions of paragraphs 1 and 2 are without prejudice to any question of equitable compensation as between the predecessor State and the successor State that may arise as a result of a succession of States.

78. Mr. USHAKOV, noting that the phrase "shall pass to the successor State in the territory of which it is situated" appeared in both article 14, subparagraph 1 (a) and article 13, subparagraph 1 (a), said that its inclusion in the latter provision was unwarranted. Article 14 dealt with the formation of at least two States, whereas article 13 was concerned with the formation of a single State. In article 13, therefore the phrase should be replaced by "situated in the territory to which the succession of States relates shall pass to the successor State", which was the wording used in article 11, subparagraph 1 (a).

79. He further noted that article 34 of the 1978 Vienna Convention was entitled "Succession of States in cases of separation of parts of a State". He therefore wondered whether the words "parts of the territory of a State" in the title of article 13 should not be replaced by "parts of a State".

80. Mr. REUTER said that he agreed with Mr. Ushakov's first comment, but would point out that article 13 could be interpreted as providing for the case in which several parts of the territory of a State separated from one another to form several States.

81. Mr. BEDJAOU (Special Rapporteur) said that, as he understood it, article 13 covered the particular case of the formation of a single State. Hence, Mr. Ushakov's suggestion seemed acceptable.

82. So far as the title was concerned, he would prefer it to remain unchanged, for the term "parts of a State" was obscure.

*Article 13, as amended, was adopted.*

#### ARTICLE 14<sup>37</sup> (Dissolution of a State)

83. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that article 14 as proposed by the Drafting Committee (A/CN.4/L.328) read:

##### *Article 14. 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) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(b) immovable State property of the predecessor State situated outside its territory shall pass to the successor States in equitable proportions;

<sup>37</sup> *Idem.*

(c) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territories to which the succession of States relates shall pass to the successor State concerned;

(d) movable State property of the predecessor State other than that mentioned in subparagraph (c) shall pass to the successor States in equitable proportions.

2. The provisions of paragraph 1 are without prejudice to any question of equitable compensation among the successor States that may arise as a result of a succession of States.

84. The wording of the article, the title of which had not been modified, was broadly the same. After mature reflection, the Drafting Committee had decided, in regard to paragraph 1 (b), to replace the words "to one of the successor States, the other successor States being equitably compensated" by "to the successor States in equitable proportions". As a consequential change, the expression "in an equitable proportion", in paragraph 1 (d), had been replaced by "in equitable proportions". Lastly, for the same reasons of accuracy and clarity that had warranted the change in article 13, paragraph 3, the Drafting Committee had added the words "among the successor States" in article 14, paragraph 2, after the words "equitable compensation".

*Article 14 was adopted.*

#### ARTICLE 15<sup>38</sup> (Scope of the articles in the present Part)

85. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee had made no change to article 15.<sup>39</sup>

*Article 15 was adopted.*

#### ARTICLE 16<sup>40</sup> (State debt)

86. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 16 (A/CN.4/L.328):

##### *Article 16. State debt*

For the purposes of the articles in the present Part, "State debt" means:

(a) any financial obligation of a State towards another State, an international organization or any other subject of international law;

[(b) any other financial obligation chargeable to a State.]

87. Although the Committee had made no change to the title, the introductory phrase or subparagraph (a), it had, like the Commission, been unable to reach agreement on whether subparagraph (b) should be retained or deleted. It had therefore decided to refer the

<sup>38</sup> *Idem.* 1671st meeting, and 1672nd meeting, paras. 1-35.

<sup>39</sup> For text, see 1671st meeting, para. 1.

<sup>40</sup> For initial consideration of the text at the current session, see 1671st meeting and 1672nd meeting, paras. 1-35.

matter to the Commission, and subparagraph (b) had been placed in square brackets for that reason.

88. Mr. REUTER suggested that subparagraph (b) should be retained, but that the words "under international law" should be added at the end of the subparagraph.

89. Mr. ALDRICH said that, in the Commission and in the Drafting Committee, he had always resisted attempts to obscure the meaning of subparagraph (b), a provision that clearly raised the question whether, under international law, a succession of States involved succession to debts owed to private banks and private individuals. He did not understand the meaning of Mr. Reuter's suggestion, which was unacceptable because it simply confused the issue under discussion. In his view, subparagraph (b) should be retained, because it would be unfair for the Sixth Committee and any international conference that might discuss the draft articles for the purposes of adopting a convention not to have before them texts on which the Commission had not been able to agree.

90. Mr. NJENGA said it was his understanding that the commentary to article 16 would indicate, in a fair amount of detail, the reasons for the Commission's decision concerning subparagraph (b).

*At the request of Mr. Ushakov, a vote was taken by roll-call on the retention of article 16, subparagraph (b).*

*Mr. Aldrich, having been drawn by lot by the Chairman, was called upon to vote first.*

*In favour:* Mr. Aldrich, Mr. Calle y Calle, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Verosta.

*Against:* Mr. Barboza, Mr. Bedjaoui, Mr. Díaz González, Mr. Njenga, Mr. Tabibi, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

*There were 8 votes in favour and 8 votes against.*

*Article 16, subparagraph (b), was not adopted.*

*The title, introductory phrase and subparagraph (a) of article 16 were adopted.*

91. Mr. REUTER, speaking in explanation of vote, said that he had voted in favour of retention of subparagraph (b) because the question at issue was one of general international law and, from the point of view of general international law, it could not be said that no financial obligation was chargeable to a State by reason of debts owed to private persons.

92. Mr. CALLE Y CALLE said that he had voted in favour of retention of subparagraph (b) because the concept covered by that provision had been approved in the past, and general international law provided for the fulfilment of obligations, including the financial obligations owed by States to creditors other than States or international organizations.

93. Mr. RIPHAGEN said that he had voted in favour of retention of subparagraph (b) for the same reasons as Mr. Reuter.

94. Mr. FRANCIS said that he had voted in favour of retention of subparagraph (b) for the reasons he had explained during the Commission's discussions of article 16. Since the Commission's vote had resulted in a tie, he would have thought that subparagraph (b), without being adopted, would at least have been retained in square brackets.

95. Mr. BARBOZA said that he had voted against retention of subparagraph (b) because he was of the opinion that the kind of debts referred to in that provision came within the scope of the internal law of States and could not be said to be covered by international law.

96. Mr. USHAKOV said that he had voted against retention of subparagraph (b) because the only kind of rule that could be laid down in international law were the kind that concerned relations between subjects of international law. The law applicable to private debts was contract law.

97. Mr. ŠAHOVIĆ said that he had voted in favour of retention of subparagraph (b) for the reasons of principle he had explained during the Commission's discussions of article 16, and because he considered that inclusion of that subparagraph would strengthen the draft and ensure its unanimous adoption.

98. Mr. DÍAZ GONZÁLEZ said that he had voted against retention of subparagraph (b) for the same reasons as Mr. Barboza. He might, however, have voted in favour of its retention if it had been worded differently.

99. Speaking as the Chairman of the Drafting Committee and referring to the point raised by Mr. Francis, he explained that subparagraph (b) had been placed in square brackets only to indicate that the Drafting Committee had not been able to agree on it and that the Commission should decide on the matter.

100. Mr. VEROSTA said that he had voted in favour of retention of subparagraph (b) for the same reasons as Mr. Reuter.

101. Mr. YANKOV said that he had voted against retention of subparagraph (b) not because the kind of obligation in question should not benefit from the protection of the law, but because it did not come within the scope of the draft as he understood it.

102. Mr. NJENGA said that he too had voted against retention of subparagraph (b) because the provision related to subjects other than subjects of international law. The debts referred to in the subparagraph were, of course, payable, but they simply were not governed by international law.

103. Mr. ALDRICH said that he could not accept the arguments put forward by the members of the Commission who had opposed retention of subparagraph (b) on the grounds that debts owed to private

individuals fell outside the scope of the draft articles. Those arguments were inconsistent because, when reference was made to State property, it was also understood to include debts owed to the State by private persons. He simply could not understand how debts owed to the State by private persons could be said to be subject to State succession, while debts owed to private persons by the State were excluded from State succession.

104. Mr. QUENTIN-BAXTER said that he had voted in favour of retention of subparagraph (b) because he thought that, if the draft articles were to have any chance of success, subparagraph (b) had to be included in article 16. He would have voted in favour of retention of the provision even if he had not agreed with its substance, because he believed it was the Commission's duty to place questions of that kind before the General Assembly and any diplomatic conference that might consider the draft articles. Indeed, he was of the opinion that the Commission had mistaken its role when it had voted on a matter of that kind, something shown by the fact that the vote had resulted in a tie.

#### ARTICLE 17<sup>41</sup> (Effects of the passing of State debts)

105. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 17 (A/CN.4/L.328):

##### *Article 17. Effects of the passing of State debts*

A succession of States entails the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as pass to the successor State in accordance with the provisions of the articles in the present Part.

106. The title of article 17 had been brought into line with that of the corresponding article of Part II, namely, article 6, for the same reasons as had led to the change in the title of that article.

*Article 17 was adopted.*

#### ARTICLE 17 bis<sup>42</sup> (Date of the passing of State debts)

107. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 17 bis (A/CN.4/L.328):

##### *Article 17 bis. Date of the passing of State debts*

Unless otherwise agreed or decided, the date of the passing of State debts is that of the succession of States.

108. In the light of the Commission's discussions, the Drafting Committee had adopted the proposal made

by the Special Rapporteur in his thirteenth report for the inclusion of a new article 17 bis (A/CN.4/345 and Add.1-3, para. 164), the title and text of which corresponded to those of article 7.

*Article 17 bis was adopted.*

#### ARTICLE 18<sup>43</sup> (Effects of the passing of State debts with regard to creditors)

109. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 18 (A/CN.4/L.328):

##### *Article 18. Effects of the passing of State debts with regard to creditors*

1. A succession of States does not as such affect the rights and obligations of creditors.

2. An agreement between the predecessor State and the successor State or, as the case may be, between successor States, concerning the respective part or parts or the State debts of the predecessor State that pass, cannot be invoked by the predecessor State or by the successor State or States, as the case may be, against a third State, an international organization or any other subject of international law asserting a claim unless:

(a) the consequences of that agreement are in accordance with the provisions of the present Part; or

(b) the agreement has been accepted by that third State, international organization or other subject of international law.

110. The Drafting Committee had made no change to the title of article 18 or to paragraph 1. In order to bring the wording of the end of paragraph 2 and of subparagraph (b) into line with that of article 16, it had added the words "or any other subject of international law" and the words "or other subject of international law". Moreover, in paragraph 2 (a), the word "provisions" had been substituted for the words "the other applicable rules of the articles" in order to avoid problems of interpretation. In the French and Spanish versions of paragraph 2, the words "*le cas échéant*" and the words "*en su caso*" had been replaced by "*selon le cas*" and "*según el caso*", respectively.

*Article 18 was adopted.*

#### ARTICLE 19<sup>44</sup> (Transfer of part of the territory of a State)

111. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) pointed out that the Committee had made a change in article 19, paragraph 1, similar to that made in article 10, which was the corresponding article in Part II; the words "between the predecessor and successor States" had been replaced by "between them". The text of article 19 proposed by the Drafting Committee (A/CN.4/L.328) therefore read:

<sup>41</sup> *Idem*, 1672nd meeting, paras. 36-60.

<sup>42</sup> *Idem*.

<sup>43</sup> *Idem*, paras. 36 *et seq.*, and 1675th meeting, paras. 33-48.

<sup>44</sup> *Idem*, 1672nd meeting, paras. 36 *et seq.*, and 1675th meeting, paras. 33 *et seq.*

*Article 19. 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 the State debt of the predecessor State to the successor State is to be settled by agreement between them.

2. In the absence of an agreement, the State debt of the predecessor State shall pass to the successor State in an equitable proportion, taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt.

*Article 19 was adopted.*

ARTICLE 20<sup>45</sup> (Newly independent State)

112. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee had simply brought the English and Spanish versions of paragraph 2 into line with the French version of that paragraph and of paragraph 4 of article 11, which was the corresponding article in Part II. The proposed text (A/CN.4/L.328) read:

*Article 20. Newly independent State*

1. When the successor State is a newly independent State, no State debt of the predecessor State shall pass to the newly independent State, unless an agreement between the newly independent State and the predecessor State provides otherwise in view of the link between the State debt of the predecessor State connected with its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State.

2. The agreement referred to in paragraph 1 shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor shall its implementation endanger the fundamental economic equilibria of the newly independent State.

*Article 20 was adopted.*

ARTICLE 21<sup>46</sup> (Uniting of States)

113. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that, in the light of the Commission's wishes, the Committee had decided to delete paragraph 2, and the article therefore read (A/CN.4/L.328):

*Article 21. Uniting of States*

1. When two or more States unite and so form a successor State, the State debt of the predecessor States shall pass to the successor State.

*Article 21 was adopted.*

ARTICLE 22<sup>47</sup> (Separation of part or parts of the territory of a State)

114. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Committee had made no change to the article as adopted on first reading.<sup>48</sup>

*Article 22 was adopted.*

ARTICLE 23<sup>49</sup> (Dissolution of a State)

115. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that, for the same reasons as in the case of article 14, which was the corresponding article in Part II, the words "an equitable proportion of the State debt of the predecessor State shall pass to each successor State" had been replaced by "the State debt of the predecessor State shall pass to the successor States in equitable proportions". The text of article 23 as proposed by the Drafting Committee (A/CN.4/L.328) therefore read:

*Article 23. Dissolution of a State*

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 otherwise agree, the State debt of the predecessor State shall pass to the successor States in equitable proportions, taking into account all relevant circumstances.

*Article 23 was adopted.*

*The meeting rose at 1.10 p.m.*

<sup>48</sup> For text, see 1688th meeting, para. 3.

<sup>49</sup> For initial consideration of the text by the Commission at the current session, see 1688th meeting, paras. 3–32.

**1693rd MEETING**

*Friday, 17 July 1981, at 10.30 a.m.*

*Chairman:* Mr. Doudou THIAM

*Present:* Mr. Aldrich, Mr. Barboza, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Tabibi, 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.4/347 and Add.1 and 2)

[Item 8 of the agenda]

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

ARTICLE I (Scope of the present articles),

\* Resumed from the 1691st meeting.

<sup>45</sup> *Idem*, 1688th meeting, paras. 3–32.

<sup>46</sup> *Idem*.

<sup>47</sup> *Idem*.

ARTICLE 2 (Couriers and bags not within the scope of the present articles),

ARTICLE 3 (Use of terms),

ARTICLE 4 (Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags),

ARTICLE 5 (Duty to respect international law and the laws and regulations of the receiving and the transit State), and

ARTICLE 6 (Non-discrimination and reciprocity)<sup>1</sup>  
(continued)

1. Mr. USHAKOV said that, in his view, the Commission should use a generic term such as "official courier", "government courier" or "*courrier de cabinet*" to designate the diplomatic, consular and other couriers it wished to cover, and another generic term such as "official bag", "Government bag" or "*valise de cabinet*" to designate the various types of bag concerned. It should then be made clear that those terms covered not only diplomatic couriers and bags but other couriers and bags. No reference should be made, in the definitions to be given to those terms, to the rules relating to the status of such couriers and bags.

2. In that connection, the definition of the term "diplomatic courier", as proposed by the Special Rapporteur in article 3, subparagraph 1 (1), contained unnecessary elements deriving from the rules which defined the status of the diplomatic courier and which belonged in subsequent articles. The term "government courier" could, for example, be defined as meaning a person having the status of courier, sent by a State to deliver the government bag or other communication to its destination. A similar definition could be given to the generic term that would be adopted to designate the various kinds of bag.

3. Article 1, (Scope of the draft articles) could then simply stipulate that the draft would apply to communications of States by means of a government courier or governmental bag. As that provision dealt only with the scope of application of the draft articles, there was no point in referring to special rules; in his view, even the expression "for all official purposes" was in the nature of a rule. It should be made clear in a subsequent article that the sending State could send a government courier to deliver a communication to its missions situated in the territory of the receiving State. There would then follow an article drafted along the lines of draft article 4, which laid down the obligations of the receiving State.

4. If the Commission were to use the terms "diplomatic courier" and "diplomatic bag" to designate all categories of courier and bag envisaged, it would inevitably be inviting difficulty, since those terms were used in a very special sense in the 1961 Vienna Convention.<sup>2</sup>

5. Draft article 5, entitled "Duty to respect international law and the laws and regulations of the receiving and the transit State", seemed premature, since the Commission should lay down the duty to respect international law and internal law only after enumerating the relevant facilities, privileges and immunities.

6. Referring specifically to paragraph 1 of article 5, he said that the duty to respect the rules of international law was incumbent only on subjects of international law, and not on the government courier. The latter could not even be regarded as an organ of the State, since he carried out very special duties and did not exercise any State power. In any event, even the organs of the State had never been deemed to have a duty to respect international law; such a duty was incumbent only on the States on whose behalf they acted.

7. Mr. ŠAHOVIĆ said he sometimes had the impression that the Commission exaggerated the importance of the subject under consideration. It was actually a fairly modest subject, although it had its practical aspects, as the Special Rapporteur has pointed out. At all events, no controversial legal problems were involved, for the general status of the diplomatic courier and the diplomatic bag had already been laid down in various multilateral conventions which had codified the rules of customary law. That raised the question how an examination of the subject by the Commission could contribute to the codification and progressive development of international law. From the outset, the Commission had emphasized the need to pinpoint those new and practical aspects of the subject that were the outcome of progress in the field of communications and of the abuse of certain privileges and immunities. The need, then, was to introduce the necessary innovations and provide the information essential for the guidance of States in the application of the existing rules of international law. It followed that, in future, the Special Rapporteur should concentrate his research on State practice, with a view to determining which legal problems called for regulation. Any other approach might lead to a work of codification for which positive law would be the sole basis.

8. While the assimilation of the diplomatic courier and bag to other types of courier and bag had been debated at length, the assimilation of the courier and bag of international organizations had so far been neglected. In Mr. Ushakov's view, the Commission's work would only be genuinely of use if it also took account of the courier and bag of international organizations. In that connection, he himself differed from other members of the Commission concerning the need to find a generic term: the terms "diplomatic courier" and "diplomatic bag" were themselves general terms and were used in that sense in the terminology of the subject under consideration. It would therefore suffice to make it clear that the rules laid down in the draft articles applied to all forms of diplomatic courier and bag.

<sup>1</sup> For texts, see 1691st meeting, para. 1.

<sup>2</sup> See 1691st meeting, footnote 1.

9. Referring to article 1, he said that paragraph 2 could be simplified, since it merely assimilated diplomatic couriers and bags to other types of courier and bag.
10. With regard to article 2, he stressed that the couriers and bags used by international organizations should be included within the scope of the draft articles. Article 2 should therefore be replaced by a provision specifying what the relationship was between the rules laid down in the draft and the other rules of international law concerning diplomatic couriers and bags.
11. The definitions of terms laid down in article 3 should, as several members of the Commission had pointed out, be stripped in so far as possible of any element in the nature of a legal rule.
12. Lastly, he trusted that provision would be made for an article on the duties of the sending State, in order to supplement articles 4, 5 and 6, which related, respectively, to the duty of the receiving State and the transit State to respect the freedom of communication; the duty of the diplomatic courier to respect international law and the internal law of the receiving State and the transit State; and the duty of the sending State and the receiving State to respect the principles of non-discrimination and reciprocity.
13. Mr. TABIBI said he was sure that, on the basis of the approach adopted and the proposals made by the Special Rapporteur, the Commission would have every chance of success in formulating draft articles on the topic under consideration. What made that topic so important was that the protection of freedom of communication and of diplomatic couriers and bags was one of the oldest principles of international law. That principle and others of fundamental importance had, of course, been embodied in the 1961 Vienna Convention and in the 1963 Vienna Convention,<sup>3</sup> which had become part of the internal law of many Member States of the United Nations. In dealing with the present topic, the Commission should attempt, not to rewrite the principles embodied in those instruments, but rather to formulate principles on which those instruments were silent, taking particular care to protect the rights and interests of smaller countries, which had at their disposal many fewer technical resources than larger countries for inspecting and controlling the content of diplomatic bags and preventing abuses thereof.
14. In his view, article 1, on the scope of the draft articles, was not restrictive enough, and the reference it made to all kinds of communications of States might be misconstrued. He agreed with Mr. Šahović that articles 4, 5 and 6 were particularly important. Article 4, on freedom of communication, referred to the obligations of the receiving State. A reference to the obligations of the sending State should, however, be included in article 5 because the balance between the rights and duties of sending and receiving States was an essential element of the topic under consideration.
15. He agreed with Mr. Calle y Calle, (1691st meeting) that the interests of organizations such as the Palestine Liberation Organization and the South West Africa People's Organization (SWAPO) should be taken into account in the draft articles, which would take on even greater significance if they also applied to couriers and bags used by international organizations for official purposes.
16. Mr. NJENGA said that the Special Rapporteur, in his excellent report and lucid oral introduction, had successfully demonstrated that the law relating to the status of the diplomatic courier and the diplomatic bag was now ripe for codification.
17. Referring to article 1, he said that he had been taken by surprise when he had read paragraphs 45 to 48 of the second report (A/CN.4/347 and Add.1 and 2), in which the Special Rapporteur had suggested that the draft articles should apply to the couriers and bags used by States and not to those used by international organizations. The arguments put forward by the Special Rapporteur in support of that suggestion were not very convincing, particularly since the practice of international organizations in respect of the use of couriers and bags for official purposes was well-established and generally accepted by States. It would therefore be perfectly justified for the Commission to look into that practice and into the relevant provisions of treaties concluded by international organizations and host countries with a view to extending the scope of the draft articles to communications by international organizations through couriers and bags. Such a course of action might ultimately save the Commission considerable time and effort, because the General Assembly would then not have to request it to prepare draft articles on the question of the status of couriers and bags used by international organizations.
18. One of the most important facts established by the Special Rapporteur in his survey of existing multilateral conventions was that the principle of freedom of communication and the principle of the inviolability of the diplomatic bag were generally recognized. An exception to the latter principle had been provided for in article 35, paragraph 3, of the 1963 Vienna Convention, but not in subsequent conventions. To his mind, that indicated that State practice established no grounds for such an exception. It might nevertheless be a good idea for the Commission to give careful consideration to the principle of inviolability because, although States had an obligation to use diplomatic couriers and bags for official purposes only, abuses did occur, and it might be expedient to provide for stronger safeguards in the draft articles.
19. In that connection, in paragraph 165 of his report the Special Rapporteur had pointed out that, according to the principle of the inviolability of official correspondence, the diplomatic bag was exempt "from any kind of inspection or control, directly or through soph-

<sup>3</sup> *Idem*, footnote 2.

isticated technical devices". It was, however, open to question whether the electronic scanning of diplomatic bags could be ruled out entirely when it was considered in the light of the duty of a State which hosted a large international conference to ensure the protection of the representative of other States attending that conference. That was a matter of practical importance, because States assumed enormous responsibilities when they hosted large conferences and they could not run the risk that diplomatic couriers and bags might be used for "unofficial" purposes. The Commission should therefore take particular care to ensure that the draft articles established a balance between the rights and obligations of sending and receiving States.

20. The suggestion made by the Special Rapporteur in paragraph 186 of his report that the term "diplomatic bag" might be replaced by the term "official bag" was a good one that might also be applied to the definition of the term "diplomatic courier" in article 3, subparagraph 1 (1). The use of the term "official courier" would make it unnecessary to refer in article 3, paragraph 1, to all the different types of couriers, who basically had the same functions.

21. He had some difficulty with the reference to the idea of "consent" in article 3, subparagraph 1 (7), containing the definition of the term "transit State"; for obvious practical reasons, transit States did not actually give their express consent whenever a diplomatic courier was to pass through their territories. The words "and with whose consent" in article 3, subparagraph 1 (7), which would be unduly restrictive, might therefore have to be amended.

22. Mr. REUTER said that he could agree to Mr. Ushakov's suggestions concerning the approach to the topic and aimed at a stricter presentation of the articles, with the clear separation of articles that dealt, respectively, with definitions, the scope of the draft, and the substantive rules. There was, however, a link between those various aspects which the Commission should analyse when it came to consider the articles themselves.

23. Several members had expressed the view that the scope of the draft should include the case of international organizations. He, too, was convinced that the situation of international organizations was identical to that of States in the area in question. The draft was based on general principles, one of which was that international organizations, like States, required freedom of communication, which was wholly subordinate to the functions involved. The Commission should therefore treat freedom of communication as a derivative of the general principle of the inviolability of the archives of international organizations, which undoubtedly formed part of the general principles of contemporary customary international law. Certain disputes between international organizations and their host States as to whether an international organization could be made subject to a national law requiring any person holding archives in the territory of the State

concerned to allow the verification of archives stored in a computer, even when they contained information about individuals, should convince the Commission of the need to affirm the existence of a general principle of the inviolability of archives that would be applicable to international organizations and would, naturally, extend to archives in transit.

24. However, various technical factors might cause uncertainty as to the advisability of extending the application of the draft to international organizations. The draft before the Commission already dwelt at length on Governments, and a decision to cover international organizations as well would further complicate the Commission's task. He would therefore go along with the Commission and the Special Rapporteur in their choice on that point.

25. From a more general standpoint, two options were open so far as the approach to the draft was concerned: the privileges accorded to the courier could either merely be spelt out or they could be amplified as well. The Commission must, indeed, substantially clarify certain aspects of the topic, including even technical aspects, if its work was to be effective. The position adopted by the Special Rapporteur in that connection had been endorsed by all the members who had made known their views.

26. The Special Rapporteur had also held that the four most recent conventions on the topic under consideration demonstrated the existence within the international community of a broad current of opinion that could be taken as justification for the extension of the privileges already provided for under the first instrument considered, the 1961 Vienna Convention. On the basis of that trend, Mr. Yankov (1691st meeting) had even criticized a provision in one of those conventions that restricted certain privileges. For his own part he was in favour of everything that could increase protection for international relations, particularly since they were threatened in the present day and age by totally unacceptable acts of barbarity. Furthermore, a recent example suggested that certain forms of protection were not as effective as might have been thought.

27. The Commission should, however, ask itself whether that was the position of Governments too. The 1961 Vienna Convention had received virtually universal approval and had been ratified by numerous States, with no significant reservation. The 1963 Vienna Convention, on the other hand, had met with less success, while the 1975 Vienna Convention<sup>4</sup> had still not come into force. Although a clear and well-constructed text would, in his view, inevitably affect practice—perhaps even as much as a convention that had formally entered into force—he none the less considered that the Commission must decide whether its real wish was to prepare a draft that would not arouse misgivings on the part of Governments. In his view, it would be

<sup>4</sup> *Ibid*, footnote 4.

advisable to take account of certain fears that might be expressed and that had already come to light in the comments made by members of the Commission.

28. There was a technical aspect of the matter that would serve to illustrate that point of view. One of the draft articles proposed by the Special Rapporteur provided that the regime governing the bag should protect the courier and all objects for official use. That provision would therefore seem to exclude medicine, drugs and weapons, but to cover coding and decoding equipment; it also seemed to apply to currency to finance the recipient's official duties. Such a solution might, however, be unacceptable, particularly to certain developing countries which were obliged to control the circulation of currency and whose borders were eminently permeable. Aspects such as that should be given detailed study within the draft, with a view to defining what the courier was and to clarifying the duties of the State, quite apart from the question of possible sanctions. If the Commission were to proceed otherwise, it could provide States with a pretext for refusing to consider the draft.

29. In the same way, the principle of non-discrimination seemed to be the rule in diplomatic relations, but not in consular relations, which fell *de facto* within the realm of bilateralism and reciprocity and, hence, of discrimination. In general, the Commission should avoid taking up positions that were too remote from the actual concerns of Governments.

30. Sir Francis VALLAT said that, while he congratulated the Special Rapporteur on his report and oral introduction, he nevertheless had a number of difficulties with the approach adopted to the topic and with the proposals contained in the report.

31. In his view, the question of the status of diplomatic couriers and diplomatic bags presented the same problems to both large and small States. In the United Kingdom, for example, the diplomatic bag had been used to the detriment of the national economy. It had been used for the importation of industrial diamonds on a large scale and of narcotics. He was convinced, moreover, that it had also been used for the importation of terrorist devices. Such practices were surely an abuse of the diplomatic bag, which was designed to protect and further the conduct of diplomatic relations between States. The problem was one which called for close examination, and the Commission should exercise great caution in considering whether the complete immunity accorded to diplomatic couriers and bags should be extended to a wider field.

32. The approach proposed by the Special Rapporteur was neither inductive nor deductive. To take four articles from four different conventions and to attempt to amalgamate certain of their provisions into a single article, to apply to all situations, would inevitably lead to confusion, particularly where the conventions in question had not yet entered into force. It might be

preferable to begin with an examination of article 27 of the 1961 Vienna Convention, for example, to determine those respects in which it worked well or badly, and to endeavour to arrive at the solutions needed in that context. Consideration would then be given to the possibility of extending the results to other fields.

33. It had been his understanding that, since the inception of the United Nations, the view had become overwhelmingly accepted that in considering the question of diplomatic privileges and immunities a functional approach should be adopted. He was not convinced that precisely the same privileges and immunities should apply to consular and to diplomatic couriers and bags. Moreover, in the case of couriers and bags used by international organizations, quite different considerations applied, since, in the first place, the communications of such organizations were not in general regarded as secret. Consequently, he recommended that the Special Rapporteur should consider an alternative approach.

34. Mr. VEROSTA said that he shared many of the views and doubts expressed by other members of the Commission. He noted that draft article 3 proposed by the Special Rapporteur contained 23 definitions, and that among them were a number of rules which would be better dealt with separately as such. In his view, some of the definitions were not all that necessary, and he feared that such a long list was the precursor of an excessively long draft. He trusted that the Commission would not enlarge the functions of the courier unduly and that it would take a prudent attitude to assimilation, so as to facilitate the acceptance of the future draft by States.

**Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/338 and Add.1-4, A/CN.4/345 and Add.1-3, A/CN.4/L.328)**

[Item 2 of the agenda]

**DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)**

35. Mr. BEDJAoui (Special Rapporteur) expressed his gratitude and warm appreciation to all those who, in a spirit of friendship and a particularly stimulating climate of intellectual excellence, had assisted him in preparing the draft articles over thirteen years of combined effort, in the service of the codification and progressive development of international law for the benefit of the international community as a whole. The draft articles as finally adopted were a truly joint product of the Commission and of the Drafting Committee, which had been directly involved in the preparation of the text.

36. Particular thanks were due to the successive chairmen of the Drafting Committee and the members of the Secretariat.

*The meeting rose at 1.00 p.m.*

## 1694th MEETING

Monday, 20 July 1981, at 3.15 p.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Aldrich, Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, 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.4/347 and Add.1 and 2)

[Item 8 of the agenda]

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*concluded*)

- ARTICLE 1 (Scope of the present articles),  
 ARTICLE 2 (Couriers and bags not within the scope of in the present articles),  
 ARTICLE 3 (Use of terms),  
 ARTICLE 4 (Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags),  
 ARTICLE 5 (Duty to respect international law and the laws and regulations of the receiving and the transit State), and  
 ARTICLE 6 (Non-discrimination and reciprocity)<sup>1</sup> (*concluded*)

1. Mr. USHAKOV said that, methodological problems aside, the draft articles should deal with the legal situation of all couriers and bags, since their status was the same. In his opinion, the term "the courier" could be used without qualification.

2. Although members of the Commission had said much about the abuse that might be made of the diplomatic bag, whether accompanied or not, he considered it an exaggeration to assert that the use of the diplomatic bag could be a source of serious danger with respect to trafficking in drugs, arms currency or human beings, for it had never played more than a marginal role in that regard. The question of abuse was, therefore, only of minor importance and should not be allowed to dominate the content of the draft articles. On the other hand, the numerous lacunae revealed by the Special Rapporteur and during the Commission's discussions unquestionably justified the continuation of work on the topic.

3. Mr. SUCHARITKUL said that he fully agreed with the Special Rapporteur, as far as the content of

the topic was concerned. While the desire to extend the privileges and immunities, currently accorded to the diplomatic courier and bag, to other institutions of States and international organizations was understandable, action to that end should be taken only after careful consideration, since it might create difficulties for the receiving State in the form of an obligation to ensure the inviolability of communications between consular missions of other States within its own borders. In order to afford such protection, a receiving State would have to issue appropriate instructions, not only to customs officers, but also to the police and other internal authorities. Moreover, it might prove difficult to assimilate the field of consular relations with that of diplomatic relations. Admittedly, bilateral treaties on consular relations had been concluded between countries with similar structures and cultural histories, such as the United Kingdom and the United States of America. However, the development of consular relations in Asian countries had followed a quite different course.

4. The difficulties existing with regard to the adoption of a universal regime for consular relations were illustrated by the fact that the 1963 Vienna Convention<sup>2</sup> had been ratified by far fewer countries than had the 1961 Vienna Convention.<sup>3</sup> Consequently, he agreed with Mr. Ushakov that, if an attempt was to be made to cover all types of official communications, it might be preferable, first, to use general terms such as "official courier" and "official bag" rather than to distinguish between diplomatic and consular couriers and bags, and, second, to determine the extent to which the receiving State could accept the duty of protection.

5. He was gratified to note that the Special Rapporteur was prepared to leave aside the question of international organizations for the time being. Such organizations did not function in the same way as States, since they had no diplomatic couriers, although of course missions accredited to international organizations of a universal character could be accorded privileges and immunities as a result of which their couriers and bags could be regarded as having diplomatic status.

6. Mr. YANKOV (Special Rapporteur) thanked all the members of the Commission who had made criticisms of his report and had suggested alternative approaches. All the points raised called for careful consideration.

7. The reason why he had placed such emphasis in his report on the provisions of the 1961 Vienna Convention, the 1963 Vienna Convention, the Convention on Special Missions<sup>4</sup> and the 1975 Vienna Convention,<sup>5</sup> rather than on other relevant bilateral or

<sup>1</sup> For texts, see 1691st meeting, para. 1.

<sup>2</sup> See 1691st meeting, footnote 2.

<sup>3</sup> *Ibid.*, footnote 1.

<sup>4</sup> *Ibid.*, footnote 3.

<sup>5</sup> *Ibid.*, footnote 4.

multilateral conventions, was that he had considered that, regardless of the number of countries which had ratified them, those four conventions could, at the current stage of the Commission's work, serve as a basis for tackling the topic, since they provided an international mean. He admitted, however, that he might have gone too far in that direction, even though the report did contain a number of references to the provisions of bilateral conventions on consular relations and to national legislation. In future, greater consideration should perhaps be accorded to other conventions which dealt with aspects not covered in the four main conventions.

8. Referring to a point raised by Mr. Šahović (1693rd meeting) concerning the scope of the topic, he said that while he agreed that the theoretical ramifications and political significance of the topic should not be exaggerated, the Commission had a responsibility to deal with it as carefully as possible. Referring to another point raised by Mr. Šahović, he said that he viewed the Commission's task as being to elaborate specific rules based on existing practice and designed to facilitate the administration of couriers and bags and reduce the difficulties arising between States. The main problem would be to strike a proper balance between concern for secrecy and the safe and unimpeded delivery of the diplomatic bag, on the one hand, and the legitimate rights and interests of other States, on the other. That problem could be solved by establishing a greater degree of legal certainty.

9. With regard to the breadth of the network of communications to be covered by the draft articles, he said that the restrictive approach, whereby such communications would be limited to those between a sending State and its various missions abroad, might not be adequate. While that approach had been followed in some of the more than one hundred pertinent bilateral treaties studied, the most common approach had been that described in paragraph 81 of his second report (A/CN.4/347 and Add.1 and 2). In the light of the observations made by members of the Commission, he would suggest the adoption of a middle way. For example, the area of communications between States might be excluded, although there had been instances in which a State, needing to deliver important diplomatic documents to another State in which it had no diplomatic mission, had, in order to protect those documents and preserve their confidential nature, resorted to use of the diplomatic bag. There had also been instances of States using the diplomatic bag to communicate with international organizations of which they were not members and in which they were not represented. It was for the Commission to state which approach it preferred.

10. With regard to the inclusion of international organizations within the scope of the draft articles, he said that many international instruments, such as those establishing the privileges and immunities of the United Nations, the specialized agencies and the Council of

Europe, established the right of such organizations to despatch and receive diplomatic couriers and diplomatic bags. Referring to the observations made by Sir Francis Vallat (1693rd meeting) in that connection, he said that critical situations arose in which the communications of the United Nations were subject to a greater than usual degree of confidentiality. Consequently, he would suggest that the Commission should keep the situation of international organizations under review, on the understanding that such organizations could, if necessary, be included in the scope of the draft articles, on the same basis as States. He agreed with Sir Francis Vallat concerning the appropriateness of a functional approach and the handling of any functional differences in specific articles.

11. A number of speakers, including Mr. Aldrich (1691st meeting) and Mr. Njenga, Mr. Reuter and Sir Francis Vallat (1693rd meeting), had referred to the extent to which the exception laid down in article 35, paragraph 3, of the 1963 Vienna Convention could be instrumental in preventing or reducing abuses of the diplomatic bag. It was to be noted that, of the four Conventions studied in detail in the report, only the 1963 Convention contained such an exception—and even that provision began by stating the principle of the inviolability of the consular bag. As Mr. Calle y Calle (1691st meeting) and Mr. Sucharitkul had stated, that principle could therefore be regarded as fundamental. Of the 122 international agreements on diplomatic law he had studied for the purposes of his report, 92 provided quite clearly that the diplomatic bag should be neither opened nor detained, and only 18 contained a provision similar to, or milder than, that contained in article 35 of the 1963 Vienna Convention. It would be unjustifiable to take what was an exceptional provision, rather than a generally accepted principle, as a model for international law governing the status of the diplomatic bag. Accordingly, he had suggested in his report that the legal status of the diplomatic bag should be based in general on the provisions of article 27 of the 1961 Vienna Convention.

12. Although the possibility of abuse of the diplomatic bag was a real problem, it should not be allowed to overshadow the importance of the principle of freedom of communication. From the international conventions he had studied, it was clear that, while States were sometimes willing to impose restrictions on their freedom of communication, they preferred, in most instances, to adhere to the general rule.

13. An idea that had gained wider acceptance over the past ten years was that, if there were grounds for suspicion concerning the contents of a diplomatic bag, it should simply be returned unopened to the sending State. However, to incorporate that idea in law might be considered unfair to the States unable to afford the sophisticated devices now in existence that could read documents contained in a diplomatic bag without the bag's being opened. It should also be noted that when

the Governments of Bahrain, Kuwait and Libya had, in relation to the 1961 Vienna Convention, reserved the right to open a diplomatic bag if there was serious reason to believe that it contained articles other than those provided for in article 27 of that convention, many States had stated categorically that such a reservation was contrary to the principle of freedom of communication and had refused to accept it. Moreover, recent discussions in the Sixth Committee of the General Assembly had shown that the majority of States favoured the principle contained in article 27 of the 1961 Vienna Convention.

14. Referring to a point raised by Mr. Verosta (1693rd meeting) concerning the number of definitions contained in the draft articles, he said that it had been his intention to provide the Commission with the maximum number of definitions, on the grounds that it would be easier to delete a definition than to introduce a new one.

15. Concerning the question of the definition of the courier, he had understood from the discussions at the Commission's thirty-second session and in the Sixth Committee that what was required was a comprehensive definition of the courier, stipulating his function, his credentials and the legal protection and facilities to be accorded to him. His own preference would be for such a definition, which would not be repeated in subsequent provisions, but would provide a basic framework. However, in that connection he would be grateful for the guidance of the Commission.

16. The same discussions in the Commission and the Sixth Committee had given him the impression that there was a preference for retaining the institutions of the diplomatic courier and diplomatic bag as a basis for determining the status of other types of courier and bag, rather than introducing a new and unfamiliar concept such as that of "official courier". In that connection, Mr. Ushakov had suggested that the unqualified term "courier" should be used. The matter was one for the Commission to decide.

17. In accordance with the comments made by members of the Commission, the wording of article 1, paragraph 2, might be simplified along the following lines:

"The present articles shall apply also to the communications referred to in paragraph 1 of the present article when consular couriers and consular bags and couriers and bags of special missions or other missions or delegations are employed".

Such an amendment would be in keeping with his suggestion concerning an assimilation provision covering all types of couriers and bags. As he had indicated in paragraphs 34 and 35 of his report, precedents for the inclusion of such wording were to be found in a number of bilateral consular conventions.

18. With regard to article 3, subparagraph 1 (3), Mr. Riphagen (1691st meeting) had said that it seemed somewhat strange to apply the words "in the perform-

ance of its official function" to the diplomatic bag. It would, of course, be possible to improve the wording of that subparagraph, but since the diplomatic bag did, in his view, perform an official function as an instrument of freedom of communication, it should be accorded preferential treatment and protection.

19. Referring to the doubts expressed by Mr. Riphagen and Mr. Njenga (1693rd meeting) concerning the use of the words "with whose consent" in article 3, subparagraph 1 (7), he said that, although he would not insist on the inclusion of those words, he did think they made it clear that diplomatic couriers were sometimes allowed to pass through the territory of a State without transit visas and sometimes required to obtain the express consent of the State concerned and the necessary visas.

20. With regard to the definition contained in article 3, subparagraph 1 (8), Mr. Aldrich (1691st meeting) had suggested that reference should be made to "other States" rather than to a "third State". In existing diplomatic law, however, the term "third State" referred to a State that was not normally involved in the dispatch of the diplomatic bag but could become so involved in certain exceptional circumstances of *force majeure* or of fortuitous event, as provided in article 40, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations.

21. He agreed with Mr. Riphagen that the use of the words "may apply" in article 3, paragraph 2, was inadequate. He therefore suggested that those words should be replaced by the words "shall apply".

22. As he had emphasized in paragraph 213 of his report, draft articles 4, 5 and 6 had been presented only on a preliminary basis, as tentative formulations designed to elicit an exchange of views. The comments made by members of the Commission on those draft articles would be very useful to him at a later stage.

23. With regard to the question raised by Mr. Ushakov concerning article 5 (1693rd meeting) and the duty of the diplomatic courier to respect international law, he explained that it was his own understanding that such a duty was, of course, incumbent on States as subjects of international law, but that, as agents of States, diplomatic couriers had certain privileges which they could not abuse without going beyond their functions and, by extension, breaching principles of international law. Provisions similar to article 5 did, moreover, exist in other international conventions.

24. The general comments made by Mr. Sucharitkul concerning the principle of freedom of communication embodied in article 4 had certainly been very helpful. In reply to Mr. Šahović's question (*ibid.*) whether the Commission should not formulate a set of general principles relating to the obligations of States concerning freedom of communication, he noted that it was not the Commission's task to prepare a code of conduct for States. For that reason, he had whenever

possible referred in the draft articles only to the rights and duties of diplomatic couriers. He would, however, try to take account in subsequent versions of draft article 4 of Mr. Tabibi's suggestion (*ibid.*) concerning the strengthening of the obligations of the sending State.

25. With regard to Mr. Riphagen's question (1691st meeting) concerning the wording of article 6, subparagraph 2 (*b*), he said he realized that the meaning of that provision might not be entirely clear, but what he had had in mind was a provision similar to that contained in article 47, subparagraph 2 (*b*), of the 1961 Vienna Convention.

26. Replying to the question raised by Mr. Riphagen and Mr. Aldrich (*ibid.*) concerning the difference between a diplomatic bag entrusted to the captain of a ship or a commercial aircraft and a diplomatic bag sent through normal postal channels as a consignment on a ship or an aircraft, he said that when a diplomatic bag was entrusted to the captain of a ship or an aircraft, an official document indicating the number of packages constituting the diplomatic bag was required and the captain of the ship or aircraft had physical custody of the bag, whereas in the case of a bag sent as parcel post, overland shipment or airfreight, only the ordinary documents for forwarding were required and the bag was the responsibility of the postal administration concerned. Legal protection for both types of diplomatic bags was, however, the same.

27. Since the Commission's term of office was ending and it was important to ensure the continuity of the study of the topic under consideration, he suggested that the Secretariat might send a questionnaire to Governments requesting them to provide all relevant information on treaties, national laws, regulations, procedures and practices concerning the treatment of the diplomatic courier and the diplomatic bag and that it might request that the topic should be discussed in the Sixth Committee of the General Assembly.

28. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft articles 1 to 6 to the Drafting Committee.

*It was so decided.*

**Succession of States in respect of matters other than treaties (concluded) (A/CN.4/338 and Add.1-4, A/CN.4/345 and Add.1-3, A/CN.4/L.328 and Add.1 and 2)**

[Item 2 of the agenda]

**DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (concluded)**

**ARTICLE G<sup>6</sup> (Scope of the articles in the present Part (State archives)),**

<sup>6</sup> For initial consideration of the text by the Commission at its present session, see 1688th meeting, paras. 33 *et seq.*

**ARTICLE H<sup>7</sup> (Effects of the passing of State archives),  
ARTICLE I<sup>8</sup> (Date of the passing of State archives),  
ARTICLE J<sup>9</sup> (Passing of State archives without compensation), and**

**ARTICLE K<sup>10</sup> (Absence of effect of succession of States on the archives of a third State)**

29. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Drafting Committee proposed that articles G, H, I, J and K should read (A/CN.4/L.328/Add.1):

**Article G. Scope of the articles in the present Part**

The articles in the present Part apply to the effects of a succession of States in respect of State archives.

**Article H. Effects of the passing of State archives**

A succession of States entails the extinction of the rights of the predecessor State and the arising of the rights of the successor State to such of the State archives as pass to the successor State in accordance with the provisions of the articles in the present Part.

**Article I. Date of the passing of State archives**

Unless otherwise agreed or decided, the date of the passing of State archives is that of the succession of States.

**Article J. Passing of State archives without compensation**

Subject to the provisions of the articles in the present Part and unless otherwise agreed or decided, the passing of State archives from the predecessor State to the successor State shall take place without compensation.

**Article K. Absence of effect of a succession of States on the archives of a third State**

A succession of States shall not as such affect State archives which, at the date of the succession of States, are situated in the territory of the predecessor State and which, at that date, are owned by a third State according to the internal law of the predecessor State.

30. Those articles, together with article A, constituted the first section, entitled "Introduction", of Part III of the draft, which dealt with State archives. Article A, which contained a definition of the expression "State archives", had been adopted by the Commission in first reading, while articles G, H, I, J and K had been submitted by the Special Rapporteur at the present session and referred by the Commission for the first time to the Drafting Committee. Those articles contained introductory provisions applicable to Part III of the draft as a whole. They corresponded to the provisions adopted in the introductory sections of Parts II and IV of the draft, which dealt with State property and State debts respectively. In drafting the titles and texts of the articles under consideration, the Drafting Committee had drawn particularly on the

<sup>7</sup> *Idem*, 1689th meeting, paras. 1-15.

<sup>8</sup> *Idem*.

<sup>9</sup> *Idem*.

<sup>10</sup> *Idem*.

articles in Part II, Section 1 (State property). It had decided, in the light of the comments made in the Commission, to maintain the parallelism between the introductory sections of Parts II and III. To that end, it had made the same drafting amendments to the articles under consideration as had been made to the articles in Part II, section 1, with the result that the articles were now identical—except as concerned the use of the terms “property” and “archives”.

*Articles G, H, I and J were adopted.*

31. Mr. ALDRICH said that, in his view, article K, like article 9, was neither necessary nor desirable.

*Article K was adopted.*

#### ARTICLE A<sup>11</sup> (State archives)

32. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that article A as proposed by the Drafting Committee (A/CN.4/328/Add.1) read:

*Article A. State archives*

**For the purposes of the present articles, “State archives” means all documents of whatever kind which, at the date of the succession of States, belonged to the predecessor State according to its internal law and had been kept by it as archives.**

33. A number of drafting changes had been made to the article to preclude the possibility of its being interpreted restrictively: the words “the collection of documents of all kinds” had been replaced by the words “all documents of whatever kind”, while, at the end of the article, the word “preserved” had been replaced by the word “kept” and the term “State archives” had been replaced by the term “archives”, which, in the context of the definition, included all types of official record. The replacement of the word “preserved” by the word “kept” made clear the scope of the definition, which covered the archives known as “living archives”.

*Article A was adopted.*

#### ARTICLE 3 *quater* (Rights and obligations of natural or juridical persons)

34. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Drafting Committee proposed an article 3 *quater* (A/CN.4/L.328/Add.2) which read:

*Article 3 quater. Rights and obligations of natural or juridical persons*

**Nothing in the present articles shall be considered as prejudging in any respect any question relating to the rights and obligations of natural or juridical persons.**

The article was designed to forestall the impression that the effects of a succession of States in respect of

State property, archives or debts might prejudice in any way any question relating to the rights and obligations of natural or juridical persons. The Drafting Committee had felt it particularly appropriate to formulate such a safeguard clause in view of the Commission’s decision (1692nd meeting) not to refer in article 16 to “any other financial obligation chargeable to a State”.

35. Article 3 *quater* had been drafted in very general terms and had, therefore, been included in Part I, which contained general provisions applicable to the draft as a whole.

36. Sir Francis VALLAT said that, while he was not opposed to article 3 *quater*, and understood its intention, he was of the opinion that it did not make good the omission of article 16, subparagraph (b), from the set of draft articles, which now contained no provision that would enable natural or juridical persons to have recourse against any of the successor States formed as a result of the dissolution of a State.

*Article 3 quater was adopted.*

#### ARTICLE L (Preservation of the unity of State archives)

37. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that article L as proposed by the Drafting Committee (A/CN.4/L.328/Add.2) read:

*Article L. Preservation of the unity of State archives*

**Nothing in the present Part shall be considered as prejudging in any respect any question that might arise by reason of the preservation of the unity of State archives.**

The article was based on the former paragraph 6 of article F, which had been adopted in first reading the previous year.<sup>12</sup>

38. In the light of the discussion within the Commission, the Drafting Committee had felt it advisable to draw up a separate article laying down, in a general form, the principle of the unity of State archives. That principle was relevant not only to the category of State succession covered by article F, but also to the other such categories covered by Part III, section 2. The Drafting Committee had, therefore, stated it in general terms and included it in Part III, section 1, the provisions of which were applicable to Part III as a whole.

39. Since it contained a safeguard clause, article L had been modelled on the other similar clauses to be found in articles 3 *ter* and 3 *quater*.

*Article L was adopted.*

#### ARTICLE B<sup>13</sup> (Newly independent State)

<sup>12</sup> For text, see 1690th meeting, para. 1.

<sup>13</sup> For initial consideration of the text by the Commission at its present session, see 1689th meeting, paras. 16–42.

<sup>11</sup> *Idem*, 1688th meeting, paras. 33 *et seq.*

40. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that article B as proposed by the Drafting Committee (A/CN.4/L.328/Add.2) read:

*Article B. Newly independent State*

1. When the successor State is a newly independent State:

(a) archives, having belonged to the territory to which the succession of States relates and become State archives of the predecessor State during the period of dependence, shall pass to the newly independent State;

(b) 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 newly independent State.

2. The passing or the appropriate reproduction of parts of the State archives of the predecessor State other than those mentioned 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 newly independent 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 newly independent State with the best available evidence from its State archives which bears upon title to the territory of the newly independent State or its boundaries, or which is necessary to clarify the meaning of documents of State archives which pass to the newly independent State pursuant to other provisions of the present article.

4. The predecessor State shall co-operate with the successor State in efforts to recover any archives having belonged to the territory to which the succession of States relates and having been dispersed during the period of dependence.

5. Paragraphs 1 to 4 apply when a newly independent State is formed from two or more dependent territories.

6. Paragraphs 1 to 4 apply when a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations.

7. Agreements concluded between the predecessor State and the newly independent State 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.

41. Article B, which together with articles C, D, E and F constituted Section 2, entitled "Provisions concerning specific categories of succession of States", of Part III of the draft, was basically identical to the article the Commission had approved in first reading. However, in response to fears voiced in the Commission that the draft as a whole would otherwise be without effect, the Drafting Committee had added a new paragraph 4, concerning the duty of the predecessor and successor States to co-operate in attempting to recover any archives having belonged to the territory to which the succession of States related that, as was often the case, had been dispersed during the period of dependence. The old paragraphs 4 to 6 had accordingly been renumbered 5 to 7, and the references they had contained to paragraphs 1 to 3 had been extended to the new paragraph 4.

42. In paragraph 3, the phrase "the best available evidence of documents from the State archives of the predecessor State" had been replaced by the words

"the best available evidence from its State archives", and the same change was made at the other points in section 2 where the phrase had appeared, namely, in paragraph 3 of article C, paragraph 3 (now para. 2) of article E, and paragraph 3 of article F. Similarly, the Drafting Committee had deleted the words "documents of" from all the provisions of section 2 where they had previously appeared before the words "State archives", namely article C, paragraphs 4 and 5 (formerly subparagraphs 4 (a) and (b)); article E, paragraph 4 (formerly paragraph 5); and article F, paragraph 5. Finally, in paragraph 2, the term "mentioned" had been preferred, for the sake of consistency with the articles already adopted, to the term "dealt with". In the English version of the draft, the word "mentioned" had also been substituted for forms of the verbs "to deal with" and "to refer to" in other provisions of section 2, namely article C, subparagraph 2 (b), and subparagraph 1 (b) of each of articles E and F.

43. Sir Francis VALLAT said that although article B was drafted in terms of the newly independent State, it was not clear to what territory paragraph 6 of that provision referred. Indeed, since the wording of paragraph 6 was defective, it would be difficult to apply paragraph 2 in relation to paragraph 3, and also difficult to apply paragraph 7. He therefore suggested that those questions should be clarified in the commentary to article B.

44. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the suggestion made by Sir Francis Vallat concerning the commentary to article B was acceptable.

45. Mr. NJENGA said that the wording of article B, paragraph 4, would be clearer if it was amended to read:

"The predecessor State shall co-operate with the successor State in efforts to recover any archives which, having belonged to the territory to which the succession of States relates, were dispersed during the period of dependence".

46. Mr. USHAKOV said that it should be emphasized in the commentary to article B that subparagraph 1 (a) referred to archives that had belonged to the territory to which the succession of State related and that had become "State archives . . . during the period of dependence", whereas paragraph 4 concerned archives that had belonged to the territory and that had "been dispersed during the period of dependence".

47. Mr. ALDRICH said that the wording of article B, subparagraph 1 (a), might be clearer if the word "having" was added between the word "and" and the words "become State archives of the predecessor State . . .".

48. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article B with the amended wording

proposed by Mr. Njenga and the addition proposed by Mr. Aldrich.

*Article B, as amended, was adopted.*

ARTICLE C<sup>14</sup> (Transfer of part of the territory of a State)

49. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the text which the Drafting Committee proposed for article C (A/CN.4/L.328/Add.2) 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 them.

2. In the absence of such 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 territory concerned is transferred, shall pass to the successor State;

(b) the part of State archives of the predecessor State, other than the part mentioned 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 from its State archives which bears upon title to the territory of the transferred territory or its boundaries, or which is 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. The predecessor State shall make available to the successor State, at the request and at the expense of that State, appropriate reproductions of its State archives connected with the interests of the transferred territory.

5. The successor State shall make available to the predecessor State, at the request and at the expense of that State, appropriate reproductions of State archives which have passed to the successor State in accordance with paragraph 1 or 2.

50. Apart from the drafting changes which he had already mentioned, the Drafting Committee had merely replaced the phrase "in question" ("*en question*") by the word "concerned" ("*concerné*") in the English and French versions of subparagraph 2 (a). The former subparagraphs 4 (a) and 4 (b) had now become paragraphs 4 and 5 respectively.

*Article C was adopted.*

ARTICLE D<sup>15</sup> (Uniting of States)

51. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the text which the Drafting Committee proposed for article D (A/CN.4/L.328/Add.2) read:

*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 to its component parts shall be governed by the internal law of the successor State.

*Article D was adopted.*

ARTICLE E<sup>16</sup> (Separation of part or parts of the territory of a State)

52. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Drafting Committee proposed that article E should read (A/CN.4/L.328/Add.2):

*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 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 mentioned in subparagraph (a), that relates directly to the territory to which the succession of States relates, shall pass to the successor State.

2. The predecessor State shall provide the successor State with the best available evidence from its State archives which bears upon title to the territory of the successor State or its boundaries, or which is necessary to clarify the meaning of documents of State archives which pass to the successor State pursuant to other provisions of the present article.

3. 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 peoples of those States to development, to information about their history and to their cultural heritage.

4. The predecessor and successor States shall, at the request and at the expense of one of them, make available appropriate reproductions of their State archives connected with the interests of their respective territories.

5. The provisions of paragraphs 1 to 4 apply when part of the territory of a State separates from that State and unites with another State.

53. Apart from the drafting changes which he already mentioned, the Drafting Committee had deleted from article E the text adopted in first reading as paragraph 2.<sup>17</sup> That text had corresponded to the second paragraph of article B, where it had been maintained. In article E, it had raised great problems of legal logic because of its dual reference to "passing" and "appropriate reproduction" and because of its final part, which had stated that the passing or reproduction "shall be determined by agreement

<sup>14</sup> *Idem*, 1690th meeting, paras. 1-31.

<sup>15</sup> *Idem*.

<sup>16</sup> *Idem*.

<sup>17</sup> For text, see 1690th meeting, para. 1.

between the predecessor State and the successor State in such a manner that each of those States can benefit as widely and as equitably as possible from those parts of the State archives”.

54. Sir Francis VALLAT, referring to paragraph 4, said that the words “at the request and at the expense of one of them”, the words “their State archives” and the words “their respective territories” were not at all clear and made it seem as though that paragraph was drafted both in the singular and in the plural.

55. Mr. USHAKOV said that, while Sir Francis Vallat was right, the text of the paragraph had been adopted in its present form in first reading. Perhaps its wording could be improved at some later stage.

56. Mr. ALDRICH said that, while paragraph 4 had not been discussed at length in the Drafting Committee, the Committee had noted that the word “appropriate” would give the predecessor and successor States involved grounds for determining exactly which reproductions they should make available to one another.

*Article E was adopted.*

#### ARTICLE F<sup>18</sup> (Dissolution of a State)

57. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that article F as proposed by the Drafting Committee read (A/CN.4/L.328/Add.2):

##### *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 mentioned in subparagraph (a), that relates directly to the territory of a successor State, shall pass to that successor State.

2. The State archives of the predecessor State other than those mentioned in paragraph 1 shall pass to the successor States in an equitable manner, taking into account all relevant circumstances.

3. Each successor State shall provide the other successor State or States with the best available evidence from its part of the State archives of the predecessor State which bears upon title to the territories or boundaries of that other successor State or States, or which is 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 its part of the State archives of the predecessor State connected with the interests of the territory of that other successor State.

58. In addition to undergoing drafting changes similar to those made to other articles, article F had lost its former paragraph 6, which had become article L. Furthermore, the Drafting Committee had decided to replace the original paragraph 2, which, except for referring only to “passing” of parts of State archives, had corresponded to paragraph 2 of articles B and E adopted in first reading. The new wording of paragraph 2 was based in part on article 23, concerning State debts, with the difference that the phrase “an equitable proportion” which appeared in article 23 had been replaced by the phrase “in an equitable manner”.

59. Sir Francis VALLAT, referring to paragraph 2, said it might be made clear in the commentary to the article that the words “in an equitable manner” referred to the manner of the passing of State archives, not to the manner of their division.

*Article F was adopted.*

60. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) drew attention to the fact that, in the second section of Part II and of Part IV of the draft, the articles entitled “Newly independent State” (arts. 11 and 20) appeared immediately after the articles entitled “Transfer of part of the territory of a State” (arts. 10 and 19); in Part III, concerning State archives, however, the article “Newly independent State” (art. B) preceded the article entitled “Transfer of part of the territory of a State” (art. C).

61. It might be thought that the articles should be arranged identically in section 2 of each of Parts II, III and IV; should the Commission subscribe to that view, the Secretariat would reorder the provisions accordingly.

62. Mr. USHAKOV proposed that the articles of Part III, Section 2, in question should be placed in the same order as the corresponding articles in Parts II and IV.

*It was so decided.*

#### Statement by the Chairman of the Drafting Committee

63. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) reminded the Commission that, in addition to the articles on the succession of States, it had referred to the Drafting Committee the articles submitted at the present session by the special rapporteurs on the topics of: question of treaties concluded between States and international organizations or between two or more international organizations; State responsibility; jurisdictional immunities of States and their property; and status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

<sup>18</sup> For initial consideration of the text by the Commission at the present session, see 1690th meeting, paras. 1–31.

64. Bearing in mind the recommendations of the General Assembly, the Drafting Committee had concentrated on the two sets of draft articles submitted in second reading and, in particular, on the draft articles concerning succession of States in respect of State property, archives and debts. That being so, it had been unable to examine all the articles relating to treaties to which international organizations were parties, and any of the articles on the other topics. The Committee therefore remained seized of those articles, and would have to study them at the Commission's next session.

*The meeting rose at 6.10 p.m.*

## 1695th MEETING

*Tuesday, 21 July 1981, at 11.05 a.m.*

*Chairman:* Mr. Doudou THIAM

*Present:* Mr. Aldrich, Mr. Barboza, Mr. Calle y Calle, Mr. Diaz González, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

### Draft report of the Commission on the work of its thirty-third session

1. The CHAIRMAN invited the Commission to consider its draft report on its thirty-third session, paragraph by paragraph.

#### CHAPTER I. *Organization of the session* (A/CN.4/L.329)

##### Paragraph 1

*Paragraph 1 was adopted.*

##### Paragraph 2

2. Mr. FRANCIS (Rapporteur) noted that the Commission had to decide whether or not to retain the words "the law of the non-navigational uses of international watercourses", which had been placed in square brackets in the last sentence.

3. The CHAIRMAN, referring to the words in square brackets, said the Enlarged Bureau proposed that no new special rapporteur should be appointed at the present session for the topic on the law of the non-navigational uses of international watercourses. The Enlarged Bureau also proposed that the next session should begin on 3 May 1982.

4. Sir Francis VALLAT said he deeply regretted the fact that the Enlarged Bureau had decided not to appoint a new special rapporteur on the topic of the law of the non-navigational uses of international watercourses. The Commission had professed a wish

to further the continuity of its work on that topic, but the decision taken by the Enlarged Bureau would block such continuity. There was no real reason for failing to take a decision to appoint a new special rapporteur. If such a decision could not have been taken early in the session, it should be taken now, at a time when many States Members of the United Nations attached great importance to the question of international watercourses. He was concerned about the decision not to appoint a new special rapporteur because he had at heart the future interests of the Commission, whose capacity to deal with topics of great technical and practical significance was one of the touchstones on which its performance would be judged.

5. Most members had agreed that there was an eminently suitable person to deal with that topic, but the Commission had failed to take advantage of that person's availability and had not appointed him because of the opposition of three members and because of the practice of proceeding by consensus. In his opinion, when a large majority of the members of the Commission wished to follow a particular course, those in the minority should bow to the will of the majority.

6. Mr. NJENGA said he too found it difficult to understand why the Commission should shy away from taking a decision to appoint a new special rapporteur on the topic in question. If it now failed to appoint a special rapporteur, no work could be done on the topic at the following session, and he was not sure how the Commission would be able to justify its decision to the General Assembly. He also agreed with Sir Francis Vallat that it was quite unfair that a few members of the Commission should be able to block a decision favoured by the majority.

7. Mr. SUCHARITKUL said that he wished to associate himself with the views expressed by Sir Francis Vallat and Mr. Njenga concerning the Commission's failure to appoint a new special rapporteur because of the problem of a lack of consensus.

8. Mr. FRANCIS said that, in his opinion, the opposition to the appointment of a new special rapporteur for the topic of the law of the non-navigational uses of international watercourses would not be able to withstand the criticism that it would receive in the Sixth Committee. From his experience as a representative on that Committee, he knew how much significance many countries placed on the study of that topic, and was quite sure that a decision not to appoint a special rapporteur would be a miscalculation of the General Assembly's attitude to the only item on the Commission's agenda that involved people, rather than abstract ideas. It was therefore a matter of deep regret to him that he would be compelled to share the responsibility for such decision.

9. The CHAIRMAN said that, in the course of the discussions within the Enlarged Bureau, it had been pointed out that special rapporteurs had always been

appointed by consensus, never by vote. In the case in point, some members of the Commission had expressed their opposition to the appointment of a special rapporteur, and no consensus had been reached. It was now a matter for the Commission to decide whether it should depart from a practice it had always followed.

10. Mr. TABIBI said that in his twenty years as a member of the Commission he had taken part in the appointment of many special rapporteurs, who had been selected either on the basis of their interest in the topics concerned and the work they had done on them or because they had agreed, as a matter of courtesy, to act as the chairmen of study groups on those topics. Decisions concerning the appointment of special rapporteurs had been taken by vote in the Commission's early days, but the consensus method had emerged later on, a method he had always been opposed to in all United Nations bodies because it was a form of veto that ran counter to the interests of the majority of the Members of the United Nations. The Commission should bear in mind that it would gain time by appointing a new special rapporteur at the present session and that it would also be answerable to the Sixth Committee and the General Assembly for its decision.

11. Mr. USHAKOV said that he deplored the discussion which was taking place and that, if a vote was taken, he would not participate in it.

12. Mr. DÍAZ GONZÁLEZ said that he would not participate in a vote either.

13. Mr. ALDRICH said that, as the newest member of the Commission, he was sorry to have to disagree with Mr. Tabibi, but he had been impressed at the present session by the fact that the Commission placed enormous confidence in its Special Rapporteurs, who had to have the support of all members if they were to succeed in the tasks entrusted to them. In his opinion, the question at issue, more than almost any other, was one on which the Commission's traditions should be followed, and it would be a great mistake to start a new special rapporteur on the difficult road that lay ahead of a rapporteur when the Commission was divided on the matter. Although it would be unfortunate to lose a year's work on the important topic of the law of the non-navigational uses of international watercourses, the Commission would be ill-advised to take a divided decision on the appointment of a new special rapporteur to deal with it.

14. Mr. BARBOZA said that he would not participate in a vote, but he could not reproach other members of the Commission for adopting a position consistent with their profound convictions.

15. The CHAIRMAN noted that some members of the Commission would not participate in a vote on the matter. Moreover, as Mr. Aldrich had pointed out, a special rapporteur appointed under such circumstances would not have the support of all members and would find it difficult to carry out his task, a situation

which would not be in the interest of the Commission. Consequently, circumstances did not appear to favour the appointment of a special rapporteur, and the proposal of the Enlarged Bureau should be adopted.

16. Mr. NJENGA said that he did not subscribe to the view that special rapporteurs must always be appointed by consensus. He therefore hoped that the decision taken by the Enlarged Bureau would not establish a precedent for the appointment of special rapporteurs in the future.

17. Mr. QUENTIN-BAXTER said he thought that the proposal by the Enlarged Bureau was the right one. He was not in favour of divided votes and had even objected to the vote which the Commission had taken at its 1692nd meeting in connection with article 16 (State debt), subparagraph (b), of the draft articles on succession of States in respect of matters other than treaties. The Commission's report should nevertheless reflect the members' concern at the inability to agree on the appointment of a new special rapporteur to deal with a topic that commanded more support in the General Assembly than did any other. The Commission must expect to be criticized for its decision and, in his view, it deserved to be so criticized.

18. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to delete the words that had been placed in square brackets in paragraph 2.

*It was so decided.*

*Paragraph 2, as amended, was adopted.*

Paragraphs 3 to 11

*Paragraphs 3 to 11 were adopted.*

*Chapter I, as amended, was adopted.*

**CHAPTER III. Question of treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/L.331 and Add.1 and 2)**

**A. Introduction (A/CN.4/L.331)**

Paragraphs 1 to 18

*Paragraphs 1 to 18 were adopted.*

Paragraph 19

19. Mr. REUTER (Special Rapporteur) proposed that, in the 3rd and 4th lines, the words "to renew, through the Secretary-General, its previous invitation to Governments and principal international organizations" be replaced by "to remind, through the Secretary-General, Governments and principal international organizations of its previous invitation".

*Paragraph 19, as amended, was adopted.*

Paragraphs 20 to 41

*Paragraphs 20 to 41 were adopted.*

*Section A, as amended, was adopted.*

**B. Draft articles on treaties concluded between States and international organizations or between international organizations (A/CN.4/L.331/Add.1 and 2)**

PART I (INTRODUCTION) AND PART II (CONCLUSION AND ENTRY INTO FORCE OF TREATIES)

*Commentaries to article 1* (Scope of the present articles) and *article 2* (Use of terms)

*The commentaries to article 1 and article 2 were approved.*

*Commentary to article 3* (International agreements not within the scope of the present articles)

20. Mr. ALDRICH proposed that the words "(Holy See, recognized national liberation movements)" at the end of paragraph (6) should be deleted.

*It was so decided.*

*Paragraph (6), as amended, was adopted.*

*The commentary to article 3, as amended, was approved.*

*Commentaries to article 4* (Non-retroactivity of the present articles), *article 6* (Capacity of international organizations to conclude treaties), *article 7* (Full powers and powers), *article 8* (Subsequent confirmation of an act performed without authorization), *article 9* (Adoption of the text), *article 10* (Authentication of the text), *article 11* (Means of expressing consent to be bound by a treaty), *article 12* (Consent to be bound by a treaty expressed by signature), *article 13* (Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty), *article 14* (Consent to be bound by a treaty expressed by ratification, act of formal confirmation, acceptance or approval) and *article 15* (Consent to be bound by a treaty expressed by accession)

*The commentaries to article 4 and to articles 6 to 15 were approved.*

*Commentary to article 16* (Exchange or deposit of instruments of ratification, act of formal confirmation, acceptance, approval or accession)

21. Mr. REUTER (Special Rapporteur) said that the original text of the article had been amended slightly. Accordingly, the words "instrument of formal confirmation" in the fifth line of the commentary should be replaced by "instrument of an act of formal confirmation", followed by a semi-colon. In the fifth and sixth lines, the words "but the use of this term is no reason for not retaining the expression" should then be replaced by "this term is in harmony with the expression".

*The commentary to article 16, as amended, was approved.*

*Commentaries to article 17* (Consent to be bound by part of a treaty and choice of differing provisions) and *article 18* (Obligation not to defeat the object and purpose of a treaty prior to its entry into force)

*The commentaries to articles 17 and 18 were approved.*

**CHAPTER IV. State responsibility (A/CN.4/L.332)**

**A. Introduction**

Paragraphs 1 to 3

*Paragraphs 1 to 3 were adopted.*

*Section A was adopted.*

**B. Commencement of consideration of Part 2 of the draft articles (content, forms and degrees of international responsibility)**

Paragraphs 4 to 15

*Paragraphs 4 to 15 were adopted.*

*Section B was adopted.*

**C. Consideration of the topic at the present session**

Paragraphs 16 and 17

*Paragraphs 16 and 17 were adopted.*

Paragraph 18

22. Mr. RIPHAGEN (Special Rapporteur) said that the word "intent" in the fourth line of the English text should be replaced by the word "items".

*Paragraph 18, as amended, was adopted.*

Paragraphs 19 to 31

*Paragraphs 19 to 31 were adopted.*

Paragraph 32

23. Sir Francis VALLAT proposed that the general part of the report should contain a paragraph explaining the difficulties encountered by the Drafting Committee as a result of its volume of work. The adoption of such a text would mean that the last sentence of paragraph 32 could be deleted.

24. He also wondered what was to be the fate of the draft articles referred to the Drafting Committee and whether a recommendation on the matter could be made to the Commission as newly-constituted at its thirty-fourth session.

25. Mr. RIPHAGEN (Special Rapporteur) supported the proposal made by Sir Francis Vallat. With regard to the second point, he believed that it would be for the newly-elected Commission to determine what was to be done with the draft articles.

26. Mr. USHAKOV said that it would be difficult to make recommendations in that respect, since the future members of the Commission might submit new texts for consideration by the Drafting Committee. Hence, only the Commission as constituted in the future could decide on that matter.

27. Mr. ALDRICH, supported by Mr. DÍAZ GONZÁLEZ and Mr. REUTER, said that the Drafting Committee still had before it the draft articles in question and only the future members of the Commission could decide otherwise.

*The amendment proposed by Sir Francis Vallat was adopted.*

*Paragraph 32, as amended, was adopted.*

*Section C, as amended, was adopted.*

*Chapter IV, as amended, was adopted.*

**CHAPTER VI. Jurisdictional immunities of States and their property (A/CN.4/L.334)**

Paragraphs 1 to 5

*Paragraphs 1 to 5 were adopted.*

## Paragraph 6

28. Sir Francis VALLAT said that it might be more convenient to record what had happened to the various draft articles referred to the Drafting Committee at the end of chapter VI, rather than in paragraph 6 of the introduction.

29. Mr. USHAKOV proposed that the Commission should authorize the Secretariat to make the necessary changes to the text, with the approval of the Special Rapporteur.

*It was so decided.*

*Paragraph 6 was adopted.*

## Paragraphs 7 to 12

*Paragraphs 7 to 12 were adopted.*

## Paragraph 13

30. Mr. ALDRICH proposed that the order of the words "new five" in the first sentence of the paragraph should be reversed.

*It was so decided.*

*Paragraph 13, as amended, was adopted.*

## Paragraph 14

*Paragraph 14 was adopted.*

## Paragraph 15

31. Mr. ALDRICH proposed that, in the interests of clarity, the words "which remained to be set forth in Part III" should be added in parentheses at the end of the second sentence.

*It was so decided.*

*Paragraph 15, as amended, was adopted.*

## Paragraph 16

*Paragraph 16 was adopted.*

## Paragraph 17

32. Mr. ALDRICH said that the words "he noted" in the first sentence of the paragraph, seemed somewhat out of place. He proposed that the Secretariat and Special Rapporteur should be authorized to make the appropriate changes.

*It was so decided.*

*Paragraphs 18 to 25 were adopted.*

## Paragraphs 18 to 25

*Paragraphs 18 to 25 were adopted.*

*Paragraph 26, as amended, was adopted.*

33. Mr. SUCHARITKUL (Special Rapporteur) said that the second sentence should be divided into two separate sentences, with the first one ending with the words "of the whole subject".

*Paragraph 26, as amended, was adopted.*

## Paragraph 27

34. Mr. USHAKOV said that the inclusion, in footnote 22, of the alternative versions of paragraph 1 of draft article 7 was unnecessary and would simply create confusion.

35. Mr. SUCHARITKUL (Special Rapporteur) said that the revised versions of the draft articles had been based on a lengthy discussion. He had included them in the report in order to give a clear indication of the stage reached in the consideration of the topic and to facilitate the Sixth Committee's consideration of the Commission's report.

36. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) agreed with the view expressed by Mr. Ushakov. The inclusion of the revised versions of the draft articles in the report would tend to create confusion in the Sixth Committee, since it would be assumed that they had been discussed by the Commission, which was not the case. However, he would not object to their retention.

37. Mr. ALDRICH supported the view expressed by Mr. Sucharitul. He noted that the revised versions of the draft articles in question were included only in a footnote, and not in the body of the report itself. However, in the light of the observations made by Mr. Díaz González, it might be preferable to state specifically that the revised versions had not been considered by either the Commission or the Drafting Committee.

*It was so decided.*

*Paragraph 27, as amended, was adopted.*

## Paragraph 28

*Paragraph 28 was adopted.*

*Chapter VI, as amended, was adopted.*

*The meeting rose at 1.10 p.m.*

## 1696th MEETING

*Wednesday, 22 July 1981, at 10.05 a.m.*

*Chairman:* Mr. Doudou THIAM

*Present:* Mr. Aldrich, Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Njenga, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitul, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

### Draft Report of the Commission on the Work of its Thirty-third Session (continued)

CHAPTER III. *Question of treaties concluded between States and international organizations or between two or more international organizations (concluded)* (A/CN.4/L.331/Add.3)

**B. Draft articles on treaties concluded between States and international organizations or between international organizations** (concluded) (A/CN.4/L.331/Add.3)

PART I (INTRODUCTION) (concluded)

*Commentary to article 2* (Use of terms) (concluded)

Paragraph 1, subparagraph (d)

*The commentary to paragraph 1, subparagraph (d) was approved.*

*Commentary to article 5* (Treaties constituting international organizations and treaties adopted within an international organization)

Paragraph (4)

1. Mr. REUTER (Special Rapporteur) proposed that, in the second sentence of paragraph (4), the words "an international organization of which another such organization is a member adopts a treaty" should be replaced by "a treaty is adopted within an international organization of which another such organization is a member".

*It was so decided.*

*Paragraph (4), as amended, was approved.*

*The commentary to article 5, as amended, was approved.*

*Part I, as amended, was adopted.*

PART II (CONCLUSION AND ENTRY INTO FORCE OF TREATIES) (concluded)

SECTION 2 (Reservations)

*Commentary to Section 2*

Paragraph (6)

2. Mr. REUTER (Special Rapporteur) said that the word "la" should be inserted before the word "difficulté" in the French version of the text.

*It was so decided.*

*Paragraph (6), as amended, was approved.*

Paragraph (12)

3. Mr. REUTER (Special Rapporteur) proposed that the word "controversé" in the last sentence of the French text should be in the plural.

*It was so decided.*

*Paragraph (12), as amended, was approved.*

*The commentary to section 2, as amended, was approved.*

*Commentary to article 19* (Formulation of reservations)

4. Mr. REUTER (Special Rapporteur) proposed that the word "traité", in the last sentence of the French version of the commentary, should be in the plural.

*It was so decided.*

*The commentary to article 19, as amended, was approved.*

*Commentary to article 20* (Acceptance of and objection to reservations)

5. Mr. REUTER (Special Rapporteur) proposed that the word "les" before the word "inconvenients" in the French text of footnote 28, should be replaced by "des".

*It was so decided.*

*The commentary to article 20, as amended, was approved.*

*Commentary to articles 21* (Legal effects of reservations and of objections to reservations, 22 (Withdrawal of reservations and of objections to reservations) and 23 (Procedure regarding reservations)

*The commentary to articles 21, 22 and 23 was approved.*

*Section 2, as amended, was adopted.*

SECTION 3 (Entry into force and provisional application of treaties)

*Commentary to articles 24* (Entry into force) and 25 (Provisional application)

*The commentary to articles 24 and 25 was approved.*

*Section 3 was adopted.*

*Part II, as amended, was adopted.*

PART III (OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES)

SECTION 1 (Observance of treaties)

*Commentary to article 26* (Pacta sunt servanda)

*The commentary to article 26 was approved.*

*Part III was approved.*

*Chapter III, as amended, was adopted.*

CHAPTER VIII. *Other decisions and conclusions* (A/CN.4/L.336 and Corr.1 and Add.1)

Programme and methods of work of the Commission (A/CN.4/L.336 and Corr.1)

Paragraphs 1 to 11

*Paragraphs 1 to 11 were adopted.*

Relations with the International Court of Justice (A/CN.4/L.336/Add.1)

Paragraphs 1 and 2

*Paragraphs 1 and 2 were adopted.*

Co-operation with other bodies

Paragraphs 3 to 12

*Paragraphs 3 to 12 were adopted.*

Date and place of the thirty-fourth session

Paragraph 13

6. The CHAIRMAN said that the dates 3 May 1982 and 23 July 1982 should be inserted at the appropriate points in paragraph 13.

*Paragraph 13 was adopted.*

**Representation at the thirty-sixth session of the General Assembly**

## Paragraph 14

*Paragraph 14 was adopted.*

**International Law Seminar**

## Paragraphs 15 to 20

*Paragraphs 15 to 20 were adopted.*

## Paragraph 21

7. Following a discussion in which Mr. SUCHA-RITKUL, Sir Francis VALLAT, Mr. REUTER, Mr. FRANCIS (Rapporteur) and Mr. BARBOZA took part, Mr. VEROSTA proposed that the first two sentences, enclosed within brackets, in paragraph 11 of document A/CN.4/L.336 should be added to paragraph 21 and that the relevant footnote on page 7 of the same document should be deleted.

*It was so decided.*

*Paragraph 21, as amended, was adopted.*

ANNEX I. Comments of Governments on the draft articles on succession of States in respect of matters other than treaties, adopted by the International Law Commission at its thirty-first and thirty-second sessions

and

ANNEX II. Comments of Governments and principal international organizations on articles 1 to 60 of the draft articles on treaties concluded between States and international organizations or between international organizations, adopted by the International Law Commission at its twenty-sixth, twenty-seventh, twenty-ninth, thirtieth, and thirty-first sessions (A/CN.4/L.338).

*Annex I and annex II to the Commission's report were adopted.*

**CHAPTER II. Succession of States in respect of matters other than treaties****A. Introduction (A/CN.4/L.330)**

## Paragraphs 1 to 50

*Paragraphs 1 to 50 were adopted.*

## Paragraph 51

8. Mr. ALDRICH proposed that, in the penultimate sentence, the words "if these articles receive general support in the General Assembly" should be inserted after the word "Accordingly".

*It was so decided.*

*Paragraph 51, as amended, was adopted.*

## Paragraphs 52 to 72

*Paragraphs 52 to 72 were adopted.*

## Paragraph 73

9. Sir Francis VALLAT expressed reservations with regard to the inclusion of the quotation from the judgement of the International Court of Justice in connection with the *North Sea Continental Shelf* cases, since the quotation was incomplete and was taken out of context.

10. Mr. REUTER proposed that the paragraph should be deleted and that a reference to the judgements of the International Court of Justice in the *Fisheries Jurisdiction* cases of 1974 should be added to footnote 84.

*It was so decided.*

## Paragraph 74

*Paragraph 74 was adopted.*

*Section A, as amended, was adopted.*

**B. Recommendation of the Commission (A/CN.4/L.330)**

## Paragraph 75

11. Mr. ALDRICH said that, in his view, the recommendation made by the Commission in paragraph 75 should reflect the amended form of paragraph 51 and provide that, if the draft received broad support in the General Assembly, it should be given the same status as the Vienna Convention. The words "if the draft received broad support in the General Assembly" should therefore be inserted after the words "to recommend that".

12. Mr. YANKOV said that the wording of paragraph 75 was a routine formula used by the Commission in similar circumstances. Obviously, the General Assembly would not convene a conference of plenipotentiaries if it considered that the time had not yet come for the draft articles to serve as a basis for concluding a convention. The fact remained that the Commission had carried out the task entrusted to it and now had to submit the results of its work to the General Assembly, which would decide what action was to be taken. However, the Commission could not in any way prejudge the General Assembly's decision or the reasons on which that decision would be based.

13. Mr. USHAKOV proposed that the Commission should use the wording of the recommendation it had made following the second reading of its draft articles on succession of States in respect of treaties. He emphasized that the General Assembly alone was competent to decide what should be done with the draft, the Commission's recommendation committing itself alone.

14. Sir Francis VALLAT said that article 23 of the Statute of the International Law Commission provided, *inter alia*, that "The Commission may recommend to the General Assembly: . . . (c) To recommend the draft to Members with a view to the conclusion of a convention; (d) To convoke a conference to conclude a convention". The Commission could easily confine itself to one of those types of recommendations by recommending, for example, that the General Assembly should study the draft with a view to the possible conclusion of a convention on the topic. It would be going too far to recommend the convening of a conference, because a number of members of the Commission considered that the draft required further consideration and that it was too early to recommend the convening of a conference of plenipotentiaries.

15. Mr. NJENGA pointed out that, on completion of the second reading of a draft, it was quite normal for the Commission to recommend that the text should be submitted to a diplomatic conference. Naturally, the General Assembly was free to decide, if it so wished, that the Commission's text should be given further study, or that a conference should be convened, or even that the draft should be referred back to the Commission.
16. Mr. DÍAZ GONZÁLEZ said that he experienced no difficulty in accepting paragraph 75, which simply repeated the wording that was customary in similar circumstances. The recommendation contained in the paragraph did not in any way limit the decision-making power of the General Assembly.
17. He would none the less like the word "*celebrar*" in the Spanish version to be replaced by another more appropriate word, such as possibly the word "*elaborar*" or the word "*redactar*".
18. Mr. REUTER proposed that the Commission should recommend that the General Assembly "should study the draft with a view to convening a conference of plenipotentiaries and concluding a convention on the topic". Such wording, which was less emphatic, might be used in future in similar circumstances.
19. Mr. VEROSTA said that he would also prefer more flexible wording, for the Commission did not know what Governments intended to do with the draft.
20. Mr. CALLE Y CALLE supported the proposal made by Mr. Reuter. The function of a conference of plenipotentiaries would not be to study a set of draft articles; rather, it would be to conclude a convention on the basis of a draft which had been prepared by the Commission and submitted to the conference in accordance with a decision taken by the General Assembly.
21. Mr. ŠAHOVIĆ said that he could easily agree to the wording of paragraph 75 without any changes, because it did not go beyond the limits of the Commission's terms of reference.
22. The proposal to alter the wording showed that not all of the members of the Commission were prepared to say that the draft was ready for submission to a diplomatic conference with a view to concluding a convention. In that respect, Mr. Reuter's suggestion paved the way for a consensus in the Commission, since it afforded the possibility of criticizing the draft and correctly reflected the shades of view of all members.
23. After many years of work on the topic, the Commission had to reach an agreement on the follow-up action to be taken, for the draft articles constituted the second part of the Commission's work on succession of States and an international convention had already been adopted on the first part. In a spirit of compromise, he was prepared to agree to the wording proposed by Mr. Reuter.
24. Mr. USHAKOV said that the Commission should not try to find an evasive formula when the choice open to it was either to recommend or not to recommend the convening of a conference. A recommendation that the General Assembly should study the draft with a view to convening a conference would not be enough. The Commission should follow past practice and adopt the same position as it had when it had completed its second reading of the first part of the draft.
25. Mr. ROMANOV (Secretary to the Commission), speaking at the invitation of the Chairman, said that paragraph 75 was consistent with the wording normally used by the Commission to recommend that the General Assembly should convene a conference of plenipotentiaries.
26. Mr. DÍAZ GONZÁLEZ said that, under article 22 of its Statute, the Commission had an obligation to submit any draft articles it adopted on second reading to the General Assembly, which was alone competent to decide whether the text was ready for submission to a conference of plenipotentiaries. A draft adopted on second reading became a draft prepared by the Commission and, with recommendations provided for in article 23 of the Statute, had to be submitted to the General Assembly to inform it of the Commission's work.
27. In view of the importance of the draft under consideration, he could not see any reason why an exception should now be made to past practice in order to delay submission of the text to the General Assembly. The Statute left the Commission no choice but to submit the draft articles to the General Assembly.
28. Sir Francis VALLAT said he recognized the fact that the wording of paragraph 75 would be quite normal if what the Commission wished to do was to recommend that one of its drafts should be submitted to a conference of plenipotentiaries. However, several members of the Commission were of the opinion that the draft was not yet ready to be submitted to such a conference, and hence, the Commission was not in a position to adopt a recommendation to that effect. The wording proposed by Mr. Reuter would nevertheless provide an acceptable solution. It would also be possible to refer in the Commission's report to the disagreement expressed by some members concerning the action to be taken on the text adopted on second reading.
29. Mr. USHAKOV said that he was in favour of retaining paragraph 75 as it stood, because wording different from that adopted for the recommendation concerning the draft articles on succession of States in respect of treaties would constitute discrimination as between special rapporteurs.
30. Sir Francis VALLAT said that the question at issue was not one of discrimination but one of a *de facto* situation. Draft articles were the property of the

Commission, not of the special rapporteurs. Any discrimination would be discrimination by the Commission against itself. Some members of the Commission considered, for good reasons, that the draft articles on succession of States in respect of State property, archives and debts were not yet ready for submission to a conference of plenipotentiaries. However, if the majority of the members of the Commission insisted on retaining the recommendation made in paragraph 75, he suggested that the Commission should follow its normal practice and add, at the end of that paragraph, a footnote which would read: "Certain members reserved their position on this recommendation".

*The amendment was adopted.*

*Paragraph 75, as amended, was adopted.*

*Section B, as amended, was adopted.*

**C. Resolution adopted by the Commission (A/CN.4/L.330)**

Paragraph 76

31. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) read out the following draft resolution for inclusion in paragraph 76:

*"The International Law Commission,*

*"Having adopted the draft articles on succession of States in respect of State property, archives and debts,*

*"Desires to express to the Special Rapporteur, Mr. Mohammed Bedjaoui, its deep appreciation of the outstanding contribution he has made to the treatment of the topic by his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its work on the draft articles on succession of States in respect of State property, archives and debts."*

32. Mr. BARBOZA. Mr. CALLE Y CALLE and Mr. TABIBI expressed their admiration for the work carried out by the Special Rapporteur.

33. Sir Francis VALLAT associated himself in that praise, and said that it was no fault of the Special Rapporteur if the draft articles fell short of what was required.

*The draft resolution was adopted by acclamation.*

*Paragraph 76, as completed, was adopted.*

*Section C, as amended, was adopted.*

**D. Draft articles on succession of States in respect of State property, archives and debts (A/CN.4/L.330/Add.1-3)**

PART I (General provisions) (A/CN.4/L.330/Add.1)

*Commentary to Part I*

*The commentary to Part I was approved.*

*Commentaries to article 1 (Scope of the present articles), article 2 (Use of terms) and article 3 (Cases of succession of States covered by the present articles)*

*The commentaries to articles 1 to 3 were approved.*

*Commentary to article [3 bis] (Temporal application of the present articles)*

34. Sir Francis VALLAT, referring to footnote 96, relative to the first sentence of paragraph 1 of the commentary and also to paragraph 75 of document A/CN.4/L.330, said he hoped that a cross-reference would also be made to the footnote relative to paragraph 75, which had been adopted by the Commission at the current meeting (see para. 30 above).

*The commentary to article [3 bis] was approved, subject to that qualification.*

*Commentary to article [3 ter] (Succession in respect of other matters)*

*The commentary to article [3 ter] was approved.*

*Commentary to article [3 quater] (Rights and obligations of natural or juridical persons)*

35. Mr. ALDRICH said the commentary gave the impression that article [3 quater] was exclusively the result of the deletion of article 16, subparagraph (b) (A/CN.4/SR.1692, para. 90), but there were other reasons for inserting it in the draft. For example, article 9 [12], to which he had expressed opposition, might have adverse effects on private property. He therefore suggested that the following sentence should be inserted after the first sentence of the commentary: "other provisions, such as article 9, might be misunderstood as implying some prejudice to the rights of natural or juridical persons".

*The commentary to article [3 quater] was approved, subject to the addition of those words.*

*Part I, as amended, was adopted.*

PART II (STATE PROPERTY) (A/CN.4/L.330/Add.2)

SECTION 1 (Introduction)

*Commentaries to article [4] (Scope of the articles in the present Part), article [5] (State property), article [6] (effects of the passing of State property), article [7] (Date of the passing of State property) and article [8] (Passing of State property without compensation)*

*The commentaries to articles [4] to [8] were approved.*

*Commentary to article [9] (Absence of effect of a succession of States on the property of a third State)*

36. Mr. ALDRICH requested that the commentary to article [9] should be amended to reflect his objection to the adoption of the article, as it was, in his view, unnecessary.

37. Sir Francis VALLAT said that the commentary should also reflect the fact that, during the Commission's discussions, he had expressed opposition to the adoption of article [9].

38. The CHAIRMAN said that, if there were no objections, the commentary to article [9] would be amended to reflect the fact that certain members of the Commission had considered article [9] unnecessary.

*It was so decided.*

*The commentary to article [9], as amended, was approved.*

*Section 1, as amended, was adopted.*

SECTION 2 (Provisions concerning specific categories of succession of States) (A/CN.4/L.330/Add.2 and 3).

*Commentary to section 2 (A/CN.4/L.330/Add.2)*

*The commentary to section 2 was approved.*

*Commentaries to article [10] (Transfer of part of the territory of a State), article [11] (Newly independent State), article [12] (Uniting of States), and articles [13] (Separation of part or parts of the territory of a State) and 14 (Dissolution of a State)*

*The commentaries to articles [10] to [14] were approved.*

*Section 2 was adopted.*

*Part II was adopted.*

PART IV (STATE DEBTS) (A/CN.4/L.330/Add.5)

SECTION 1 (Introduction)

*Commentary to article [15] (Scope of the articles in the present Part)*

*The commentary to article [15] was approved.*

*Commentary to article [16] (State debt)*

39. Sir Francis VALLAT said that, if he had been present when the Commission had voted on article 16, subparagraph (b), (1692nd meeting), he would have voted in favour of retention of that subparagraph.

*The commentary to article [16] was approved.*

*Commentaries to article C (Definition of odious debts), article [17] (Effects of the passing of State debts), article [17 bis] (Date of the passing of State debts) and article [18] (Effects of the passing of State debts with regard to creditors)*

*The commentaries to articles C, [17], [17 bis] and [18] were approved.*

*Section 1 was adopted.*

*The meeting rose at 12.50 p.m.*

## 1697th MEETING

*Friday, 24 July 1981, at 10.05 a.m.*

*Chairman: Mr. Doudou THIAM*

*Present: Mr. Aldrich, Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Njenga, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.*

## Co-operation with other bodies (concluded)\*

[Item 11 of the agenda]

### STATEMENT BY THE OBSERVER FOR THE ARAB COMMISSION FOR INTERNATIONAL LAW

1. The CHAIRMAN invited Mr. Treki, Observer for the Arab Commission for International Law, to address the Commission.

2. Mr. TREKI (Observer for the Arab Commission for International Law) said that the participation of the Arab Commission for International Law in the thirty-third session of the International Law Commission would strengthen relations between the two bodies, help to shed the light on the difficulties of the newly independent countries, including such matters as the legal foundation of the new international economic order, ecological problems and the question of international peace and security, and at the same time open the way for greater contacts between the Arab Commission and such institutions as the Asian-African Legal Consultative Committee.

3. He expressed the hope that the work of the International Law Commission would help to establish equality among the members of the international community, with due regard for the rights of peoples struggling for self-determination and for the harmony of the rules of justice, and that the Commission would be able to achieve its goal of serving the interests of mankind.

4. The CHAIRMAN said that Arab civilization and the Islamic legal system occupied an important place in the world. They were well represented in the Commission, and it was his hope that co-operation with the Arab Commission for International Law would be further strengthened in the future.

### Draft Report of the Commission on the work of its thirty-third session (concluded)

#### CHAPTER II. Succession of States in respect of matters other than treaties (concluded)

##### D. Draft articles on succession of States in respect of State property, archives and debts (concluded)

PART III (STATE ARCHIVES) (A/CN.4/L.330/Add.4)

*General commentary*

*The general commentary was approved.*

SECTION 1 (Introduction)

*Commentaries to article [G] (Scope of the articles in the present Part), article [A] (State archives), articles [H] (Effects of the passing of State archives), [I] (Date of the passing of State archives), [J] (Passing of State archives without compensation) and [K] (Absence of effect of a succession of States on the archives of a third State), and article [L] (Preservation of the unity of State archives)*

\* Resumed from the 1689th meeting.

*The commentaries to articles [G], [A] and [H] to [L] were approved.*

*Section 1 was approved.*

SECTION 2 (Provisions concerning specific categories of succession of States)

*Commentaries to article [B] (Newly independent State), article [C] (Transfer of part of the territory of a State), article [D] (Uniting of States) and articles [E] (Separation of part or parts of the territory of a State) and [F] (Dissolution of a State)*

*The commentaries to articles [B] to [F] were approved.*

*Section 2 was adopted.*

*Part III was adopted.*

PART IV (STATE DEBTS) (*concluded*) (A/CN.4/L.330/Add.6)

SECTION 2 (Provisions concerning specific categories of succession of States)

*Commentary to section 2*

*The commentary to section 2 was approved.*

*Commentary to article [19] (Transfer of part of the territory of a State)*

5. Sir Francis VALLAT drew attention to the fact that the example given in paragraph (25) of the commentary to article [19] and the examples given in connection with other articles of the draft related not only to inter-State debts, but also to the private debts of States.

6. He suggested that, since it was not within the Commission's competence to cast doubt on the existence of rules of law, the phrase "if it exists" appearing at the end of the last sentence of paragraph (36) of the commentary should be deleted. He also suggested that the last sentence of paragraph (39), which was neither logical nor accurate, should be brought into line with the text of article [19].

*It was so decided.*

*Paragraphs (36) and (39), as amended, were approved.*

*The commentary to article [19], as amended, was approved.*

*Commentaries to article [20] (Newly independent State), article [21] (Uniting of States) and articles [22] (Separation of part or parts of the territory of a State) and 23 (Dissolution of a State)*

*The commentaries to articles [20] to [23] were approved.*

*Section 2, as amended, was adopted.*

*Part IV, as amended, was adopted.*

*Chapter II, as amended, was adopted.*

CHAPTER V. *International liability for injurious consequences arising out of acts not prohibited by international law* (A/CN.4/L.333)

A. Introduction

Paragraphs 1 to 3

*Paragraphs 1 to 3 were adopted.*

*Section A was adopted.*

B. Consideration of the topic at the present session

Paragraphs 4 to 6

*Paragraphs 4 to 6 were adopted.*

Paragraph 7

7. Mr. ALDRICH proposed that, in the third sentence of paragraph 7, the words "at large" should be replaced by the words "left open".

*It was so decided.*

8. Mr. VEROSTA, also referring to the third sentence, proposed that the word "not" should be inserted between the word "might" and the word "have".

*It was so decided.*

*Paragraph 7, as amended, was adopted.*

Paragraphs 8 to 11

*Paragraphs 8 to 11 were adopted.*

Paragraph 12

9. Sir Francis VALLAT said that, as an editing matter, the Secretariat might try to ensure that paragraph 12 and other paragraphs made a clearer distinction between the point of view of the Special Rapporteur and the points of view expressed by members of the Commission.

*Paragraph 12 was adopted, subject to such editing changes.*

Paragraphs 13 to 30

*Paragraphs 13 to 30 were adopted.*

Paragraph 31

10. Mr. ALDRICH said that in paragraph 31, which referred to one of the comments he had made in the Commission's discussions, the words "It was, however, noted" in the second sentence should be replaced by the words "The Special Rapporteur, however, suggested", so as to make it clear that it was the Special Rapporteur who considered that "there were criteria which should meet this need".

*It was so decided.*

*Paragraph 31, as amended, was adopted.*

Paragraphs 32 to 34

*Paragraphs 32 to 34 were adopted.*

Paragraph 35

11. Sir Francis VALLAT noted that the second sentence of paragraph 35, which drew attention to the need for a pragmatic and empirical approach, implied that a considerable amount of information had to be collected on State practice. He was sure that the Special Rapporteur, if he had been present at the

meeting, would have expressed his appreciation for the assistance the Secretariat had given him in the past and would undoubtedly provide him in the future.

*Paragraph 35 was adopted.*

Paragraphs 36 and 37

*Paragraphs 36 and 37 were adopted.*

Paragraph 38

12. Mr. YANKOV said he did not think that the words "but most Commission members felt that the topic was valid, and that study should begin at the level of greatest generality" in the first sentence of paragraph 38 accurately reflected the view of most members of the Commission that general theories and academic reasoning would be less helpful at the present stage than a thorough examination of State practice. He therefore suggested that either those words should be deleted or they should be replaced by less categorical wording indicating that, while generalities might be discussed, account should primarily be taken of the practical implications of the topic.

13. Sir Francis VALLAT said that, in his view, the words "greatest generality" referred both to the generality of the rules to be laid down in the draft articles and to the generality of the subject-matter. In his opinion, the Commission tended to think that, initially at least, general rules should be formulated on the basis of a pragmatic study of State practice. Hence, the words "and that study should begin at the level of greatest generality" could be amended along the following lines: "and that, although the study should be aimed initially at the identification of general rules, it should be based upon a pragmatic and empirical examination of the sources".

*It was so decided.*

*Paragraph 38, as amended, was adopted.*

*Section B, as amended, was adopted.*

*Chapter V, as amended, was adopted.*

**CHAPTER VII. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/L.335)**

**A. Introduction**

Paragraphs 1 and 2

*Paragraphs 1 and 2 were adopted.*

*Section A was adopted.*

**B. Consideration of the topic at the present session**

Paragraphs 3 to 9

*Paragraphs 3 to 9 were adopted.*

Paragraph 10

14. Mr. ALDRICH pointed out that the words "It was stated in this connection" at the beginning of paragraph 10 might give the impression that the view expressed in that paragraph was that of the Special Rapporteur or that of the Commission as a whole.

15. Mr. YANKOV (Special Rapporteur) said that the view reflected in paragraph 10 had been expressed by several members of the Commission. The words "It was stated by several members of the Commission" should therefore be used.

*It was so decided.*

*Paragraph 10, as amended, was adopted.*

Paragraphs 11 to 20

*Paragraphs 11 to 20 were adopted.*

Paragraph 21

16. Mr. YANKOV (Special Rapporteur) said it had been suggested that a more pragmatic approach should be adopted and, in order to ensure the continuity of the Commission's work on the topic, he was proposing that paragraph 21 should be amended to read:

"Finally, upon the suggestion of the Special Rapporteur, the Commission requested the Secretariat:

(a) to bring up-to-date the compilation of the relevant provisions of multilateral and bilateral treaties in the field of diplomatic and consular law, prepared earlier for the Special Rapporteur;

(b) to solicit from States information on national laws, regulations, procedures and practices as well as information on judicial decisions, arbitral awards and diplomatic correspondence regarding the treatment of the diplomatic courier and the diplomatic bag."

At his request, the Secretariat had already prepared a valuable study on those questions, but the study had to be brought up to date because it covered only the period up to about 1975. The Secretariat would, of course, continue to be responsible for preparing the topical summary of the discussions held in the Sixth Committee and for inquiring into the practice followed by the organizations of the United Nations system in connection with the use of the courier and the bag.

*Paragraph 21, as amended, was adopted.*

Paragraph 22

17. In reply to a question raised by Sir Francis Vallat, Mr. YANKOV (Special Rapporteur) explained that the second sentence of paragraph 22 had been drafted before the Commission had decided to indicate, in chapter I of its report, the action to be taken on the articles that had been referred to the Drafting Committee. The sentence could therefore be deleted.

*It was so decided.*

*Paragraph 22, as amended, was adopted.*

*Section B, as amended, was adopted.*

*Chapter VII, as amended, was adopted.*

**CHAPTER VIII. Other decisions and conclusions (concluded) (A/CN.4/L.336/Add.2)**

**A. Relations between States and international organizations (second part of the topic)**

Paragraph 1

*Paragraph 1 was adopted.*

*Section A was adopted.*

**D. Co-operation with other bodies (concluded)**

4. ARAB COMMISSION FOR INTERNATIONAL LAW

*Subsection 4 was adopted.*

*Section D was adopted.*

*Chapter VIII, as amended, was adopted.*

18. The CHAIRMAN put to the vote the draft report of the Commission on the work of its thirty-third session as a whole, amended.

*The draft report as a whole, as amended, was adopted.*

**Closure of the Session**

19. After an exchange of congratulations and thanks, the CHAIRMAN declared the thirty-third session of the International Law Commission closed.

*The meeting rose at noon.*

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